NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

DENNIS AYALA,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

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

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April 23, 2021

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred when it held, contrary to this Court's holding in Molina-Martinez, that any error in the District Court's choice between two guideline ranges was harmless error because of a single statement by the court that the sentence was "appropriate" under either guideline. Molina-Martinez makes it clear that where the parties anchor their sentencing arguments around the application of a certain guideline, and where that guideline is the focal point of the sentencing hearing, the court's use of an incorrect guideline prejudices a defendant, even where the ultimate sentence falls within two guideline ranges.

Whether the district court substantively and procedurally erred when it calculated the quantity of drugs for which Petitioner was responsible. The district court is required to find drug quantity by a preponderance of the evidence. In the present case, the evidence was insufficient to support a finding of drug quantity by a preponderance of the evidence. The court had insufficient evidence to find that both bank withdrawals, preceding the April 26, 2018 drug transaction, could be converted to drugs.

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PETITION FOR WRIT OF CERTIORARI TO
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The Petitioner, Dennis Ayala, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on March 19, 2021.

OPINION BELOW

On March 19, 2021, the Court of Appeals entered its Opinion affirming the Petitioner's conviction and sentence. Judgment is attached at Appendix 1.

JURISDICTION

On March 19, 2021, the United States Court of Appeals for the First Circuit entered its Opinion affirming Petitioner's conviction and sentence. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V:

> No person shall...be deprived of life, liberty, or property without due process of law...

STATEMENT OF THE FACTS

Introduction

On April 18, 2018, state law enforcement searched Petitioner's residence pursuant to a warrant. Petitioner was arrested and subsequently released on bail on April 20, 2018. (Revised Presentence Report, 6/4/19 at 4, para 1 [hereinafter, "RPSR at ___"]). Petitioner was again arrested on state charges on May 23, 2018. (RPSR at 4, para. 1). The arrest followed the traffic stop and car search of a related defendant. The search led to the discovery of 196.4 grams of fentanyl hidden in a WD-40 cannister. (RPSR, 6/4/19 at para. 8, p. 5-6). On June 7, 2018, Petitioner was arrested on a federal warrant based on the state charges. (RPSR at 4, para. 1).

On August 23, 2018, the federal grand jury returned a two-count, Superseding indictment charging Petitioner with Conspiracy to Distribute and Possession with Intent to Distribute, 40 grams of Fentanyl and Possession with Intent to Distribute and Aiding and Abetting Possession with Intent to Distribute, 40 grams of Fentanyl. (D.E. at 6, No. 61).

Offense Conduct

On April 18, 2018, Petitioner's residence was searched by state law enforcement who had been investigating Petitioner for drug trafficking activities. The search of Petitioner's residence revealed a minimal amount

of cocaine base, drug paraphernalia and a single "ticket of heroine". The search also revealed $5, 720 in a safe. (RPSR at 5, para. 6). Petitioner was arrested on state charges and subsequently released on bail.

On May 22, 2018, State law enforcement together with the U.S. Drug Enforcement Administration (DEA) received information from a confidential source that a person connected to Petitioner would be returning from Massachusetts to Maine with a quantity of fentanyl. (RPSR at 5, para. 7). Maine State police stopped the car and discovered 196.4 grams of heroin hidden in a WD-40 container. The driver of the car, Devin Dulong, agreed to cooperate with the agents. Dulong told officers that she picked up the fentanyl in Massachusetts from Petitioner's source of supply and was delivering the heroin to Petitioner. (RPSR at 6, para. 7-8). Petitioner was arrested at his residence the same day. A search of the residence revealed drug paraphernalia with traces of fentanyl, but no measurable quantity of drugs. (RPSR at 6, para. 8).

A search of Petitioner's cellular phone following his arrest revealed texts to Petitioner's source of supply, "Papa" and "Mama", in Lawrence Massachusetts. Texts to and from "Papa" and information supplied by the confidential source reveal that Petitioner's stepdaughter, Andrea Hoffman, traveled to Lawrence Massachusetts on April 26, 2018 to pick up drugs for

Petitioner. A search of Petitioner's bank records shows that on April 24, 2018, a withdrawal of $5,000 was made from Petitioner's account. On April 26, 2018, $3, 300 was withdrawn, and on May 22, 2018 $4,500 was withdrawn. (RPSR at 5, para. 6).

Plea Agreement and Change of Plea Hearing.

On January 29, 2019, Petitioner signed an Agreement to Plead Guilty. (D. E. at 7, No. 149). In the agreement the government agreed to dismiss count two of the indictment and recommend a base offense level of 28, based on a drug quantity of 700 to 1000 kilograms of converted drug weight. The government also recommended a three-level reduction in the offense level under USSG 3E. 1.1 for acceptance of responsibility. (Plea Agreement, 2/7/19 at p. 2).

