No. 20-8345

IN THE
Supreme Court of the United States

RICKY PARKERSON,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITIONER'S REPLY BRIEF

JEFFREY T. GREEN
TOBIAS S. LOSS-EATON
MATTHEW B. CAHILL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

XIAO WANG
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

CHRISTOPHER A. CURTIS*
FEDERAL PUBLIC DEFENDER'S OFFICE FOR THE NORTHERN DISTRICT OF TEXAS
819 Taylor Street
Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Chris_Curtis @fd.org

Counsel for Petitioner

*Counsel of Record

December 1, 2021

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INTRODUCTION

On the first question presented, the government concedes that a "disagreement exists in the circuits" on whether the government must prove facts alleged in a PSR to which a defendant objects. Opp. 10; see *id.* at 14. The government does not dispute that eleven of the twelve geographic circuits have taken sides in this split. Nor does it dispute that Mr. Parkerson's sentence rests on such a contested fact: The allegation that he abducted his niece, which he disputed below.

Instead, the government points to a puzzling and irrelevant distinction: It says that Mr. Parkerson disputed his niece's "statements *themselves*," and not whether the PSR accurately recited them. Opp. 18. But the government cites no authority to support the distinction, because this is not a real difference. No circuit has hinted, much less held, that the burden of proof at sentencing depends on this distinction. To the contrary, at least five circuits hold that, when the defendant objects to the accuracy of factual allegations that a PSR repeats from another source, the government must produce evidence to prove those allegations—regardless of whether the PSR repeats them correctly. This case, in short, implicates an acknowledged and entrenched circuit split, and warrants review.

On question two, the government mischaracterizes the petition as seeking "fact-bound" error correction. Opp. 20. But the question is actually whether the Fifth Circuit's rule—that it will not reweigh the statutory sentencing factors on appeal—comports with this Court's precedents. The answer is no. As other circuits recognize, substantive-reasonableness review necessarily requires scrutinizing and reweighing the

sentencing factors. The Fifth Circuit disagrees. This clear conflict warrants review as well.

I. COURTS ARE SPLIT ON WHETHER THE GOVERNMENT MUST SUBSTANTIATE DISPUTED FACTS ASSERTED IN A PSR.

A. Five Circuits Would Have Required The Government To Prove The Facts Disputed Below.

While the government concedes the circuit split, Opp. 14–15, it claims that the split is not implicated here because Mr. Parkerson "did not dispute that the presentence report accurately recounted his niece's statements to police"; he disputed only "the statements *themselves*." Opp. 12–13, 18. The government thus sees—and assumes that the split reflects—some distinction between (i) objecting to a PSR's accuracy in reciting allegations and (ii) objecting to the allegations themselves.

The government is alone in seeing this distinction. No circuit has suggested that this difference matters, and at least five circuits have reached contrary results.

The Second Circuit, for example, has long held that the government must prove disputed facts at sentencing, *United States* v. *Lee*, 818 F.2d 1052, 1056 (2d Cir. 1987), and thus a "sentencing court" cannot simply "rely on information" in a PSR to which the defendant objects, *United States* v. *Helmsley*, 941 F.2d 71, 98 (2d Cir. 1991). The court has applied this rule to set aside a sentence based on a PSR that "simply recited" allegations "in contemporary newspaper accounts and . . . prison records." *United States* v. *Riddle*, 601 F. App'x 36, 38 (2d Cir. 2015).

Riddle did not involve some sort of scrivener's error in transcribing these sources. Instead, the court

simply faced these stories and records on the one hand, and the defendant's "contradictory account" on the other. See *id.* The same is true here: The government offered a certain narrative in the PSR, while Mr. Parkerson responded with a contradictory account of the same events. In the Second Circuit, such a conflict creates "a disputed factual question" on which the district court "could not rely" without proof from the government. *Id.* In the Fifth Circuit, the sentencing court can simply brush that dispute aside. That is a split.

The Eighth Circuit would also have reached a different result here. There, if a defendant "objects to any of the factual allegations" in a 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." *United States* v. *Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004). *Poor Bear* thus vacated a sentence that relied on "objected-to paragraphs" in a PSR "gleaned . . . from FBI investigation reports." *Id.* at 1040. Again, no one disputed that the PSR accurately described *what the FBI reports said*; rather, the defendant (as here) offered an inconsistent account of the underlying facts. See *id.*

So too in the Ninth Circuit: "[W]hen a defendant raises objections to the PSR, the district court is obligated to resolve the factual dispute and the government bears the burden of proof." *United States* v. *Ameline*, 409 F.3d 1073, 1085–86 (9th Cir. 2005) (citation omitted) (en banc). In *Ameline*, the defendant disputed the drug quantity the PSR attributed to him, which was "based solely on the investigative reports the officer had reviewed." *Id.* at 1075. Again, no one disputed that the PSR accurately described the reports' contents; the question was whether the drug quantity itself was correct.

