

ORIGINAL

20-8282

No. _____

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY HERMAN LUCIO — PETITIONER
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIFTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANTHONY HERMAN LUCIO #58474-177
(Your Name)

FCI TALLADEGA-P.O. BOX 1000
(Address)

TALLADEGA, ALABAMA 35160
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

WAS PRESENTENCE REPORT'S CALCULATIONS ON QUANTITY OF DRUGS UNDER
U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 ATTRIBUTED TO DEFENDANT
PROPER BASED ON FACTS BEING SUFFICIENTLY SUPPORTED BY FINDINGS.

LIST OF PARTIES

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

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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SUPREME COURT OF THE UNITED STATES

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at U.S. v. Lucio, 2021 U.S. App. LEXIS 1096; or,

[] has been designated for publication but is not yet reported; or,

[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,

[] has been designated for publication but is not yet reported; or,

[x] is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,

[] has been designated for publication but is not yet reported; or,

[] is unpublished.

The opinion of the _____ court
appears at Appendix _____ to the petition and is

[] reported at _____; or,

[] has been designated for publication but is not yet reported; or,

[] is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 14, 2021.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V.

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

STATEMENT OF THE CASE

I. INVESTIGATION OF OFFENSE

On an unknown date in December 2018, a Fort Worth, Texas, Police Department (FWPD) confidential source (CS) provided information regarding the drug distribution activities of Anthony Herman Lucio and indicated he/she could introduce an undercover officer to Lucio. On December 11, 2018, an undercover officer (UC) with FWPD initiated a series of phone calls and text messages with Lucio negotiating the purchase of methamphetamine for \$275. Later that day, the UC met with Lucio and purchased three ounces of methamphetamine for \$275 per ounce, totaling \$825. The methamphetamine involved in this transaction was forwarded to the South Central Laboratory in Dallas, Texas. It was determined to be d-methamphetamine "Ice" with a net weight of 83.3 grams and purity level of 93 percent. On December 14, 2018, surveillance was initiated at 3716 Oscar Avenue in Fort Worth, Texas where Lucio lived.

On February 26, 2019, under the guidance and direction of FWPD officers, the CS purchased an additional three ounces of methamphetamine for \$200 per ounce, totaling \$600. During their meeting, the CS inquired with Lucio regarding the purchase of one kilogram of methamphetamine "Ice". Lucio advised the CS he would sell the CS one kilogram of methamphetamine "Ice" for \$6,500. The methamphetamine involved in this transaction was forwarded to the South Central Laboratory in Dallas, Texas, for analysis. It was determined to be d-methamphetamine "Ice" with a net weight of 83.53 grams and a purity level of 99 percent.

On February 28, 2019, surveillance captured Murrell Wilson, the

uncle of Lucio's common-law-wife, Shelly Norrell, leaving Lucio's residence. Shortly thereafter, a traffic stop was conducted, and Wilson was arrested for a traffic offense. After his arrest, Wilson was permitted to contact Norrell to retrieve his vehicle. Norrell and Lucio arrived at the scene, and Lucio was arrested for an active felony warrant. Norrell was detained pending further investigation. After Lucio's arrest, surveillance captured Ramiro Cantu leaving Lucio's residence. A traffic stop was conducted, and he was taken into custody for active warrants. Officers recovered \$1,800 from Cantu.

During debriefing, Norrell advised officers three children were at the residence, ranging in age from four to nine years old. After determining no other adult occupants were at the residence, a search warrant was executed. The following drugs were seized from the residence: 619 grams of methamphetamine, 1.27 kilograms of cocaine, 57.66 ounces of marijuana, three firearms, ammunition, a digital scale, and \$13,568 were recovered from the bedroom shared by Lucio and Norrell. An additional firearm was recovered from Wilson's bedroom, \$3,000 was recovered from the kitchen, and 22 ounces of marijuana was recovered from a silver Hyundai Accent.

The methamphetamine and cocaine recovered from the bedroom of Lucio and Norrell was forwarded to the South Central Laboratory in Dallas, Texas, for analysis. While the laboratory confirmed the cocaine, results pertaining to the methamphetamine remained pending as of the disclosure of the Presentence Report. As such, the PSR classified the methamphetamine recovered from the residence as methamphetamine instead of methamphetamine "Ice".