On February 25, 2019, a Change of Plea hearing was held. Petitioner pled guilty to Count One of the Superseding Indictment. The court accepted Petitioner's plea. (D.E. at 8, No. 154).

Presentence Report

On April 2, 2019, probation prepared the original presentence report. Probation computed a base offense level of 30, based on a drug quantity of at least 1000 kilograms but less than 3,000 kilograms of converted drug weight. Although only 196.4 grams of fentanyl was discovered in the three

searches, two of Petitioner's residence and one of the car stop of co-defendant Dulong, Probation arrived at this greater quantity by converting the cash found in Petitioner's safe and three withdrawals from Petitioner's account into drug weight. (RPSR at 7, para. 11). Probation converted the $5,720 in the safe to 248.70 kilograms of drug weight, the $5,000 withdrawn from the bank on April 24, 2018 to 217.39 kilograms, and the money withdrawn on April 26, 2018 to 143.48 kilograms, for a total of 1,101.82 kilograms of converted drug weight.

Both Petitioner and the government objected to probation's calculation of drug weight. The government objected to a base offense level higher than the agreed upon level 28. (Addendum to RPSR, at 1, Govt's Obj. No. 1). Petitioner objected to the converted drug weights for the money in the safe and the bank withdrawals, arguing "There is little, if any, evidence connecting these monies to any drug distribution activities." (Addendum to RPSR at 1, Def. Obj. No.1). Probation responded the conversion was "reasonable" based on Petitioner's disability income of $1, 200 a month and the fact that the withdrawals were made the day before and two days before the April 26th drug re-supply trip. (RPSR, Addendum at 1, Def. Obj. no. 1).

Presentence Conference.

On June 25, 2019, the court held a presentence conference. At the conference, the government noted its objection to probation's drug quantity. The government stood by its agreement to recommend a base offense level of 28. (Presentence Conference, 6/25/19 at 2-3, [hereinafter "Presentence Conf. at ___"]. Petitioner also reiterated his objection to the drug quantity contending the base offense level should be 28 and not 30. Petitioner's counsel stated that there was no adequate tie between the monies involved and drug activities. Counsel argued particularly that the money discovered in the safe could not be connected to drug activity. (Presentence Conf. at 3).

Sentencing Memorandum

Prior to sentencing, Petitioner submitted a sentencing memorandum in which he argued, among other arguments, that the cash found in Petitioner's safe and the two withdrawals from Petitioner's bank account should not be converted to drugs. (Defendant's Sentencing Memorandum, 7/8/19, at 1-3, [hereinafter [Memorandum at ___"]). Petitioner argued that there was no evidence connecting the sums to drug trafficking activities. Petitioner argued that the money in the safe did not coincide with any known drug activity and that there was "no evidence that the cash in the

safe was anything other than Ayala's savings". (Memorandum at 1, 2,). Petitioner also argued that there was no nexus between the withdrawals from Petitioner's accounts and drug quantity. Petitioner stated that the $5,000 withdrawal on April 24, 2019, was to repay his stepdaughter, Hoffman, for the cash bail she posted on his behalf on that day. Petitioner attached a receipt showing that Andrea Hoffman posted $5,000 cash bail for Petitioner in his state case on April 24, 2019. (Memorandum, Ex. A at 2). Petitioner argued if either the money in the safe ($5,720) or the $5,000 withdrawal on April 24, 2019, were not converted to drugs, Petitioner's drug quantity would be well within the drug quantity set forth in USSG § 2D1.1(a)(6), for a base offense level of 28 (700-1000 kg of heroin). (Memorandum at 3).

Sentencing Hearing

The district court noted that both sides believed the base offense level should be level 28 but noted that probation found the base offense level was 30 based on the conversion of cash in the safe and bank withdrawals to drugs (Sentencing at 15). The court queried whether the government wanted to say anything other than to recommend a base offense level of 28, and the government declined. (Sentencing at 15). Petitioner's counsel argued consistent with his memorandum that there was no nexus between

the money and any drugs (Sentencing at 16). The court stated that the $5,000 was withdrawn the day "his cohort went down to get drugs." (Sentencing at 16). Petitioner argued that the $5,000 was for bail in the state case and noted that counsel had provided the court with the bail receipt for $5,000. (Sentencing at 16).

The court nonetheless stated, "I don't have any evidence of that other than your assertion." (Sentencing at 16). Defense counsel argued that if the cash in the safe was not converted to drugs, that alone would bring the drug quantity within the base offense level of 28. The court noted that Petitioner lent or gave sums of money to relatives, that Petitioner had been on disability since 1991 receiving a monthly benefit of $1,200 and that coupled with clear evidence of drug dealing and the substantial sums of money being transmitted, led the court to overrule Petitioner's objection. (Sentencing at 17). The government recommended a sentence within the guideline range or "even at the lower end of the guideline range, would be appropriate". (Sentencing at 23).