The Eleventh Circuit likewise holds that "[w]hen a defendant challenges one of the factual bases of his sentence as set forth in the PSR, the Government has the burden of establishing the disputed fact." *United States* v. *Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995). It has applied that rule to hold that, after the defendant "disput[ed] the factual accuracy of [the PSR's] description of the conduct underlying his false imprisonment conviction," the government bore "the burden of proving those facts." *United States* v. *Rosales-Bruno*, 676 F.3d 1017, 1023–24 (11th Cir. 2012). Once more, there was apparently no question that the PSR accurately described the document it used; what mattered was that the defendant disputed the underlying facts. *Id.* at 1023; see also *Lawrence*, 47 F.3d at 1562, 1567 (requiring the government to offer "evidence supporting" the drug quantity the PSR calculated, based on information that "came from the prosecutor's office").

Finally, in the D.C. Circuit, "the Government carries the burden to prove the truth of [a] disputed assertion" in a PSR, which "is triggered whenever a defendant disputes the factual assertions in the report." *United States* v. *Price*, 409 F.3d 436, 444 (D.C. Cir. 2005). *Price* addressed a prior conviction, which the PSR asserted based on "Court documents and criminal history information." *Id.* at 445. The defendant asserted that he was "not associated" with the case number the PSR recited, which sufficed to "dispute[d] the factual accuracy of the PSR with regard to the 1999 conviction." *Id.* Again, what mattered was not the form or basis of the objection, but that the defendant "dispute[d] the existence" of the conviction. *Id.* The government's reliance on *Price* is thus baffling; the point here is that Mr. Parkerson, like Price, "disputes the

factual assertions" in the PSR, which originated elsewhere. Opp. 19 (quoting 409 F.3d at 444).

B. The Government's Proffered Distinction Is Untenable.

In short, *none* of the circuits that reject the Fifth Circuit's rule limit the government's burden to rebutting "accuracy" objections. And rightly so: The ultimate question here is whether the PSR's allegations are true. It does not matter whether the allegations are false because the PSR mischaracterized them, or because they were never true to begin with. Rather, what matters in all these circuits is whether the defendant disputes a fact asserted in the PSR. If so, "the district court is obligated to resolve the factual dispute, and the government bears the burden of proof." *Ameline*, 409 F.3d at 1085 (citation omitted).

After all, a PSR almost always consists of secondhand information gathered from various sources. In some cases, the defendant will contend that the probation office made an error in reciting that information. But in most, he will object to information in the report by challenging the veracity of the underlying assertions. Such objections—to the quantity or type of drugs or a co-conspirator's plan—are common. It makes no sense to shift the burden to the defendant in one of these situations but not the other. Either way, a critical fact is disputed. And because the PSR "is not evidence," *Poor Bear*, 359 F.3d at 1041 (citation omitted), when its allegations are disputed, there must be *some* sort of proof. That is all that Mr. Parkerson asks. Had he made his request in the Second, Eighth, Ninth, Eleventh, or D.C. Circuits, he would have gotten relief.

Two final points. First, the government says that a district court may accept a PSR's assertions that are

not "reasonably in dispute." Opp. at 12. That is both true and irrelevant. This case is about disputed facts.

Second, the government discusses at length the wide range of materials a district court may "consider" at sentencing. *Id.* at 11–12. Again: true and irrelevant.

> [W]hile the Guidelines allow a district court to 'consider relevant information . . . [that] has sufficient indicia of reliability to support its probable accuracy,' this relaxed evidentiary standard does not grant district courts a license to sentence a defendant in the absence of sufficient evidence when that defendant properly objects to a PSR's conclusory factual recitals.

Lawrence, 47 F.3d at 1567 (citation omitted); cf. *Townsend* v. *Burke*, 334 U.S. 736, 740 (1948) (due process prohibited a sentence based on the "prosecution's submission of misinformation").

C. The Split Warrants Review, And This Is A Good Vehicle.

The government offers a long string cite of prior petitions that raised "substantially the same issue." See Opp. 15. But that only highlights the recurring nature of this question, which has arisen over many years from a variety of circuits. Indeed, it shows the split has become entrenched and is not capable of resolution. And as the government itself has argued, many of those cases were bad vehicles, and thus the split was "not implicated" there. *E.g.*, Brief in Opposition 9–10, *Tshiansi* v. *United States*, 139 S. Ct. 2748 (2019) (No. 18-8524); *accord* Brief in Opposition 10–11, *Gipson* v. *United States*, 139 S. Ct. 2636 (2019) (No. 18-7139); Brief in Opposition 6–7, *Pena-Trujillo* v. *United States*, 138 S. Ct. 639 (2018) (No. 17-5532).

The government makes a similar argument here, asserting that this case is a poor vehicle because "any error in the district court's consideration of the psychologist's opinion was harmless," since the court "gave 'not much' weight to the opinion." Opp. 19 (quoting Pet. App. 9a). But both courts below *did* rely on the niece's abduction allegations, a fact the government nowhere disputes. See Pet. App. 3a, 7a–8a. And the government does not contend that this reliance could be harmless. The government thus concedes that this issue affected Mr. Parkerson's sentence such that an error on this point would require resentencing.