In a post-arrest statement, Wilson estimated he resided with Lucio

and Norell at 3716 Oscar Avenue for one year. He confirmed he was aware of Lucio's drug-trafficking activities and indicated he delivered narcotics on Lucio's behalf under Lucio's direction. Specifically, Wilson reported Lucio instructed him to deliver methamphetamine, cocaine, or marijuana throughout the Fort Worth area. Wilson advised he did not receive any money for the deliveries but indicated Lucio did not require him to pay rent for living at his residence. In addition, Wilson recalled delivering two to three ounces of methamphetamine to an unidentified male on one occasion, and he and Lucio obtained two to three pounds of methamphetamine approximately one month prior to their arrests for the instyant offense. He also advised he had been present on five other occasions when methamphetamine "Ice" was delivered at each transaction, and 1 kilogram of methamphetamine "Ice" was delivered during another transaction. Wilson further indicated Lucio stored approximately 48 kilograms of methamphetamine "Ice" in a storage shed at 804 Glen Garden Drive in Fort Worth, the residence of his brother-in-law, Josue Terran approximately one month earlier, along with firearms and body armor.

Based on the information provided by Wilson and pursuant to a search earrant, on May 29, 2019, DEA TFO Castaneda conducted a search of Lucio's cellular telephone. Between February 25, 2019, and February 27, 2019, Lucio and an unidentified person (UP), utilizing the cellular telephone number 213-318-1703, exchanged a series of text messages regarding the negotiation of a methamphetamine transaction. Specifically, they discussed arrangements for Lucio to purchase 24 to 25 kilograms of methamphetamine. On February 25, 2019, the UP confirmed he had 24 to 25 kilograms of methamphetamine and asked Lucio if he had money available to complete the transaction. The text messages were determined to be a

deal to purchase methamphetamine by DEA TFO Castaneda, based on his interpretation of the messages.

I. CONVICTION AND SENTENCE

On March 1, 2019, a Criminal Complaint was filed in the Northern District of Texas, Fort Worth Division. Pursuant to the Criminal Complaint, the defendant, Anthony Herman Lucio, and his coconspirator, Murrell Wilson, were arrested by DEA agents and Task Force Officers with the Fort Worth, Texas, Police Department. Lucio waived his right to indictment, and on May 22, 2019, he was named in a one-count felony Information. Count 1 charged him with conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 846 and 841(a)(1) & (b)(1)(B). Specifically, beginning in or before December 2018 and continuing until in and around February 2019, in the Fort Worth Division of the Northern District of Texas, and elsewhere, Lucio knowingly and intentionally combined, conspired, confederated, and agreed to possess with intent to distribute methamphetamine.

On May 29, 2019, Lucio appeared before Magistrate Judge Ray, on behalf of the Honorable Terry R. Means, Senior U.S. District Judge, for arraignment at which time he pleaded guilty to the one Count felony Information. Lucio made a open-plea without benefit of a plea agreement. On June 13, 2019, Senior Judge Means issued an order accepting Lucio's plea of guilty and adjudged him guilty. The Court subsequently ordered the preparation of the Presentence Report.

The PSR was prepared calculating a base offense level of 38 using the drug quantity table for a equivalent of 109,294.25 kilograms of

converted drug weight from the following:

- * 83.33 grams of methamphetamine "Ice" from the controlled buy on December 11, 2018;
- * 83.35 grams of methamphetamine "Ice" from the controlled buy on February 26, 2019;
- * 619 grams of methamphetamine seized from Lucio's residence on February 28, 2019;
- * 1.27 kilograms of cocaine seized from Lucio's residence on February 28, 2019;
- * 1,634.66 grams of marijuana seized from Lucio's residence on February 28, 2019;
- * 623.7 grams of marijuana seized from a vehicle at Lucio's residence on February 28, 2019;
- * 24 kilograms of methamphetamine involved in the drug transaction with an unknown person on February 27, 2019, and
- * \$18,368 in drug proceeds collected from Lucio's residence and Cantu on February 28, 2019

The PSR assessed two points pursuant to U.S.S.G. § 2D1.1(b)(1) for the four firearms recovered from the residence, two points pursuant to U.S.S.G. § 2D1.1(b)(5) based on the methamphetamine being supplied from Mexico; and two points pursuant to U.S.S.G. § 3B1.1(a) based on Lucio being a organizer, leader, manager, or supervisor in any criminal activity. With a three point reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a) & (b) the resulting total offense level was 41 and a criminal history of III.

The government concurred with the findings of the PSR. Counsel William R. Biggs filed objections to the attributable drug quantity, specifically the 24 kilos of methamphetamine towards his drug quantity based on text messages found on Lucio's phone with an unidentified individual, the conversion of \$18,368 in cash proceeds to 2.83 kilograms

of Ice, the application of the two level importation from Mexico enhancement, and the application of an aggravating role adjustment. The government filed its response citing Wilson's post-arrest and proffer statements as substantiating the agent's interpretation of the text messages between the defendant and the alleged methamphetamine-source. Counsel replied and submitted a request for downward departure based on the guideline drug calculations of methamphetamine and methamphetamine "Ice".

On November 14, 2019, the Honorable Terry R. Means held sentencing. The court made tentative findings overruling the objections of the defendant for the reasons set out in the probation officer's addendum to the presentence report and the government's response to the defendant's objections. The Court did grant the defendant's motion for sentencing variance. Counsel declined to present any evidence regarding the overruled objections to the PSR. The Court adopted the PSR's final findings of the statement of facts. The Court allowed Lucio and relatives to address the Court and ultimately imposed a variant sentence of 324 months.

