No. _____

In the

Supreme Court of the United States

_____

Joel Reyna-Aragon,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

1. Whether an error in applying the Federal Sentencing Guidelines occasions a presumption of prejudice?

2. What is the government's burden of persuasion in showing that an error in applying the *Ex Post Facto* Clause to an amendment in the Federal Sentencing Guidelines?

3. Whether the courts of appeals should ordinarily accept statements by the district court seeking to insulate a Guideline error from appellate review by claiming that the sentence would be the same irrespective of the Guidelines?

4. Whether this Court should grant certiorari in an appropriate case to decide whether the defendant bears a burden of production to dispute factual claims in the Presentence Report, and whether it should hold the instant Petition in light of any forthcoming authority addressing the issue?

PARTIES TO THE PROCEEDING

Petitioner is Joel Reyna-Aragon, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joel Reyna-Aragon seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Court of Appeals is reported at *United States v. Reyna-Aragon*, 992 Fed. Appx. 381 (5th Cir. March 26, 2021). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on March 26, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTE, RULES, AND CONSTITUTIONAL PROVISIONS

Section 3742 of Title 18 reads in relevant part:

> (e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—
> (1) was imposed in violation of law;
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;
> (3) is outside the applicable guideline range, and
> (A) the district court failed to provide the written statement of reasons required by section 3553(c);
> (B) the sentence departs from the applicable guideline range based on a factor that—
> (i) does not advance the objectives set forth in section 3553(a)(2); or
> (ii) is not authorized under section 3553(b); or
> (iii) is not justified by the facts of the case; or
> (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the

reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or
(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.
The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

Federal Rule of Criminal Procedure 52 reads as follows:

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Article III, Section 1 states in relevant part:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

Article III, Section 2 states in relevant part:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States… to controversies to which the United States shall be a party….

STATEMENT OF THE CASE

A. Facts

In January 2018, immigration officials learned that Petitioner Joel Reyna-Aragon--a noncitizen who lost his immigration status in deportation proceedings--had illegally returned to the United States. (Record in the Court of Appeals, at 51). The district court imposed sentence in January 2020 (Record in the Court of Appeals, at 77), but the sentencing analysis focused on events almost two decades earlier.

Mr. Reyna-Aragon was born in Mexico in 1979. (Record in the Court of Appeals, at 39). When he was just three years old, his family brought him to the United States and he remained in the country through high school graduation and even earned legal permanent residence status in March 2001. (Record in the Court of Appeals, at 116). He ultimately lost that status due to a conviction for "sexual assault of a child under 17." (Record in the Court of Appeals, at 113).

In Texas, sexual assault of a child is a true statutory rape offense-- the prosecution does not have to prove that the defendant knew the victim's age. *See, e.g., Vasquez v. State*, 622 S.W.2d 864, 866 (Tex. Crim. App.1981); *accord Johnson v. State*, 967 S.W.2d 848, 849 (Tex. Crim. App. 1998). Mr. Reyna-Aragon's conviction arose from a sexual encounter shortly after he turned 20 with a victim who was 14 years old. (Record in the Court of Appeals, at 222--223).

According to an affidavit of probable cause, Mr. Reyna-Aragon and the victim met at a party in February 2000. Mr. Reyna-Aragon admitted that they had a sexual encounter that night. (Record in the Court of Appeals, at 222--223). In plea papers,

the prosecutor acknowledged that "mutual consent may exist," and that the victim and Mr. Reyna-Aragon were somewhat close in age (even if outside the bounds marked by statute). (Record in the Court of Appeals, at 224).

On April 20, 2001, consistent with the prosecutor's recommendation, the state court placed Mr. Reyna-Aragon on deferred adjudication pending completion of a five-year term of probation. (Record in the Court of Appeals, at 234). Federal immigration law treats a deferred adjudication just like a conviction. *See* 8 U.S.C. § 1101(a)(48)(A). Mr. Reyna-Aragon "was not aware of this distinction" when he accepted the plea offer. (Record in the Court of Appeals, at 198). That did not save him from eventual deportation.

In July 2001, Mr. Reyna-Aragon was arrested again. The allegation was that he sexually assaulted (or attempted to assault) a different victim, but the state never prosecuted him. (Record in the Court of Appeals, at 115). According to the PSR, no grand jury ever found probable cause. (Record in the Court of Appeals, at 115). In August 2001, prosecutors moved to revoke his deferred-adjudication probation. (Record in the Court of Appeals, at 190--194). The motion, signed by a prosecutor and a probation officer, alleged that Mr. Reyna-Aragon attempted to sexually assault the victim. (Record in the Court of Appeals, at 245--246). The state court never resolved that allegation; Mr. Reyna-Aragon instead agreed to an order amending the conditions and extending the duration of his community supervision. (Record in the Court of Appeals, at 248). Thus, the prosecutor never had to prove that he committed or attempted to commit that new crime. (Record in the Court of Appeals, at 193--194).

Even so, immigration officials sought and ultimately obtained his deportation based on the deferred adjudication. He lost his status and "was first ordered removed from the United States on February 19, 2004." (Record in the Court of Appeals, at 111). Immigration officers executed that order the next day. (Record in the Court of Appeals, at 111).

As Mr. Reyna-Aragon would later admit, he returned almost immediately. His entire immediate family (father, mother, sisters, brother, partner, children) lives in Texas. (Record in the Court of Appeals, at 117, 171). At the time, he didn't have any support in Mexico. (Record in the Court of Appeals, at 171). By March 2004, he was back in the United States. (Record in the Court of Appeals, at 251). He initially gave officers a false name, but they figured out who he was and arrested him. (Record in the Court of Appeals, at 251). This arrest led the state court to revoke his community supervision and adjudicate him guilty of the sexual assault. (Record in the Court of Appeals, at 255--256). The court sentenced him to two years in prison. (Record in the Court of Appeals, at 255--256). He was deported a second time at the conclusion of that sentence in August 2005. (Record in the Court of Appeals, at 111).