Later in the sentencing hearing the court spontaneously returned to the issue of drug quantity. (Sentencing at 32).

The Court: Do you want to address the issue of a fine?

Mr. McKee: Yes, I do - -

> The Court: Let me - - let me just add, before you do that, that when I'm - - I'm going to add to my finding in terms of the money in the safe being drug money that it's hard for me to imagine a man who has accumulated the kind of assets I see in this presentence report on disability. I think it's all drug money, and that is an additional component of my earlier finding. You don't have to address that; I've already addressed that issue. But why don't you address the issue of the fine, why should he not be addressed a fine with this type of assets? (Sentencing at 32).

During the argument concerning imposition of a fine, the court also interjected, "And he has got two snowmobiles. It's quite amazing - - how someone on disability has been able to do that well. ...With no other assets." (Sentencing at 34).

Prior to Petitioner addressing the court, defense counsel informed the court that Petitioner wish to consult with counsel. Petitioner told counsel, for the first time, that in 2013 Petitioner had inherited $200,000 from the life insurance policy and a $50,000 payment of military benefits from a daughter who had died. Petitioner expressed to counsel that he was concerned that the court seemed to think that Petitioner purchased his house and vehicles with drug money, and he wanted the court to understand "there was a legitimate source for these purchases". (Sentencing at 36). Counsel requested a continuation of sentencing to obtain the relevant documents. The court noted that the issue of whether the money in the safe was drug money had been on the table for some

period. (Sentencing at 39). The government sought clarification as to whether Petitioner's documentation would be "regarding the source of the money from the safe, or from the house or from the bank account." The court replied, "I think all of - - all of the above from what I understand. Am I correct, Mr. McKee?" "Yes, your Honor". (Sentencing at 40). The court granted the continuance over the government's objections. (Sentencing at 40-41).

Continued Sentencing Hearing.

Prior to the Continued Sentencing Petitioner submitted a supplemental sentencing memorandum. (Defendant's Supplemental Sentencing Memorandum, 9/13/19, D.E. at 9, No. 205, [hereinafter "Supplemental Memorandum at _"]). Attached to the memorandum, was a copy of Petitioner's Bangor Saving's Bank account records showing a deposit on May 2, 2013 from MCTFS SPCL DFAS-CLEVELAND (Marine Corps Total Force System Defense Finance Accounting Service) of $50,000 and on May 8, 2013 a deposit from PURDENTIAL OSGLI (Office of Servicemen's Group Life Insurance) of $200, 038.24 into Petitioner's checking account. (Supplemental Memorandum, Ex. A, at 1). The documentation supported Petitioner's statement that he had an additional source of income other than his monthly disability payments, namely, the

$50,000 in military benefits and $200,000 military life insurance payments he received upon his daughter's death. (Declaration of Dennis Ayala, 9/13/19 at 1, [hereinafter "Declaration at ___"]).

Petitioner also submitted documentation that he did not purchase his house with drug monies. In 2006, Petitioner's significant other Cynthia Ryman's father, David Ryman, deeded a home to Ms. Ryman. On February 22, 2011 following a Probate Court order authorizing the transaction, the home was transferred by Ms. Ryman to David Ryman, Trustee of the Dennis Ayala Supplemental Care Trust. The home remains in the trust and David Ryman remains the trustee. (Declaration at 1, Ex. B at 1-4).

Petitioner also declared that the bank withdrawals on April 24, and 26, 2018 were for repayment of his cash bail originally paid by his stepdaughter, Andrea Hoffman and for payment of bills. Petitioner submitted documents showing his cash bail was paid by Andre Hoffman on April 20, 2018 and numerous receipts for bills due in April. (Declaration at 1, Ex. D, Defendant's Sentencing Memorandum, Ex A at 1-2).

Continued Sentencing Hearing took place on September 16, 2019. The court stated it had a couple of questions for counsel and asked counsel where the money from the military benefit and the insurance was at

present. (Continued Sentencing, 9/16/19 at 3, [hereinafter Continued Sentencing at ___"]). The court stated:

> The trouble is I don't know the source of those things by looking at those records because all I see is that there is money there, but it doesn't mean that there isn't money still unused to buy all those things. I just don't see it. (Continued Sentencing at 4).

Counsel replied that the money has been spent over the years. (Continued Sentencing at 5). The court queried whether counsel had any proof of the purchase of "these various items". Counsel noted that the house about which the court had inquired at the original sentencing had not been purchased by Petitioner but was held in a special needs trust and Petitioner was not the trustee. Counsel represented that the motorcycle, the truck, and snowmobiles had been purchased with the proceeds of the insurance. (Continued Sentencing at 5).

The court then stated, "Having - - having reviewed the additional documentation, my earlier questioning is not satisfied." (Continued Sentencing at 7).