Lucio filed a timely notice of appeal and was represented once again by William R. Biggs. *United States v. Lucio*, 2021 U.S. App. LEXIS 1096 (5th Cir. Jan. 14, 2021). On appeal counsel raised the two challenges regarding drug quantity calculations. The Fifth Circuit affirmed the judgment holding that the calculations were proper because facts sufficiently supported the findings as defendant was a meth dealer and agent who reviewed text message applied his experience to interpret the exchange in light of defendant's criminal history. No rehearing was sought.

This timely writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

WAS PRESENTENCE REPORT'S CALCULATIONS ON QUANTITY OF DRUGS UNDER U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 ATTRIBUTED TO DEFENDANT PROPER BASED ON FACTS BEING SUFFICIENTLY SUPPORTED BY FINDINGS?

Appellant pleaded guilty, without plea agreement, to conspiring to possess with intent to distribute more than 50 grams of methamphetamine, in violation of 21 U.S.C. § 846 and § 841(a)(1) 7 (b)(1)(b).

At sentencing the presentence report and other sentencing items revealed the following information. Lucio sold three ounces of methamphetamine on two occasions to law enforcement, in December 2018 and February 2019. The ese quantities were later tested and found to be 83.33 and 83.35 grams of ICE. On the second transaction, the confidential source (CS) inquired how much it would be to purchase 1 kilogram of methamphetamine ICE. Lucio advised that the fee would be \$6,500.

On February 28, 2019, Lucio was arrested. Officers serached his residence and found: 1) 1.27 kg of cocaine; 2) 619 grams of methamphetamine; 3) 57.66 oz. of marijuana; 4) firearms; and 5) &16,568 in cash.

Law enforcement also arrested two other individuals, Ramiro Cantu and Murrell Wilson. Cantu was seen on surveillance leaving Lucio's residence. He was arrested following a traffic stop and had \$1,800 in his possession. Wilson, Lucio's uncle in law, lived at the residence and participated in drug trafficking. Upon his arrest, he debriefed with the government and claimed Lucio possessed and received large quantities of methamphetamine.

Law enforcement searched Lucio's phone. On the phone, it found a cryptic text conversation in Spanish between Lucio and an unknow person.

Agents surmised that the conversation pertained to a drug transaction. However, neither the particular drug nor unit of measurement of the drug were revealed in the conversation. At its most sopecific, the exchanges were as follows:

Unknown: What time do I take you the food? Do you
have the paper because I want to give it to
that guy.

Lucio: How many of them are there?

Unknown: 24 or 25.

Based on this information, the agent and (ultimately the probation officer) concluded that Lucio was purchasing 24-25 kg of methamphetamine.

The district court erred when calculating the drug quantity attributable to Lucio under Section 2D1.1(c) of the Federal Sentencing Guidelines.

First, it held Lucio accountable for 24 kg of methamphetamine based on text messages between Lucio and an unknown individual. During this conversation, the two discuss the delivery of "24 or 25" of some unknown object, but the particular object is never specified. Even if it could be assumed the object were drugs, the message never reveal the type of drug nor unit of measurement.

The conclusion that the substance had been methamphetamine was wholly speculative: the eveidence showed that Appellant also distributed cocaine and marijuana. In fact, officers found twice as much cocaine (1.27 kilograms) in his home as methamphetamine (619 grams). The assumed unit of measurement was equally dubious in light of the know evidence. Lucio had been selling only multi ounce quantities and less than a kilogram of methamphetamine had been found at the residence the day after

the supposed 24kg transaction had taken place.

A coconspirator had claimed Lucio received large quantities of methamphetamine, but the record demonstrates that the court did not find those statements to be reliable. It did not include those quantities in the drug-quantity determination under USSG § 2D1.1(c). And the court downwardly varied for reasons that wouldn't have existed had the court actually relied upon the coconspirator's statements.

The district court also erred in converting all of the cash proceeds recovered to ICE. Law enforcement seized over \$18,00 in cash the day of Lucio's arrest. More than \$16,00 was found in Lucio's home and the remaining amount was seized from another conspirator who had recently left Lucio's home. The court had no basis to conclude that the cash found reflected cash proceeds from methamphetamine trafficking, where sizeable quantities of cocaine and marijuana had also been found in the home.

A. ARGUMENT

THE DISTRICT COURT ERRED.