In November 2007, police again found him in the United States without permission. (Record in the Court of Appeals, at 114--115). According to the PSR, he had been living in Cleburne Texas for "about a year" at the time of his arrest. (Record in the Court of Appeals, at 114). Local authorities released him. This time, he recognized the need to return to Mexico and stay in Mexico. (Record in the Court of

Appeals, at 131). He remained in Mexico for nearly ten years before committing the instant offense. (Record in the Court of Appeals, at 131, 143, 198)

Soon after the events giving rise to his conviction, Mr. Reyna-Aragon entered into a long-term relationship with his partner. They have now been together more than eighteen years. (Record in the Court of Appeals, at 117). They have three children, ages 17, 15, and 12. (Record in the Court of Appeals, at 117).

Initially, and for a couple of years, Mr. Reyna-Aragon's partner made regular trips to Mexico so the children could visit their father. (Record in the Court of Appeals, at 117). But the travel became too hard on her. (Record in the Court of Appeals, at 117). Even so, Mr. Reyna-Aragon remained in Mexico and provided for many years. He finally decided to come back when his oldest son started "acting out." (Record in the Court of Appeals, at 117). The son had several "outbursts." (Record in the Court of Appeals, at 117). He fathered a child at age 16. (Record in the Court of Appeals, at 95). The family needed help--his partner couldn't handle the son's "discipline problems." (Record in the Court of Appeals, at 117).

Mr. Reyna-Aragon "knew he wasn't supposed to" come back into the United States, but he had to try to do something for his son. The stress of being so far away in Mexico, and unable to help, caused him to increase his drinking. (Record in the Court of Appeals, at 117). He ultimately broke the law in hopes that "he might be able to turn his son around." (Record in the Court of Appeals, at 95).

On January 27, 2018, Cleburne, Texas police officers responded to a single vehicle crash. (Record in the Court of Appeals, at 115). Mr. Reyna-Aragon was the

driver; he admitted he had consumed a 12-pack of beer that day. (Record in the Court of Appeals, at 115). He would later plead guilty to misdemeanor DWI, and serve a sentence of 45 days. (Record in the Court of Appeals, at 115). But his past also caught up with him in a big way. In 2008, after his release and voluntary return to Mexico, state authorities formally charged him with failure to register as a sex offender and providing a false identification. (Record in the Court of Appeals, at 113-- 114). The warrant had been outstanding all this time. He pleaded guilty on March 12, 2018, to failure to register as a sex offender (in 2007), providing a false I.D. (in 2007), and DWI (in 2018). (Record in the Court of Appeals, at 114--115). The state court sentenced him to concurrent prison terms of 3 years, time served, and 45 days, respectively. (Record in the Court of Appeals, at 114--115). He paroled into federal custody on May 10, 2019. (Record in the Court of Appeals, at 114).

B. Proceedings in District Court

Mr. Reyna-Aragon promptly pleaded guilty to illegal re-entry after deportation in violation of 8 U.S.C. § 1326(a). (Record in the Court of Appeals, at 36—40, 60-75). He admitted that he was a citizen of Mexico who had been deported in 2005 and that he returned without permission in January 2018. (Record in the Court of Appeals, at 39). According to the indictment, the plea papers, and the district court's judgment, the offense concluded on January 28, 2018--the day after his DWI arrest when immigration agents interviewed Mr. Reyna-Aragon in the Johnson County jail. (Record in the Court of Appeals, at 19, 39, 51).

The original PSR utilized the 2016 version of the U.S. Sentencing Guidelines Manual--the one that applied when he committed his offense—and calculated a Guideline range of 37-46 months imprisonment. *See* (Record in the Court of Appeals, at 118).

The Government objected to these calculations, arguing that the district court should retrospectively apply Guideline Amendment 809 (even though that Amendment did not become effective until November 2018). (Record in the Court of Appeals, at 122--128). This raised the total offense level to 21, and the guideline range to 57--71 months. (Record in the Court of Appeals, at 143--144). Mr. Reyna-Aragon responded that applying Amendment 809 without violating his *ex post facto* protections (Record in the Court of Appeals, at 133—140, 145--148). The district court ultimately sided with the Government. (Record in the Court of Appeals, at 90, 154).

Mr. Reyna-Aragon asked the district to depart or vary below that range in light of his cultural assimilation and the time he spent in state custody after federal authorities "found" him in January but before they initiated prosecution in May. (Record in the Court of Appeals, at 167--172). He had a strong case in favor of cultural assimilation: (1) His family brought him to the United States when he was just 3 years old; (2) he grew up in the United States through high school graduation; and (3) he earned legal permanent residence status. (Record in the Court of Appeals, at 171). After two deportations and his 2007 arrest, he left the United States and stayed in Mexico for ten years. He only returned because one of his children was having trouble his family needed his help. (Record in the Court of Appeals, at 172).

The Government responded that the district court should impose a sentence within the elevated guideline range, relying on the allegation that Mr. Reyna-Aragon committed "another sexual assault" in July 2001. (Record in the Court of Appeals, at 176). But the Government's only "evidence" of that assault was the mere fact of an arrest, followed by a motion to revoke probation in state court. (Record in the Court of Appeals, at 193--194). No grand jury found probable cause, and the state court modified the terms of probation without any finding that he committed that crime. (Record in the Court of Appeals, at 115, 248).

The district court denied Mr. Reyna-Aragon's motion for downward variance or departure. The court specifically relied on Mr. Reyna-Aragon's arrest for the second attempted sexual assault when selecting the sentence of 60 months in prison:

> All right. Well, I think that the prior crime is--you know, it may have been 20 years ago, but it's very serious. And then he has another one that he got arrested for. I don't know if they did what Mr. Magliolo said, because I'm not sure, but I know he was adjudicated guilty. And then, you know, they--he had two years to do. So it is a serious offense. I mean, I think she was 13. . . .
> She was 14. Okay. But it's serious. And then you have the failure to register as a sex offender, which is serious; he's not following his obligations. And he got in trouble for that. He got convicted of a crime for that, 11/23/2007, failure to identify, same time. And then a DWI, which he was involved in a crash.
> So all that is very serious. And we have another sexual assault arrest, not a prosecution, but, nonetheless, an arrest in 2001. So we have all those serious crimes, and he has been here twice.
> So I think really for the safety of the community, to promote respect for the law and to provide just punishment and all the other 3553 factors, that 60 months is right. **60 months is not the very bottom, but it's at the bottom of the range, and it will do for me.** 60 months is not too much, not more than it should be to carry out the purposes of our sentencing statutes.