The court found that Petitioner's total offense level was 30, (a base offense level of 30 based on quantity of drugs, rather than 28 as agreed to by the parties, three level increase for role in the offense and three level reduction for acceptance of responsibility), a Criminal History Category of II, resulting in a guideline range of 108 to 135 months. (Continued

Sentencing at 9). The court sentenced Petitioner to a 108-month term of imprisonment. The court stated, "In my view the 108 months is appropriate under either set of circumstances, and that's what I'm going to sentence him to." (Continued Sentencing at 9). The court recommended Petitioner be enrolled in the 500-hour drug program and ordered a supervised release term of four years and a mandatory assessment of $100 and a fine in the amount of $2,000. (Continued Sentencing at 9, 11). The government dismissed Count 2 of the superseding indictment. (Continued Sentencing at 12).

Court of Appeals Decision

The Court of Appeals bypassed review of all Petitioner's sentencing issues. The Court held that any error the District Court may have made with respect to drug quantity in calculating the GSR in Ayala's case was harmless. United States v. Ayala, 91 F.3d 323, 326 (1st Cir. 2021). The Court stated that after examining the record as a whole, it was clear that Petitioner's sentence did not depend on whether the District Court found Petitioner's base offense level (BOL) to be 28 or 30 because the District Court determined Petitioner's sentence was "appropriate under either set of circumstances" Id. at 326.

In examining the District Court's determination of drug quantity "in the context of the record as a whole", the Court of Appeals did not address the fact that the District Court held a two-day hearing, received documentation, and heard extensive argument on the issue of drug quantity and the appropriate resulting guideline sentencing range. Nor did the Court of Appeals address the fact that the District Court never mentioned the appropriateness of both guidelines at any time until after the imposition of sentence. A sentence which was based on the greater drug quantity and higher guideline range. (Continued Sentencing at 9).

REASON FOR GRANTING THE WRIT

The Court of Appeals erred when it held, contrary to this Court's holding in Molina-Martinez, that any error in the District Court's choice between two guideline ranges was harmless error because of a single statement by the court that the sentence was "appropriate" under either guideline. Molina-Martinez makes it clear that where the parties anchor their sentencing arguments around the application of a certain guideline, and where that guideline is the focal point of the sentencing hearing, the court's use of an incorrect guideline prejudices a defendant, even where the ultimate sentence falls within two guideline ranges.

Argument

The district court incorrectly calculated Petitioner's drug quantity and the resulting guideline sentencing range. Incorrect calculation of a guideline range constitutes a significant procedural error which requires resentencing even where the ultimate sentence falls within two guideline ranges. Molina-Martinez v. United States, 136 S.Ct. 1338 (2016), United States v. Alfas, 785 F.3d 775, 779 (1st Cir. 2015).

Petitioner preserved his claim of error in the district court. Therefore, it was the government's "weighty" burden to prove beyond a reasonable doubt that the sentencing error did not adversely affect Defendant's substantial rights. "This is a daunting standard" United States v. Benedetti, 443 F.3d 111, 119 (1st Cir. 2005).

In the present case the government did not meet that burden. The district court was clearly invested in determining the quantity of drugs for which Petitioner was responsible and the correspondingly correct guideline sentencing range. The majority of both the Sentencing Hearing and the Continued Sentencing focused on this issue. Despite both the government and Petitioner agreeing that Petitioner's BOL was 28, the District Court found that Petitioner's offense level was 30. (Continued Sentencing at 9). The court sentenced Petitioner based on his findings that Petitioner's offense level was 30. (Continued Sentencing at 9).

It is true that the sentencing court following its imposition of sentence stated, "In my view the 108 months is appropriate under either set of circumstances." (Continued Sentencing at 9). The Court of Appeals held that when this statement was read in the context of the "record as a whole", it clearly demonstrated that the District Court's sentence did not depend on its choice of drug quantity. Ayala, 991 F.3d at 328. The Court of Appeals errs in holding that this single phrase can insulate the district court's unequivocally significant factual findings from appellate review.

In the present case, the district court held an evidentiary hearing on the issue, received documentation on the issue, adjourned the sentencing hearing for further evidence on the issue, calculated a drug quantity, used

its calculation to set the base and total offense level, and then used the resulting guideline sentencing range in sentencing Petitioner. (Continued Sentencing at 9). Almost the entire sentencing record is taken up with the determination of drug quantity. Yet despite this record evidence, the Court of Appeals held that in context of the record as a whole, any error in determining the guideline sentencing range was harmless. United States v. Ayala, 991 F.3d at 326.