The district court's drug quantity determination was flawed in two respects. first, the court erred when it attributed 24 kilograms of methamphetamine to Lucio based on vague text messages with an unidentified individual, wherein the two discuss effectuating the sale of "24 or 25" of an unspecified item with an unspecified unit of measurement. Even assuming the messages do in fact provide evidence of a negotiated drug sale, the messages do not reveal the type nor quantity of drugs involved. *United States v. Lee*, 427 F.3d 881, 893 (5th Cir. 2005)("[a] sentencing judge may not speculate about the existence of a fact that would permit a more severe sentence").

The messages only discuss "24 or 25 of them" but what drug and what unit of measurement remains unknown. The court had no basis to conclude that the discussed sale involved methamphetamine in particular. Law enforcement found sizeable quantities of cocaine and marijuana in Lucio's home the day after this mystery transaction took place. In fact, officers found twice as much cocaine in the residence (1.27 kilograms) as methamphetamine (619 grams).

The unit of measurement was equally mysterious. Lucio trafficked in methamphetamine in quantities far lower than 24 to 25 kg. The evidence only showed that Lucio sold to law enforcement in three-ounce quantities and that Lucio had mentioned that he could obtain a single kilogram for \$6,500. Both of these amounts roughly cohere with the 619 grams actually found at Lucio's residence. But the 24kg figure absolutely dwarfs these quantities. There was no reason to infer from this evidence that "24 or 25" represented kilogram quantities of a drug as opposed to grams, ounces, or pounds. And of course, it could have been another drug all together, if it were even a controlled substance at all.

It merits emphasis that this supposed 24-25 kg drug deal allegedly took place on February 27, 2019, one day before law enforcement raided Lucio's house. Conspicuously absent is any sign of the 24 kilograms of methamphetamine he had allegedly acquired. The following day Lucio was found with a far smaller quantity of methamphetamine.

In defense of the drug quantity, the government pointed to statements from Murrell Wilson. Wilson had claimed in a brief that he had seen Lucio receive large quantities of methamphetamine: 10 kilograms on four occasions, 2-3 kilograms on another occasion, 1 kilogram on an additional occasion, and that Lucio had 48 kilograms stored in a storage shed at a

relative's address. The government argued in its objection and at sentencing that Wilson's statements made Lucio variance argument irrelevant: because Wilson attributed over 45 kg of mixture methamphetamine to Lucio, he would be a level 38 regardless of the ICE attributed to him.

Critically, however, the record shows that the district court did not find those statements to be sufficiently reliable. First, the court did not include any of the quantities Wilson discussed in the drug quantity determination. Second, the court chose to vary notwithstanding the government's argument that Wilson's proffer mooted any variance argument. If the court had found Wilson's statements reliable, the government would have been correct that there would have been no basis for a variance based on differential purity. The court's purity-based variance again demonstrated that it had rejected Wilson's proffer on drug quantity.

For similar reasons, the district court also erred in concluding that all of the cash seized at the residence and found on Castro should be converted to ICE. Here again, the search of Lucio's home revealed 1.27 kilograms of cocaine, roughly twice the quantity of methamphetamine located. The search also revealed a large quantity of marijuana-more than 57 ounces worth. With significant quantities of cocaine and marijuana also found at the home, there was no basis to conclude that the seized cash reflected methamphetamine proceeds at all, much less exclusively methamphetamine proceeds.

However, if the court had refused to apply 24 kilograms of methamphetamine towards the drug quantity, the variance range would have been significantly less. Treating all Ice as regular methamphetamine and removing the 24kg drug quantity, the converted drug weight would have been 7,474.25 kilograms. This figure would have corresponded to a base offense level

of 32 instead of 36, and a hypothetical total offense level of 35 instead of 39. Total offense level 35 and criminal history category III set forth a sentencing range of 210-262 months.

There thus can be no doubt then that the error affected the sentence. The bottom of this corrected variance range is a staggering 114 months below the current sentence of 324 months. Even 262 months, the top of this corrected hypothetical sentencing range, is roughly five years less than the current sentence.

The harm only increases if the Court finds that the district court also erroneously converted all of the seized cash to methamphetamine. By conservative calculation (again treating Ice and methamphetamine as the same), had neither the phantom 24 kilogram text transaction nor the converted cash proceeds been counted as methamphetamine, the converted drug weight would have been 1,827.61 kg. This quantity would have corresponded to a base offense level of 30 and a total offense level of 33. U.S.S.G. § 2D1.1(c)(5). A total offense level of 33 and a criminal history category of III would have yielded a variance of 168-210 months.

A comparable low-end sentence on this variance range would have been a staggering 13 years below the current sentence. The sentence effectively would be cut in half. Even the high-end sentence of 210 months would represent a sentence nearly 10 years shorter than the current sentence. See *United States v. Johnson*, 805 Fed. Appx. 848 (5th Cir. 2020) ("has a due process right ... not to be sentenced based on false or unreliable information").

In short, the Court has violated due process in failing to rely on on reliable information in calculating Lucio's sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'Art L', is written over a horizontal line.

Date: 6-4-21