(Record in the Court of Appeals, at 101--102) (emphasis added).

The district court then suggested that it might very well impose the same sentence even without the *ex post facto* Amendment:

> I want to say--and I don't ever say this. But I would have given him 60 months if the ex post facto law had been in place or not, because I think this is a serious enough offense.
>
> And it was not that long ago, 20 years, but it's still a serious offense, so I would have done it anyway.

(Record in the Court of Appeals, at 104).

C. Appellate Proceedings

1. Petitioner's Contentions

Petitioner appealed, contending that the sentencing court committed two constitutional errors. First, he argued that the court applied the wrong version of the Sentencing Guidelines Manual in violation of the Constitution's *Ex Post Facto* Clause. See Initial Brief in *United States v. Reyna-Aragon*, No. 20-10071, 2020 WL 3611693, at *11-15 (5th Cir. Filed June 30, 2020)("Initial Brief"). Specifically, he argued that the court erred in considering the sentence imposed following a revocation of deferred adjudication when deciding the enhancement applicable under USSG §2L2.1(b)(2). *See* Initial Brief, at *11-15.

The Fifth Circuit had already held that the 2016 version of §2L1.2(b)(2) required the sentencing court to disregard sentences upon a revocation if that revocation followed the defendant's first removal. *See United States v. Franco-Galvan*, 864 F.3d 338 (5th Cir. 2017). But Amendment 809 called for the sentencing court to consider this part of the sentence in applying §2L1.2(b)(2). *See* USSG, Appx. C, Amendment 809 (Nov. 1, 2018). The result was that the district court's decision to

apply a post-offense Amendment to the Guidelines increased the Guideline range to 57-71 months imprisonment, rather than 37-46 months imprisonment. (Record in the Court of Appeals, at 118, 143--144).

Second, Petitioner identified error in the district court's reliance on a bare arrest record when selecting the sentence. *See* Initial Brief, at *11, 15-18. Specifically, he maintained that the court had considered the defendant's conduct in a sexual assault for which he had never been indicted or convicted, but merely arrested. *See id*. This, he contended, represented a violation of due process protections against sentencing on the basis of unreliable information. *See id*.

2. The Opinion

The court of appeals affirmed. *See United States v. Reyna-Aragon*, 992 F.3d 381, 384 (5th Cir. March 26, 2021). It agreed that the district court had violated the *Ex Post Facto* Clause in retroactively applying an Amendment to the Guidelines, and that this Amendment had erroneously increased the Guideline range from 37-46 months imprisonment to 57-71 months imprisonment. *See Reyna-Aragon*, 992 F.3d at 386-387. Yet it found the error harmless because the district court said that it would have imposed the same sentence even if the Guidelines were different. *See id.* at 387-389.

In addressing the question of harmlessness, the court of appeals first expressly declined to find that *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016), required it to apply presumption of prejudice. *See id.* ("Reyna-Aragon argues that there is a presumption that the district court committed reversible error, because

it based his sentence on an incorrect Guidelines range. However, *Molina-Martinez* established no such presumption."). It proceeded instead to set out two tests, one applicable to cases where the district court considers the true range, and one where it fails to do so. *See id.* at 387-388. Because the sentencing court had not considered the range of 37-46 months imprisonment, the court of appeals found the second of these tests applicable. *See id.* ("The sentencing transcript does not show that the district court expressly considered the correct Guidelines range of 37–46 months."). The court of appeals thus considered whether the sentencing court would have varied from the Guidelines for the same reasons if it had not made the Guideline error, and whether the Guidelines had any influence on the sentence imposed. *See id.* at 388-389.

The court of appeals thought this test justified a finding of harmless error. *See id.* In its view, the sentencing court's statements showed that it would have imposed an above-range sentence "for the same overarching reason" that it imposed a sentence within the range it believed applicable. *Id.* at 388. And it regarded the district court's statement disclaiming the impact of the Guidelines as adequate proof that the Guidelines exerted no influence over the sentence imposed. *See id.* at 388-389. It did not acknowledge any requirement that the government prove constitutional error harmless beyond a reasonable doubt. *See id.* at 387-389.

The court also rejected Petitioner's second claim of error. *See id.* at 389-391. It thought that he had failed to preserve the court's consideration of unreliable information. *See id.* at 389-390. Applying plain error review, it applied Fifth Circuit

law requiring defendants to introduce rebuttal evidence as to any contested portion of the Presentence Report. *See id.* at 389-390 ("Generally, a PSR has sufficient indicia of reliability and its facts may be adopted without further inquiry if an adequate evidentiary basis is provided and the defendant does not offer rebuttal evidence or otherwise show that the PSR's information is not reliable.")(citing *United States v. Harris*, 702 F.3d 226, 229 (5th Cir. 2012)). And it found that the district court's belief that the defendant had committed a sexual assault did not affect its decision to impose a 60 month sentence, nor its hypothetical willingness to depart upwards by 24 months from the Guideline range that would have applied but for its *ex post facto* error. *See id.* at 391.

REASONS FOR GRANTING THE PETITION

I. In *Molina-Martinez v. United States*, this Court held that a defendant may rely on the sheer numerical effect of an error on the Guideline range to find that such an error prejudiced a party. Yet it left a question open: whether such an error occasions a presumption of prejudice. The result has been division in the court of appeals on that question, which this Court should resolve.

A. The courts of appeals are divided.

Although advisory only, *see United States v. Booker*, 543 U.S. 220 (2005), the Federal Sentencing Guidelines play a central role in federal sentencing. The district court must begin each sentencing determination by correctly calculating them, and mistakes in their application constitute reversible error. *See Gall v. United States*, 552 U.S. 38, 49, 50 (2007). This central role for the Guidelines is reflected in any number of holdings by this Court. It has held that Guideline sentences may be presumed reasonable, *see Rita v. United States*, 551 U.S. 338, 347 (2007), that defendants enjoy *ex post facto* rights in the Guideline range operative at the time of the offense, *see Peugh v. United States*, 569 U.S. 530, 533 (2013), that defendants subject to retroactively reduced Guideline ranges may be entitled to relief even if they negotiated for a specific sentence, *see Freeman v. United States*, 564 U.S. 522, 525-526 (2011), and that even unpreserved Guideline error will ordinarily affect the fairness, integrity, and public reputation of judicial proceedings. *See Rosales-Mireles v. United States*, __U.S.__, 138 S.Ct. 1897, 1903 (2018).