This Court has held that in determining whether the use of an incorrect guideline has influenced a defendant's sentence this Court should look to "the facts and circumstances of the case before it". Molino-Martinez v. United States, 136 S.Ct. 1338, 1346 (2016). Molina-Martinez stated that when both parties anchored their sentencing arguments around the application of a certain guideline, and its effect on defendant's sentence, and when the application of that guideline is the focal point of the sentencing proceedings, then the court's use of that guideline affects the defendant's sentence and use of an incorrect guideline prejudices the defendant. Molino-Martinez, 136 S. Ct. at 1347 (2016) (an error in the guideline calculation affects the sentence imposed when the parties anchor their sentencing arguments in the guidelines, the guidelines serve as the

starting point for the sentencing and are the "focal point" of the proceedings that followed.)

Here, Petitioner "anchored" his sentencing arguments in contesting the offense level of 30 and the corresponding drug quantity. Both Petitioner and the District Court focused in the first and second sentencing hearing on the applicable guideline range and total offense level. It is indisputable that the focal point of sentencing and the continued sentencing hearing was drug quantity and the resulting guideline range. Thus, Petitioner's sentence was inextricably 'tethered' to the guidelines. Molina-Martinez, 136 S.Ct. at 1347. Like the Fifth Circuit in Molina-Martinez, the First Circuit erred when it failed to "view as probative the parties anchoring their sentencing arguments in the Guidelines" Molina-Martinez, 136 S. Ct. at 1345 (2016) (internal quotations omitted). Petitioner's sentence was clearly not, as the Court of Appeals contends, independent of the District Court's choice between the two BOLs. United States v. Ayala, 991 F.3d at 326.

Even under the plain error standard when a defendant is sentenced under an incorrect guideline range "the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome' Id. at 1345, Here, as the government concedes, Petitioner preserved this claim of error. Molina-Martinez, 136 S. Ct. at 1349 (Rule 52 treats defendants who

have preserved their claims much more favorably than those who fail to register a timely objection). It was the government's burden to prove that guideline range did not affect Petitioner's sentence. United States v. Olano, 507 U.S. 725, 741-42 (1993) (Kennedy, J., concurring) (when the defendant has made a timely objection to an error the government bears the burden of persuasion with respect to prejudice). This they should not be able to do by reference to the district court's single, self-serving, post-sentencing statement. (Continued Sentencing at 9).

This Court has held that Courts of Appeals must engage in a "full record assessment" to determine whether the government has met its "case specific burden" of showing harmlessness. Molina-Martinez, 136 S.Ct at 1349-50. In the present case, a full record assessment shows that the district court did indeed base its final sentence on its incorrect drug quantity determination and the resulting incorrect guideline. (Continued Sentencing at 9).

It is disingenuous of both the Court of Appeals, the District Court, and the government to claim that the dispute about drug quantity and the guideline range did not affect the sentence imposed. (Continued Sentencing at 9, government's brief at 14, United States v. Ayala, 991 F.3d at 327). If drug quantity did not matter, the court would not have engaged

in the extensive arguments, hearings and evidence collecting over the issue of drug quantity and the resulting base offense level. The District Court would have stated at the outset that the drug quantity determination would not affect Petitioner's ultimate sentence. Fed.R.Crim.P. 32(i)(3)(B) (for any disputed portion of the presentence report the court must rule on the dispute or determine that a ruling is unnecessary because the matter will not affect sentencing).

Thus, the government cannot prove beyond a reasonable doubt that the court's erroneous guideline calculation based on drug quantity did not substantially affect Petitioner's sentence. Sepulveda, 15 F.3d at 1198 (under the guidelines drug quantity has a dramatic leveraging effect-relatively small quantitative differences produce markedly different periods of imprisonment).

II. The district court committed clear procedural and substantive error when it calculated Petitioner's drug quantity.

Standard of Review

The government must prove, and the district court must find, drug quantities by a preponderance of the evidence. United States v. Sepulveda, 15 F.3d 1161, 1198 (1st Cir. 1993). Petitioner preserved his objections to drug quantity in his objection to the PSR, at the Presentence Conference, in his Sentencing Memorandum, his Supplemental Sentencing Memorandum, and at the Sentencing Hearing and Continued Sentencing Hearing. (Addendum to the PSR, Obj. No. 1 at 1, Memorandum at 2, 11, Ex. A, Presentence Conf. at 3, Sentencing at 16, Supplemental Memorandum at 1, Continued Sentencing at 4-5).

Argument

A. The sentencing court procedurally erred when it relied on the factual findings in the presentence report to calculate Petitioners' drug quantity. Where the government has the burden of proof on an issue, and Petitioner contests the issue, the government must submit evidence at the sentencing hearing on the contested factual findings. The court may not rely on the PSR to support its findings. In the present case, the government declined to submit any proof of the drug quantity set out in the PSR. Therefore, the court erred in relying on the PSR in calculating drug quantity.