The government also notes that the court of appeals "did not address" Mr. Parkerson's constitutional arguments. Opp. 19. But certiorari is improper "only when 'the question presented was not pressed *or* passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (emphasis added). Mr. Parkerson undisputedly pressed all his arguments below. See Brief of Defendant-Appellant at 17–18, *United States* v. *Parkerson*, 984 F.3d 1124 (5th Cir. 2021). And, as just explained, many circuits have addressed these issues; the Court will have the benefit of those decisions on review.

II. THE COURT SHOULD AFFIRM THAT SUBSTANTIVE-REASONABLENESS REVIEW ALLOWS APPELLATE COURTS TO REWEIGH THE SENTENCING FACTORS.

A. The Fifth Circuit Has Adopted A Rule That It Will Not Substantively Second-Guess Sentences, Creating A Split With Other Circuits.

The government says the second question is merely a "fact-bound" attack on the reasonableness of Mr. Parkerson's sentence. That is incorrect. The Fifth

Circuit consistently refuses, as a matter of law, to conduct *any* substantive reasonableness review, in a clear departure from this Court's precedent and the authority from other circuits.

The Fifth Circuit consistently holds that reweighing a district court's determination of the § 3553(a) factors is "outside the scope of [its] review." *United States* v. *McCullough*, 800 F. App'x 207, 211 (5th Cir. 2020); *accord United States* v. *Acosta-Leyva*, 802 F. App'x 855, 856 (5th Cir.), *cert. denied*, 141 S. Ct. 826 (2020)(mem.); *United States* v. *Douglas*, 957 F.3d 602, 609–10 (5th Cir. 2020); *United States* v. *Guerrero-Rodriguez*, 693 F. App'x 354 (5th Cir. 2017); *United States* v. *Morales*, 694 F. App'x 350 (5th Cir. 2017).).

This case is no exception. The Fifth Circuit merely recited its substantive reasonableness rule, Pet. App. 10a, mentioned the district court's sentencing considerations, *id.* at 11a–12a, and summarily concluded "it is not our role to second-guess the district court[]," *id.* It did not analyze how the statutory sentencing factors balance here. Rather, it reiterated its view that it is "not our role," and is "inappropriate," to "second-guess the district court[]." *Id.* at 11a. These statements reflect the court's consistent refusal to reweigh the § 3553(a) factors. See Pet. 15.

This refusal implicates a circuit split. Some circuits, like the Fifth, "will not" "reweigh . . . the relevant factors." *Douglas*, 957 F.3d at 609–10. Others will "find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence," which necessary requires the court of appeals "to make the calculus ourselves." *United States* v. *Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008); see *United States* v. *Boucher*, 937 F.3d 702, 707 (6th Cir. 2019) ("[W]e ask whether the sentencing court gave reasonable weight

to each relevant factor.") (emphasis omitted); *United States* v. *Irey*, 612 F.3d 1160, 1193–94 n.20 (11th Cir. 2010) (collecting cases from other circuits holding "that the weight given each § 3553(a) factor may be reviewed"); Pet. 15 (collecting cases).

In short, the circuits genuinely dispute whether substantive reasonableness review exists at all.

B. Applying Actual Substantive Reasonableness Review Would Affect Mr. Parkerson's Sentence.

Citing the need to "ensure public safety," the district court weighed Mr. Parkerson's recidivism risk heavily in its consideration of the § 3553(a) factors. Pet. App. 11a. But as a sister circuit has recognized, "[a]lthough the risk of recidivism [can] justify an upward variance, [an] extreme increase reflects an exercise of judicial discretion of the kind that the Sentencing Act was designed to avoid." *United States* v. *Tucker*, 473 F.3d 556, 564 (4th Cir. 2007).

Had the appellate panel properly considered the *totality* of the verified, reliable evidence, including the Static 99 test, it would have concluded Mr. Parkerson did not pose an inordinate recidivism risk. See *Gall* v. *United States*, 552 U.S. 38, 51 (2007) ("When conducting [substantive reasonableness] review, the court will, of course, take into account the totality of the circumstances . . . .")

That is all the more true because the Guidelines *already* incorporate a criminal history score intended to reflect all relevant aspects of a defendant's record, to which other circuits give due credit when analyzing sentencing variances attributable to criminal histories. See *United States* v. *Perez-Rodriguez*, 960 F.3d 748, 758 (6th Cir. 2020) (finding defendant's criminal

record was already "accounted for . . . in [his] Guidelines range").

Under these circumstances, had the Fifth Circuit properly applied substantive-reasonableness review, Mr. Parkerson likely would have received a different sentence.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

JEFFREY T. GREEN
TOBIAS S. LOSS-EATON
MATTHEW B. CAHILL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

XIAO WANG
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611

CHRISTOPHER A. CURTIS*
FEDERAL PUBLIC DEFENDER'S OFFICE FOR THE NORTHERN DISTRICT OF TEXAS
819 Taylor Street
Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Chris_Curtis @fd.org

Counsel for Petitioner

*Counsel of Record

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