Relevant here, it has also held in *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016), that a party appealing an unpreserved Guideline error may rely on the Guideline error alone to show a reasonable probability of a different result but for the error, that is, to show prejudice. *See Molina-Martinez*, 136 S.Ct. at 1345. And it even recognized that "[i]n most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." *Id.* at 1346.

Yet *Molina-Martinez* left one important question unresolved: whether a Guideline error establishes a rebuttable presumption of prejudice. On the one hand, this Court recognized that "in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." *Id*. at 1347. And while it recognized that a Guideline error will not invariably be prejudicial, it suggested that it was the government's job to "'poin[t] to parts of the record' —including relevant statements by the judge—'to counter any ostensible showing of prejudice the defendant may make.'" *Id.* at 1346-1347 (quoting *United States v. Vonn*, 535 U.S. 55, 68 (2002)). It expected that silence in the record would be resolved in favor of remand. *See id.* ("Where, however, the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect

range in most instances will suffice to show an effect on the defendant's substantial rights.").

On the other hand, the Court did not use the term "presumption." *See Griffith v. United States*, 871 F.3d 1321, 1338 (11th Cir. 2017)(so observing). And a concurring opinion stated that the Court's opinion did not establish a burden-shifting presumption. *See Molina-Martinez*, 136 S.Ct. at 1351, n.4 (Alito, J., concurring)("…the Court makes clear that today's decision does not shift the burden of persuasion from a forfeiting defendant to the Government.").

The result has been division in the court of appeals. The court below has twice held in quite explicit terms that *Molina-Martinez* creates no presumption of prejudice attendant to a Guideline error. In *United States v. Sanchez-Hernandez*, 931 F.3d 408 (5th Cir. 2019), the defendant asserted a plain unpreserved Guideline error, but the Fifth Circuit found no reasonable probability of a different result. *See Sanchez-Hernandez*, 931 F.3d at 411–412. Undertaking that analysis, it said that if a judge offered a detailed explanation for the sentencing, it would "**apply no presumptions** or categorical rules," and instead "'consider the facts and circumstances of the case …'" *Id*. at (quoting *Molina-Martinez*, 136 S.Ct. at 1346)(emphasis added).

In Petitioner's case, which was published, the Fifth Circuit again expressly disclaimed any presumption of prejudice, notwithstanding the uncontested

preservation of a conceded Guideline error. *See United States v. Reyna-Aragon*, 992 F.3d 381, 387 (5th Cir. 2021). Petitioner contended "that there is a presumption that the district court committed reversible error, because it based his sentence on an incorrect Guidelines" but the court below held definitively that "*Molina-Martinez* established no such presumption." *Reyna-Aragon*, 992 F.3d at 387. In support, it cited *Sanchez-Hernandez*, already discussed. *See id.*

Noting the absence of any express reference to a "presumption" of prejudice in *Molina-Martinez*, the Eleventh Circuit has expressed skepticism that the opinion established one. *See Griffith v. United States*, 871 F.3d 1321, 1337–39 (11th Cir. 2017). In *Griffith*, the defendant sought collateral relief for ineffective assistance of counsel, arguing that his lawyer's failure to lodge a viable Guideline objection established a reasonable probability of prejudice. See *Griffith*, 871 F.3d at 1337. The Government conceded that *Molina-Martinez* established a presumption of prejudice, but argued that the presumption should not apply in collateral cases. *See id*. at 1337-1338. The Eleventh Circuit, however, questioned whether a presumption had actually been established:

> The minor premise of the government's contention, which is that *Molina–Martinez* created a presumption of prejudice in direct appeal cases, is far from clear. The Court's opinion used the word "presume" or any of its derivatives only once and that was to say that "reviewing courts may presume that a sentence imposed within a properly calculated Guidelines range is reasonable."

Id. at 1338 (quoting *Molina-Martinez*, 136 S.Ct. at 1347 (citing *Rita*, 551 U.S. at 341). Although acknowledging *Molina-Martinez*'s "prediction" that Guideline error will ordinarily occasion remand, it opined that "[a] prediction is not … a presumption." *Id*. Nonetheless, it thought that the court's sentence at the bottom of the erroneously determined Guideline range would establish a reasonable probability of a different result, provided the defendant could show that it resulted from ineffective assistance of counsel. *See id.* at 1339. Reflecting the continuing uncertainty on this question, the Eleventh Circuit has referred to an "assumption/presumption" of prejudice attendant to a Guideline error. *United States v. Newton*, 766 F. App'x 742, 756–57 (11th Cir. 2019)(unpublished).

By contrast, the Third, Fourth and Seventh Circuits have all expressly applied a presumption of prejudice to Guideline error. In *United States v. Dahl*, 833 F.3d 345 (3d Cir. 2016), the Third Circuit reversed a plain Guideline error in the application of USSG §4B1.5, a specialized career offender provision. See *Dahl*, 833 F.3d at 358–59. In its view, *Molina-Martinez*'s observation that Guideline error "most often will" satisfy the third prong established a rebuttable presumption of prejudice. *See id*. at 358 (citing this portion of *Molina–Martinez*, and citing *United States v. Knight*, 266 F.3d 203, 207 (3d Cir. 2001), for the proposition that "an error in application of the Guidelines that results in [the] use of a higher sentencing range should be presumed to affect the defendant's substantial rights," but observing that

"[t]he government can rebut this presumption…"). In a case where "the sentencing judge referenced the initial guideline range," the Third Circuit found the presumption controlling. *Id.* at 358-359. Subsequent Third Circuit authority distinguished errors involving the statutory range, but confirmed that a presumption of prejudice applies to Guideline error. *See United States v. Payano*, 930 F.3d 186, 195–96 (3d Cir. 2019)("In sum, unlike an erroneous Guidelines range, an erroneous statutory range is not 'itself ... sufficient to show a reasonable probability of a different outcome absent the error.' And without a presumption, a defendant must show actual prejudice to satisfy the third prong …")(internal citations omitted)(quoting *Molina-Martinez*, 136 S Ct. at 1345)).