The government must prove drug quantity by a preponderance of the evidence. United States v. Sklar, 920 F.2d 107, 112-13 (1st Cir. 1990), United

States v. Sepulveda, 15 F.3d at 1198, United States v. Marks, 365 F.3d 101, 105 (1st Cir. 2004). If a defendant objects to any of the factual allegations contained in the PSR on an issue on which the government has the burden of proof, the government must present evidence at the sentencing hearing to prove the existence of the disputed facts. Id. at 898. Where the government does not present any evidence on the disputed facts, the court may not rely on the facts as stated in the PSR as true. The PSR is not evidence. United States v. Jenner, 473 F.3d 894, 897 (8th Cir. 2007), United States v. Lindsey, 827 F.3d 723, 738 (8th Cir. 2016), Fed.R.Crim.P. Rule 32 (i)(3)(A) (the court may accept only undisputed portions of the PSR as findings of fact). In the present case, the government declined to present any evidence in support of probation's drug quantity calculation and in fact objected to probation's drug quantity. Therefore, the district court erred when it relied on facts in the PSR to support its drug quantity finding and the case must be remanded for resentencing. United States v. Jenner, 473 F.3d at 897.

In accordance with their plea agreement, the government recommended a base offense level of 28. This base offense level was based on the quantity of drugs for which Petitioner was responsible. (Plea Agreement at 2, para.3(A)). Probation found that Petitioner's base offense

level was 30. Probation increased the drug weight attributable to Petitioner by converting three sums of money into drugs, $5, 720 found in a safe at Petitioner's residence, a $5,000 and a $3,300 withdrawal from Petitioner's bank account. (RPSR at 7, para. 11).

Petitioner challenged both probation's conclusion that the cash and the bank withdrawals were connected to a drug transaction and probation's factual statement that Petitioner's $1,200 a month disability payment was his only legitimate income. (Memorandum at 1-2, Supplemental Memorandum at 1). Petitioner offered documentary proof that the April 24, 2018, bank withdrawal was to repay his cash bail, and that in addition to his $1,200 income, Petitioner had received a $250,000 pay out from his daughter's life insurance and military benefits. (Supplemental Memorandum, Ex A at 1).

At the sentencing hearing, the government declined to present any evidence on the conversion of the cash and the withdrawals to drug quantity or indeed any evidence on drug quantity at all. (Addendum to the RPSR at 1, Gov'ts Obj. 1, Sentencing Hearing at 15). The government continued to recommend a base offense level of 28 and a sentence at the low end of the guideline range. (Sentencing at 15, 23). Nonetheless, the district court based its drug quantity finding on facts set out in the

presentence report. The court adopted the PSR's conversion of the cash in the safe and the bank withdrawals to drugs. The court adopted the finding that the withdrawals happened on two days before and on the day of a subsequent drug transaction. The court relied on the PSR's factual statement that $1,200 was Petitioner's only source of income. (RPSR at 5, 7, Addendum to PSR at 1, Def's Obj 1, Response). Thus, the court entirely supported its drug quantity calculation with facts from PSR. This was reversible error.

The PSR is not evidence. United States v. Jenner, 473 F.3d 894, 897 (8th Cir. 2007), United States v. Lindsey, 827 F.3d 723, 738 (8th Cir. 2016), cert. denied 137 S.Ct. 413, 196 L.Ed.2d 321 (2016). The court can only rely on uncontested portions of the PSR. Once Petitioner contests the facts and conclusions in the PSR, on an issue on which the government has the burden of proof, the government must offer evidence, at the evidentiary hearing, to prove drug quantity by a preponderance of the evidence. The court is not entitled to rely on the PSR to sustain the government's burden of proof. Id., United States v. Ross, 502 F.3d 521 (6th Cir. 2007). The PSR is compiled by probation, probation is an arm of the court. United States v. Saxena, 229 F.3d 1 (1st Cir. 2000), United States v. Caribe Garcia, 125 F.Supp.2d, 19, 20-21 (D.P.R.2000). An arm of the court cannot meet the

government's burden of proof on such an essential element of a defendant's sentence. To hold otherwise would make the government's duty to prove drug quantity by a preponderance meaningless. Sepulveda, 15 F.3d at 1198, (The district court must "sedulously enforce quantum-of-proof rule" and hold the government to its duty to prove drug quantity), United States v. Valencia-Lucena, 988 F.2d 228, 232-33(1st Cir. 1993) (At the evidentiary hearing the government must prove drug quantity by a preponderance, because drug quantity "is a critical factor in determining length of imprisonment").

Thus, the court committed reversible error when it did not require the government to present evidence at the sentencing hearing to prove the existence of the disputed facts in the PSR. It is the government's burden to prove drug quantity by a preponderance of the evidence, and because the disputed facts were not proven, the court committed reversible error when it relied on the PSR for its drug quantity finding. United States v. Jenner, 473 F.3d 898.