The Fourth Circuit also understands *Molina-Martinez* to establish a presumption of prejudice. *See United States v. Green*, 996 F.3d 176, 186–87 (4th Cir. 2021). In its view, "[t]he whole point of *Molina-Martinez* is that the Guidelines range is presumed to have the kind of anchoring effect that might well have affected the district court's selection of a sentence …" *Green*, 996 F.3d at 186–187. Notably, it has given the presumption controlling weight even where a district court announced its intention to impose sentence well above the erroneous range. *See id.* A district court's mere intent to impose an above-range sentence does not rebut the presumption that the Guidelines affected the sentence. *See id.*

The Seventh Circuit has reasoned similarly. In *United States v. Jerry*, 996 F.3d 495 (7th Cir. 2021), it found that *Molina-Martinez* confirms its view that "[w]hen a district court incorrectly calculates the guideline range, we normally presume the improperly calculated guideline range influenced the judge's choice of sentence, unless he says otherwise." *Jerry*, 996 F.3d at 498 (quoting *United States v. Adams*, 746 F.3d 734, 743 (7th Cir. 2014))(emphasis omitted). As such, it resolved record silence on the prejudice question in favor of remand, offering relief for what it described as an error in "a complicated application of the sometimes-esoteric categorical approach." *Id.* at 497.

B. The circuit split merits this Court's attention.

This Court should intervene to address the circuit split. As can be seen, five circuits have weighed in, offering inconsistent results. And the split is sharp. While the Third Circuit has held in a published case that "[the] use of a higher sentencing range should be presumed to affect the defendant's substantial rights," *Dahl*, 833 F.3d at 358, the Court below flatly held in this published case that "*Molina-Martinez* established no such presumption" of prejudice, *Reyna-Aragon*, 992 F.3d at 387. These statements of law are diametrically opposed to each other. As the division of authority stems from an ambiguity in this Court's *Molina-Martinez* decision, and an issue noted expressly by the concurrence, it is unlikely to resolve spontaneously.

The issue is also important. In plain error cases, the presumption will often be controlling, as judicial silence is normal as to issues not brought to the courts' attention. *See Molina-Martinez*, 136 S.Ct. at 1347 ("In a significant number of cases the sentenced defendant will lack the additional evidence the Court of Appeals' rule would require, for sentencing judges often say little about the degree to which the Guidelines influenced their determination.").

But even in cases of preserved error like the one at bar, the presence or absence of error may prove critical. A judge is more likely to speak to the effect of an objection it overrules, but it will not always speak unequivocally or persuasively. Here, for example, the judge said that the sentence would be the same, but it also quite explicitly referenced the sentence's position with respect to the erroneous range, stating that a sentence near the low end "will do for me." *Reyna-Aragon*, 992 F.3d at 385. In evaluating the persuasive value of such disclaimers, it may matter a great deal whether the court begins with the presumption that Guideline errors affect the outcome, or instead begins on a blank slate.

C. This case is an excellent vehicle.

This Court should use Petitioner's case to address the circuit split. is published. The court below expressly passed on the presumption question, and resolved the case exclusively on harmless error. *See Reyna-Aragon*, 992 F.3d at 387. Finally, error is conceded, so there is no other question that will render it unnecessary

the existence and force of the presumption. *See id.* at 386-387. There is no good reason to wait for another case to resolve the issue that has divided the courts of appeals.

II. The courts of appeals have divided on the government's burden of persuasion to show harmless error when the district court violates the defendant's *ex post facto* rights by retroactively applying post-offense Guideline Amendment. The court below applies the same burden of persuasion to *ex post facto* claims as to any other claim of Guideline error. The First Circuit, by contrast, applies a distinct and higher standard requiring proof of harmlessness beyond a reasonable doubt.

A. The circuits are divided.

Article I, Section 9 of the U.S. Constitution forbids the enactment *of ex post facto* laws. This Court has held that this prohibition applies to the Federal Sentencing Guidelines. *See Peugh v. United States*, 569 U.S. 530, 533 (2013). Thus, district courts may not apply amendments to the Guidelines enacted after the defendant's offense concluded, if they result in a higher sentencing recommendation. *See Peugh*, 569 U.S. at 533.

The court below acknowledged the *ex post facto* error in this case, but found that it was harmless. *See Reyna-Aragon*, 992 F.3d at 386-389. In doing so, however, it applied the ordinary burden of persuasion applicable to preserved error. *See id.* at 387-389.

The court below outlined two distinct tests for evaluating the harmlessness of Guideline error. *See id.* (citing *United States v. Guzman-Rendon*, 864 F.3d 409, 411

(5th Cir. 2017), *United States v. Ibarra–Luna*, 628 F.3d 712, 718–19 (5th Cir. 2010), *United States v. Castro-Alfonso*, 841 F.3d 292, 297–99 (5th Cir. 2016), and *United States v. Martinez-Romero*, 817 F.3d 917, 925–26 (5th Cir. 2016)). First, it described the test applicable when the district court expressly considers the range vindicated on appeal. *See id.* at 387 (citing *United States v. Guzman-Rendon,* 864 F.3d 409, 411 (5th Cir. 2017)). In that case, the judge need only say that it would have imposed the same sentence. *See id.*

The court below then outline a second test for cases where the sentencing court has not considered the true range. *Id.* at 388 (citing *Ibarra–Luna,* 628 F.3d at 718–19). In these cases, the record must demonstrate that the judge would have varied from the true range for the same "overarching reason" used to justify the sentence actually imposed. *Id.* Further, the record must also show that the Guidelines did not influence the sentence. *See id*. at 388-389 (citing *Ibarra–Luna,* 628 F.3d at 718–19, *Castro-Alfonso*, 841 F.3d at 297–99, and *Martinez-Romero,* 817 F.3d at 925–26).

Notably, these are precisely the tests employed to decide harmlessness for claims of ordinary Guideline error, that is, when no constitutional provision is involved. *See Guzman-Rendon*, 864 F.3d at 411; *Ibarra–Luna*, 628 F.3d at 718–19. Accordingly, the court below does not apply a higher, distinct burden of persuasion to the harmless error question in adjudicating *ex post facto* claims.