B. The district court committed procedural error when it failed to make required finding of facts on a disputed issue. In the present case, Petitioner sufficiently controverted the facts supporting the PSR's drug quantity calculation. This triggered the court's duty to make the required finding of facts as to the disputed issue. This the court did not do, and the case must be remanded for resentencing.

Whenever a defendant objects to statements in the PSR and submits countervailing proof, the court is obligated to rule on the controverted issue, making specific findings of facts. Fed R.Crim.P. 32(i)(3)(B), (for any disputed portion of the presentence report the court must rule on the dispute or determine that a ruling is unnecessary), United States v. Cox, 851 F.3d 113, 121 (1st Cir.2017) (The district court is obligated to resolve any genuine and material dispute on the merits).

In the present case, the court adopted the facts in the presentence report without making the required finding of fact on the disputed issues. The court based its drug quantity finding (conversion of the cash and withdrawals to drugs) on the following facts; (1) $1200 was Petitioner's only source of income, (2) Petitioner lent money to relatives, (3) Petitioner purchased items, including a house, truck and snowmobiles, on this limited income and (4) the bank withdrawals were near in time to the April 26th drug transaction. (Sentencing at 17, 32-34).

Petitioner offered evidence which sufficiently controverted the facts upon which the court based its quantity decision and triggered the court's duty to make the required findings of fact. Petitioner submitted documentary evidence that his house was not purchased by him but held in a trust of which he was not the trustee. Petitioner also submitted evidence

that he had an additional source of income of $250,000, which he received from proceeds from his daughter's life insurance and military benefits. Petitioner also offered documentary evidence that the $5,000 withdrawal was repayment of his cash bail.

The court never resolved these controverted factual issues. United States v. Cirilo, 803 F.3d 73, 75 (1st Cir. 2015) (where facts are sufficiently controverted, court must make factual findings on contested portions of the presentence report). The court is obligated to resolve contested facts that are material to sentencing United States v. Gonzalez, 736 F.3d 40, 444(1st Cir. 20123), Fed.R.Crim.Pro., Rule 32(i)(3)(B). The district court never made specific findings as to whether Petitioner's $1,200 monthly disability payment was his only source of legitimate income. Neither did the court determine whether the $5,000 bank withdrawal was made to repay Petitioner's cash bail in his state case. Most importantly Petitioner offered evidence that his assets, his house, and his vehicles, where not purchased with drug money. The court never made specific findings about or ruled on any of these controverted issues, each of which was important to court's drug quantity findings. (Sentencing at 17, 32-34). United State v. Bruckman, 874 F.2d 57, 64 (1st Cir. 1989) (If sentencing judge fails to make requisite findings or the findings are ambiguous, the case must be

remanded for resentencing), United States v. Sepulveda, 15 F.3d 1161, 1198-99 (1st Cir. 1993) (In the face of timely objection, wholly conclusory findings cannot be said to command a preponderance of the evidence standard).

At the sentencing hearing and the continued sentencing hearing, the court merely stated its conclusion without ruling on the disputed facts. (Sentencing at 17, 32, Continued Sentencing at 7). This is reversible error. If a sentencing judge fails to make the requisite findings and determinations or the findings are ambiguous, the case must be remanded for resentencing. United States v. Wilson, 920 F.2d 1290, 1294 (6th Cir. 1990).

C. The district court substantively erred when it determined drug quantity. The district court is required to find drug quantity by a preponderance of the evidence. In the present case, even assuming, arguendo, that the court could consider the facts set out in the PSR, the evidence was insufficient to support a finding of drug quantity by a preponderance of the evidence. The court had insufficient evidence to find that the two bank withdrawals preceding the April 26, 2018 drug transaction could be converted to drugs.

A sentencing court must find drug quantity by a preponderance of the evidence. United States v. Sepulveda, 15 F.3d 1161, 1198 (1st Cir. 1993) (Courts must sedulously enforce the quantum of proof rule, for, under the guidelines, drug quantity has a dramatic leveraging effect), United States v. Marks, 365 F.3d 101, 105 (1st Cir. 2004). The court may choose between

plausible estimates of drug quantity but must "err on the side of caution." Id., *quoting* United States v. Sklar, 920 F.2d 107, 113 (1st Cir. 1990).

In the present case, the District Court could not find by preponderance of the evidence that both bank withdrawals were made to purchase drugs. Petitioner withdrew two amounts in the days preceding the April 26th drug trip, $5,000 two days before the trip and $3,300 on the day of the trip. (RPSR at 5, 7, para 6, para. 11). The court converted each withdrawal, a total of $8,300, to drugs. But the court had no reasonable basis to conclude that all $8,300 was for the drug trip on April 26th. There was no evidence in the PSR as to the quantity of drugs purchased during the April 26, 2018 transaction. It is true that sentencing courts can estimate the quantity of drugs based on known quantities from other similar transactions. United States v. Alcalde, 818 F.3d 791 (8th Cir.2016). However, in the present case, the only drug deal about which there was definitive quantity information was the May 22nd trip. The quantity of drugs purchased on May 22nd was approximately half the amount the court attributed to Petitioner for the April 26th trip. ($4,500 v. $8,300) (RPSR at 7, para 11).[1] Thus there was no reasoned basis to attribute both bank withdrawals to the drug purchase. Sepulveda, 15 F.3d at 1199 (drug

quantity findings must be "more than a guess" and wholly conclusory findings cannot command a preponderance of the evidence).

Additionally, Petitioner submitted documentary proof that the $5,000 withdrawal on April 24, two days before the drug trip on April 26th, was made to reimburse his niece, Andrea, for paying his bail in the state case. Petitioner had documentary evidence that $5,000 was the amount of his state bail. Petitioner also had a receipt showing the bail was paid by his niece on April 24, the same day Petitioner withdrew the $5,000 to repay her. (Memorandum, Ex. A, at 2). Therefore, it is impossible to find by preponderance of the evidence that both the $5,000 and the $3,300 withdrawal were connected to the April 26th drug transaction. Because "relatively small quantitative differences may produce markedly different periods of immurement", (in this case 100 kilograms converted drug weight produced a 22 month increase in Petitioner's sentence), it is vital that the court base their findings on "reliable information" and where uncertainty reigns, must "err on the side of caution"". Sepulveda, 15 F.3d at 1198, quoting, United States v. Sklar, 920 F.2d 107, 113 (1st Cir. 1990), United States v. Marks, 365 F.3d 101, 105 (1st Cir. 2004) (A district court may

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[1] Law enforcement recovered 196.9 grams of fentanyl following the May 22nd trip, which probation opined cost $4,500. (RPSR at 7, para.11).

choose between plausible estimates of drug quantity but must "err on the side of caution.").

Indeed, later at sentencing the District Court appeared to recognize that it lacked evidentiary support for converting the monies to drug quantity. Mid-sentencing, the court interrupted the defense counsel to declare that he was supplementing his findings concerning the conversion of monies to drug quantity. The District Court stated, "I think it's all drug money and that is an additional component of my earlier finding." (Sentencing at 32). The District Court opined that because Petitioner's only legitimate means of support was his $1,200 a month disability income, all Petitioner's money, and assets, including his house, his truck, his snow mobiles were the proceeds of drug trafficking. (Sentencing at 33, 34). The District Court offered this statement "I think it's all drug money", as an additional basis for the court's drug quantity findings. United States v. Gerante, 891 F.2d 364, 369-70 (1st Cir. 1989) (We are warned future cases may involve the conversion of cars, houses, and other items into 'quantities of drugs' for the purpose of determining a defendant's drug quantity. We

need not address the appropriateness of such speculative and remote scenarios").[2]

A sentencing court's finding that a specific sum of currency can be converted to drug quantity is based on reliable evidence connecting a sum of money (almost exclusively, cash seized at the scene) to drug transactions. The court's global statement that all Petitioner's assets were drug money is not evidentiary support for converting specific bank withdrawals to drug quantity. United States v. Rivera Calderon, 578 F.3d 78, 100 (1st Cir. 2009) (quantity finding must have demonstrable record support and be based on reliable evidence).

Moreover, in this case, Petitioner offered documentary evidence to rebut the court's sweeping generalization that all Petitioner's assets and monies were drug money. Petitioner offered proof that his $1,200 monthly income was not his only source of income. Petitioner offered documentary evidence that he had an additional source of income in the $250,000 he inherited on the death of his daughter. Petitioner offered bank records showing the deposit by the insurance company and by the military. (Supplemental Memorandum, Ex. A at 1, at 69). Furthermore, Petitioner

[2] It is true the court did not convert all Petitioner's assets to drug quantity, but rather used the statement as a rational basis to convert specific amounts of money.

showed documentary proof that his house was not purchased with drug money, as the court had opined, but rather was deeded to him through a special interest trust of which he was not the trustee. (Continued Sentencing at 5,6, Supplemental Memorandum, Ex. B at 1-4). Thus, the court's calculation of drug quantity was not supported by a preponderance of the evidence. Not only was there was a dearth of evidence to support converting both bank withdrawals to a drug quantity, but there was also a significant quantum of evidence to show that withdrawals were for other purposes and to show that Petitioner's income was not limited to $1,200 monthly disability payments, nor were all his assets purchased with "drug money", factors the court relied on to support its drug quantity finding. (Sentencing at 17, 32-34).

The District court clearly erred in converting each bank withdrawal to drugs. It is impossible to look at the evidence as a whole and not come away with a "strong, unyielding belief" that a mistake was made. Accordingly, Petitioners entitled to resentencing.

CONCLUSION

For the above reasons, this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 23rd day of April 2021.

/s/Jane E. Lee

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