In two published[1] cases addressing *ex post facto* Guideline errors, it has not mentioned or employed the reasonable doubt. *See United States v. Martinez-Ovalle*, 956 F.3d 289, 295 (5th Cir. 2020); *Reyna-Aragon*, 992 F.3d at 386-389. Indeed, the opinion below expressly identified the burden of persuasion as "heavy." *Reyna-Aragon*, 992 F.3d at 388 (quoting *Ibarra–Luna*, 628 F.3d at 717). This is the same burden employed for ordinary claims of preserved Guideline error, and it is not equivalent to proof beyond a reasonable doubt. *See Ibarra–Luna*, 628 F.3d at 717. Rather, it appears to be akin to the "clear and convincing evidence" standard. *See id.* at 714 ("the harmless error doctrine applies only if the proponent of the sentence convincingly demonstrates both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing.")

By contrast, the First Circuit has expressly applied the reasonable doubt standard in a published case. In *United States v. Mantha*, 944 F.3d 352, 356–58 (1st Cir. 2019), the First Circuit found an *ex post facto* error, and then accepted the

[1] In one unpublished case, the Fifth Circuit mentioned the reasonable doubt standard in passing. *See United States v. Perez Rangel*, 810 Fed Appx 319, 320–21 (5th Cir. 2020)(unpublished). This case is not binding precedent, and so must yield to the published authorities under Fifth Circuit rules and precedent. *See* Fifth Cir. I.O.P. 57.5.4; *Ernst v. Methodist Hospital*, 1 F.4th 333, 339, n.5 (5th Cir. 2021). Further, the case simply recited and applied the same two-part test employed to determine other claims of Guideline error. *See Perez Rangel*, 810 F. App'x at 320–21. So if *Perez-Rangel* reflects a general willingness of the Fifth Circuit to employ a reasonable doubt standard, unpublished status notwithstanding, it does not reflect any intention to apply a distinct and higher standard.

government's invitation to apply the reasonable doubt standard. *See Mantha*, 944 F.3d 352, 356–367. Applying this standard, it declined to find that error harmless. *See id.* at 356-358. Notably, the district court had in that case asserted that it would have imposed the same sentence irrespective of the error. *See id.* at 357-358. The First Circuit applied careful scrutiny to this disclaimer, and reversed in spite of it. *See id.*

Mantha thus reflects a clear split with the court below. First, whereas the Mantha opinion expressly applied the reasonable doubt standard, the published opinions of the court below have twice eschewed it and expressly applied the court's ordinary standards of harmless error review. Second, whereas *Mantha* reversed in spite of a Guideline disclaimer, the court below accepted the Guideline disclaimer at face value and affirmed.

B. This division of authority merits the Court's attention.

This Court should intervene to address the circuit split. The disagreement between the First and Fifth Circuits appears to stem from a passage in this Court's *Peugh* decision, in which it said that "*ex post facto* error may be harmless" when "the record makes clear that the District Court would have imposed the same sentence under the older, more lenient Guidelines that it imposed under the newer, more punitive ones." *Peugh*, 569 U.S. at 550, n. 8. The court below seems to have understood this to establish a lesser standard for harm in *ex post facto* Guideline

cases than proof of harmlessness beyond a reasonable doubt. *See Martinez-Ovalle*, 956 F.3d at 295 (quoting this passage in *Peugh*). As the disagreement derives from precedent in this Court, it is unlikely to resolve spontaneously.

Further, the split is clear and distinct, and it pertains to an important issue. The *Ex Post Facto* Clause serves values that are critical to the rule of law. Namely, it ensures "that individuals have fair warning of applicable laws and guards against vindictive legislative action." *Peugh*, 569 U.S. at 554 (citing *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981)). It "safeguards 'a fundamental fairness interest ... in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.'" *Id*. (quoting *Carmell v. Texas*, 529 U.S. 513, 533 (2000)). These values are undermined if errors in its application may be dismissed as harmless on a lesser standard of proof.

Finally, there is no good reason to distinguish the constitutional error at issue in this case, *ex post facto* error, from other kinds of sentencing error that implicate different provisions of the constitution. As such, this Court's general insistence on proof of harmlessness beyond a reasonable doubt in cases of constitutional error, *see Chapman v. California*, 386 U.S. 18, 24 (1967), may be threatened by the lesser standard applied below.

C. The present case is an excellent vehicle to address the issue.

The Court should use this case to address the split between the circuits. This case is published, and it turns exclusively on harmless error. *See Reyna-Aragon,* 992 F.3d at 386-389. Further, the burden of persuasion is probably dispositive. The district court sentenced within the Guidelines and expressly referenced the position of the sentence within the range when explaining the reason for the sentence. *See Reyna-Aragon,* 992 F.3d at 385. This likely raises a reasonable doubt as to harm.[2]

III. The courts of appeals have divided as to the level of deference appropriate to statements by the district court disclaiming any impact of a Guideline error on the sentence imposed.

As noted above, this Court has repeatedly recognized the central role of the Guidelines in the federal sentencing process. *See Rita,* 551 U.S. at 341; *Gall,* 552 U.S. at 49, 50; *Freeman*, 564 U.S. at 525-526; *Peugh,* 569 U.S. at 533; *Molina-Martinez,* 136 S.Ct. at 1345; *Rosales-Mireles,* 138 S.Ct. at 1903. The approach of

[2] Indeed, the nature of the error may itself raise a reasonable doubt. District courts are free to disagree with policy choices of the Sentencing Commission when selecting a sentence, and these policy disagreements may inform a choice to impose the same sentence irrespective of a Guideline error. *See Kimbrough v. United States*, 552 U.S. 85, 109–110 (2007)). Thus, for example, a district court may conclude that a prior conviction falls outside the definition of a "crime of violence," but reasonably conclude that the defendant's conduct is sufficiently disturbing that it **ought** to be treated as such. It is not clear, however, that district courts always enjoy the same latitude with respect to *ex post facto* violations. A district court that simply decides that a post-offense Guideline better estimated the defendant's culpability than the pre-offense Guideline may have done what *Peugh* forbids: accepted the recommendations of a post-sentence Amendment.

the court below, in common with that of several other circuits, gravely undermines the central role of the Guidelines in federal sentencing. The standard for addressing harmless error applied below renders Guideline error essentially irreversible upon the utterance of the appropriate magic words by the sentencing judge. This conflicts with the standards applied in several other courts, with repeated this Court's exhortations to encourage respectful consideration of the Commission's work, and with Congressional policy.

A. The circuits are divided.

The court below permits district courts to insulate Guideline errors from review by offering a clear statement that the sentence would have been the same irrespective of the Guidelines. In cases where the district court considers both ranges (the one found incorrect on appeal and the one vindicated on appeal), it need only explain that it would have given the same sentence under either range. If it follows this practice, the Fifth Circuit will hold the error harmless. *See Guzman-Rendon*, 864 F.3d at 411; *accord United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012)(citing *United States v. Duhon*, 541 F.3d 391, 396 (5th Cir.2008); *United States v. Bonilla*, 524 F.3d 647, 656 (5th Cir.2008)); *United States v. Rico*, 864 F.3d 381, 386 (5th Cir. 2017); *United States v. Thomas*, 793 Fed. Appx. 346, 346-347 (5th Cir. 2020)(unpublished).

Yet even when the sentencing court does not consider both ranges, the court below will accept a Guideline disclaimer from the sentencing judge if that statement is "firm, plain, and clear," and does "not beat around the bush." *Castro-Alfonso*, 841 F.3d at 298–99; *Reyna-Aragon*, 992 F.3d at 388-389. Indeed, it did so in this case, even though the sentencing judge referenced the Guideline range in explaining the sentence.

At least two other courts follow forgiving rules akin to the Fifth Circuit's. The Fourth Circuit will deem Guideline error harmless if the district court says it would have imposed the same sentence, provided the variance is substantively reasonable. *See United States v. Prater*, 801 Fed. Appx 127, 128 (4th Cir. 2020)(unpublished); *United States v. Mills*, 917 F.3d 324, 330 (4th Cir. 2019); *United States v. Gomez-Jimenez*, 750 F.3d 370, 382-83 (4th Cir. 2014); *United States v. Hargrove*, 701 F.3d 156, 161–63 (4th Cir. 2012). Similarly, the First Circuit will affirm erroneous sentences under an alternative rationale even if the justification is cursory. *See United States v. Marsh*, 561 F.3d 81, 86 (1st Cir. 2009).

But some circuits do not defer uncritically to Guideline disclaimers. The Second Circuit has affirmatively discouraged district courts from trying to determine the sentence that would have been imposed under hypothetical Guideline ranges. It warned that:

> a district court **generally should not try to answer the hypothetical question** of whether or not it definitely would impose the same

> sentence on remand if this Court found particular enhancements erroneous.

United States v. Feldman, 647 F.3d 450, 460 (2d Cir. 2011)(emphasis added). That court expressed concern that the purposes of appellate review would be defeated if all criminal sentences could "be exempted from procedural review with the use of a simple incantation: 'I would impose the same sentence regardless of any errors calculating the applicable Guidelines range.'" *Feldman*, 647 F.3d at 460.

Likewise, the Ninth Circuit has repeatedly issued similar warnings about Guideline disclaimers, namely that a "district judge's 'mere statement that it would impose the same above-Guidelines sentence no matter what the correct calculation cannot, without more, insulate the sentence from remand.'" *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1089 (9th Cir. 2015)(quoting *Acosta–Chavez*, 727 F.3d 903, 910 (9th Cir. 2013)(quoting *United States v. Munoz–Camarena*, 631 F.3d 1028, 1031 (9th Cir.2011))(internal quotations omitted). It has thus twice remanded Guideline errors in spite of an alternative rationale. *See Garcia-Jimenez*, 807 F.3d at 1089–90; *Acosta–Chavez*, 727 F.3d at 910.

In short, the First, Fourth and Fifth Circuits will accept the district court's effort to insulate Guideline errors from review, provided they are made with clear and unequivocal language. But the Second and Ninth Circuits look at such disclaimers more skeptically, and actively caution against them.

B. The division of authority merits review.

The Guidelines seek to promote proportionality of sentence among similarly situated offenders. *See Rita*, 551 U.S. at 349; *Molina-Martinez*, 136 S.Ct. at 1342. And appellate review of Guideline questions is important to that goal. Review provides public information about the meaning of Guidelines, resolving ambiguities that might afflict all litigants in the Circuit. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 151 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334 (describing the right to appellate review "essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines."). This process also alerts the Sentencing Commission that an Amendment might be necessary. *See Rita*, 551 U.S. at 350; *Braxton v. United States*, 500 U.S. 344, 348 (1991).

The approach of the First, Fourth, and Fifth Circuits jeopardizes this important function for appellate review, because it provides a way to avoid meaningful scrutiny of Guideline application questions. Many judges, after all, regard the Guidelines as complicated and cumbersome. *See United States v. Williams*, 431 F.3d 767, 773 (11th Cir. 2005)(Carnes, J., concurring) ("The *Booker* decision did not free us from the task of applying the Sentencing Guidelines, some provisions of which are mind-numbingly complex and others of which are just mind-numbing."); *Molina-Martinez*, 136 S.Ct at 1342 ("The Guidelines are complex…"). District courts that

do not wish to trouble with them, or that do not wish to trouble with them more than once, may be tempted to insulate all sentences from review by issuing a simple Guideline disclaimer. Indeed, distinguished circuit judges have encouraged such disclaimers precisely to avoid the need to avoid frustrating and difficult Guideline adjudications. *See Williams*, 431 F.3d at 773 (Carnes, J., concurring).

Guideline disclaimers also diminish the anchoring force of the Guidelines in federal sentencing. Indeed, a concurring and dissenting opinion of the Fourth Circuit has argued that this is already the condition of federal sentencing:

> The evolution of our harmless error jurisprudence has reached the point where **any procedural error may be ignored simply because the district court has asked us to ignore it**. In other words, so long as the court announces, without any explanation as to why, that it would impose the same sentence, the court may err with respect to any number of enhancements or calculations. More to the point, a defendant may be forced to suffer the court's errors without a chance at meaningful review**. *Gall* is essentially an academic exercise in this circuit now**, never to be put to practical use if district courts follow our encouragement to announce alternative, variant sentences. If the majority wishes to abdicate its responsibility to meaningfully review sentences for procedural error, the least it can do is acknowledge that **it has placed *Gall* in mothballs, available only to review those sentences where a district court fails to cover its mistakes with a few magic words**.

Gomez-Jimenez, 750 F.3d at 390 (Gregory, J., concurring and dissenting in part)(emphasis added).

Finally, the practice of pronouncing judgment as to hypothetical circumstances raises serious concerns about advisory opinions. “It is quite clear that

'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968)(quoting C. Wright, Federal Courts 34 (1963)). The prohibition on advisory opinions stems from separation of powers concerns and the duty of judicial restraint. *Flast*, 392 U.S. at 96-87. But it also stems from practical concerns:

> recogniz[ing] that such suits often "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests."

Id. (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)).

The hypothetical decisions encouraged by the court below squarely implicate these concerns. After the district court has resolved the Guidelines, the parties are likely to frame their arguments about the appropriate sentence using the range stated by the court as a framework, benchmark, or lodestar. Thus, a defendant who believes himself or herself subject to an unacceptably high range may seek to **distinguish** himself or herself from the typical offender in this range. But a defendant who obtains a more favorable Guideline range may instead emphasize the **typicality** of the offense, and the advantages of Guideline sentencing generally.

A district court that issues a "hypothetical sentence" thus does so without the benefit of advocacy from parties who know what the range will actually be, to say nothing of the correct advice of the Sentencing Commission. If this does not

implicate the Article III prohibition on advisory opinions, it at least reduces the level of confidence appropriate to hypothetical alternative sentences.

The approach of the First, Fourth, and Fifth Circuits seriously undermines the administration of justice, and ought to be reviewed.

C. The present case is an excellent vehicle to address this conflict.

Petitioner's case squarely presents the question of how much deference courts of appeals ought to give Guideline disclaimers. It is published, and error is conceded. *See Reyna-Aragon*, 992 F.3d at 385. Further, several factors suggest that the level of deference applied to the district court's Guideline disclaimer could be dispositive. The sentencing judge imposed sentence within the range it believed applicable. *See id.* It expressly referenced the position of the sentence within the range it believed applicable, and stated that no variance was necessary. *See id.* A sentence of 60 months would have represented a substantial – *two year* -- upward variance from the true range. *See id.* at 387-388. Finally, and perhaps most critically, the constitutional nature of the *ex post facto* error should have triggered the reasonable doubt standard for claims of harmless error. *See Chapman*, 386 U.S. at 24. If the foregoing do not show that the sentence would have been different, they at least raise a reasonable doubt to that effect. A reasonable quantum of skepticism toward a judge's self-serving efforts to insulate Guideline error from review could well have resulted in reversal.

IV. This Court should accept certiorari on the question of whether statements of fact made in a Presentence Report must be accepted absent rebuttal evidence. It should hold the instant Petition in light of any grant of certiorari on this question.

At least three authorities combine to safeguard the accuracy of fact-finding at federal sentencing. Most fundamentally, the due process clause demands that evidence used at sentencing be reasonably reliable. *See United States v. Tucker*, 404 U.S. 443, 447 (1972). The Federal Guidelines likewise require that information used at sentencing exhibit "sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3(a). And Federal Rule of Criminal Procedure 32 offers a collection of procedural guarantees that together "provide[] for the focused, adversarial development" of the factual and legal record. *See Burns v. United States*, 501 U.S. 129, 134 (1991).

Several circuits, including the court below, have interpreted these authorities to impose on the defendant a burden of production. *See United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005); *United States v. O'Garro*, 280 F. App'x 220, 225 (3d Cir. 2008); *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002); *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995); *United States v. Lang*, 333 F.3d 678, 681-682 (6th Cir. 2003); *United States v. Mustread*, 42 F.3d 1097, 1102 (7th Cir. 1994); *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006). In these circuits, a district court may adopt the factual findings of a presentence

report "without further inquiry" absent competent rebuttal evidence offered by the defendant. *United States v. Valdez*, 453 F.3d 252, 230 (5th Cir. 2006); *see also Prochner*, 417 F.3d at 66; *Lang*, 333 F.3d at 681-682; *Mustread*, 42 F.3d at 1102; *Rodriguez-Delma*, 456 F.3d at 1253.

But the D.C., Second, Eighth, Ninth, and Eleventh Circuits have all rejected this reasoning. In each of these cases, an objection to facts stated in a PSR shifts the burden of production to the government to produce additional supporting evidence. *See United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005)("the Government may not simply rely on assertions in a presentence report if those assertions are contested by the defendant."); *United States v. Helmsley*, 941 F.2d 71, 98 (2d Cir. 1991) ("If an inaccuracy is alleged [in the PSR], the court must make a finding as to the controverted matter or refrain from taking that matter into account in sentencing. If no such objection is made, however, the sentencing court may rely on information contained in the report."); *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004) ("If the defendant objects to any of the factual allegations . . . on which the government has the burden of proof, such as the base offense level. . . the government must present evidence at the sentencing hearing to prove the existence of the disputed facts."); *United States v. Ameline*, 409 F.3d 1073, 1085-86 (9th Cir. 2005) (*en banc*)("However, when 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 . . . . The court may not simply rely on the factual statements in the PSR. "); *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009) ("It is now abundantly clear that once a defendant objects to a fact contained in the [PSR], the government bears the burden of proving the disputed fact by a preponderance of the evidence.").

This Court should grant certiorari to resolve this division of authority regarding an issue so basic to federal sentencing. In the event that it does so, it should hold the instant petition pending the outcome of that case. The court below rejected Petitioner's claim that the judge relied on unproven criminal conduct with the following recitation of Fifth Circuit law:

> Generally, a PSR has sufficient indicia of reliability and its facts may be adopted without further inquiry if an adequate evidentiary basis is provided and the defendant does not offer rebuttal evidence or otherwise show that the PSR's information is not reliable.

Reyna-Aragon, 992 F.3d at 390. Insofar as it addresses Petitioner's claim of factual error, the decision below thus rests chiefly on the defendant's burden to rebut factual assertions in the PSR. As such, a hold of the instant Petition will be appropriate in the event that this Court grants certiorari to address the validity of that burden shifting regime. *See Lawrence v. Chater*, 516 U.S. 163 (1996).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 23 day of August, 2021.

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