

No.\_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

JUAN MANUEL LIRA-SALINAS, PETITIONER

V.

UNITED STATES OF AMERICA

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

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**QUESTION PRESENTED FOR REVIEW**

Whether the Fifth Circuit's practice of shifting the burden of production and proof to the defendant at sentencing violates a defendant's Due Process rights

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Juan Lira asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on July 14, 2021.

**PARTIES TO THE PROCEEDING**

The caption of the case names all the parties to the proceedings in the court below.

**OPINION BELOW**

The opinion of the court of appeals, reported at 852 Fed. Appx. 860 (5th Cir. 2021), is attached to this petition as Appendix A.

**JURISDICTION OF THE SUPREME COURT OF  
THE UNITED STATES**

The opinion and judgment of the court of appeals were entered on July 14, 2021. This petition is filed within 90 days after the denial of rehearing. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISION INVOLVED**

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that “no person shall be . . . deprived of life, liberty, or property without due process of law.”

**STATEMENT**

Petitioner Juan Lira pleaded guilty to conspiring to possess 50 grams or more of methamphetamine with the intent to distribute it and to possessing 50 grams or more of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846.<sup>1</sup> Lira agreed to a factual basis for the pleas that stated he had twice helped to arrange for methamphetamine to be transported on commercial inter-city buses. The first time, Lira had provided Eduardo Sanchez with a drug-

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<sup>1</sup> The district court exercised jurisdiction under 18 U.S.C. § 3231.

laden suitcase. Sanchez checked the bag at the Turimex bus station in Laredo, Texas, but it was seized at a checkpoint north of Laredo. The second time, Lira provided a suitcase containing methamphetamine to Stephen Martinez. That suitcase was also seized.

Following Lira's plea, a probation officer prepared a presentence report. The officer found that Lira's base offense level under sentencing guidelines §2D1.1(c)(1) was 38. The officer recommended a number of upward adjustments to that base offense level, including a two-level increase because the officer believed that Lira had made a credible threat of violence after his arrest when he asked Sanchez's girlfriend whether Sanchez was cooperating and stated that he needed to think of his family. *See U.S.S.G. §2D1.1(b)(2).*

The probation officer's recommendations resulted in a total offense level of 43, which, with Lira's criminal history category of III, yielded an advisory guideline sentence range of life imprisonment. U.S.S.G. Ch.5, Pt.A. (sentencing table). Both Lira and the government objected to the presentence report. The government thought that level 43 was not high enough and sought a leadership assessment against Lira under guidelines §3B1.1 Lira objected to the credible-threat adjustment under §2D1.1(b)(2), arguing that he had made his statement to Sanchez's girlfriend because he was concerned that drug cartel members might hurt Sanchez and Lira.

Lira renewed his objection at sentencing. Defense counsel acknowledged that Lira had told Sanchez's girlfriend that Sanchez should think of his family, and

explained what Lira meant by that. As defense counsel put it, Lira and Salinas “were actually friends and still remain friends to this day, but [Lira] was telling me that he was saying that [to Sanchez] in kind of being cautionary that both of them needed to think about their family should they be cooperating with the Government because they both knew who they were working [for].” App. B. The words, Lira himself explained, were not a threat but an expression of concern. The district court overruled Lira’s objection, adopted the view of the statement set out in the presentence report, and increased Lira’s guideline offense level by two levels. ROA.206; ROA.271.

The district court varied downward from the life-sentence recommendation of the presentence report and guidelines. It imposed a 168-month imprisonment term on Lira. He appealed, challenging the accuracy of the threat determination. The Fifth Circuit affirmed the sentence. It wrote that “[t]he presentence report (PSR) is presumed reliable, and a sentencing court may rely on the facts recounted in the PSR unless the defendant demonstrates by competent rebuttal evidence that the information is “materially untrue, inaccurate or unreliable.” Appendix at 3 (citing *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012)).

## REASONS FOR GRANTING THE WRIT

### THE CIRCUITS ARE DIVIDED OVER THE WEIGHT TO BE ACCORDED STATEMENTS IN THE PRESENTENCE REPORT AND WHO BEARS THE BURDEN OF PROOF WHEN STATEMENT IN THE PRESENTENCE REPORT ARE CHALLENGED.

Federal courts have broad discretion as to what evidence they may consider in sentencing a defendant. 18 U.S.C. § 3661. That broad discretion is, however, limited by the Due Process Clause. Although the Due Process Clause does not impose particular limits on the types of evidence a sentencing court may consider, *Williams v. New York*, 337 U.S. 241 (1949), due process does mandate that a district court's sentencing determinations be supported by information bearing reasonable indicia of reliability, a threshold the Court has indicated is satisfied by proof by a preponderance of the evidence, *United States v. Watts*, 519 U.S. 148, 156 (1997). *See also United States v. Johnson*, 648 F.3d 273, 277 (5th Cir. 2011) (observing that sufficient-indicia-of-reliability standard equates to "due process requirement that sentencing facts must be established by a preponderance of the evidence.") The question in this case, which has divided the circuits, is does information become sufficiently reliable to satisfy due process and thus to sentence upon simply because it has made its way into a presentence report or must the government prove the information by a preponderance of the evidence.

Several courts have held that the presentence report, by itself is enough and that once an assertion is in the presentence report the burden shifts to the defendant to disprove it. The Fifth Circuit may be the foremost exponent of this view. That court

has repeatedly held that, “[g]enerally, a PSR bears a sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.” *United States v. Zuniga*, 720 F.3d 587, 591 (5th Cir. 2013) (quoting *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012)). A district court, therefore, “may adopt the facts contained in a [PSR] without further inquiry if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable.” *Harris*, 702 F.3d at 230 quoting *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007)).

Building upon its belief that inclusion in a presentence report provides sufficient indicia of reliability for factual determinations at sentencing, the Fifth Circuit has reasoned that the “defendant bears the burden of demonstrating that the PSR is inaccurate; in the absence of rebuttal evidence, the sentencing court may properly rely on the PSR and adopt it.” *Zuniga*, 720 F.3d at 591 (quoting *United States v. Ollison*, 555 F.3d 152, 164 (5th Cir. 2009)). To carry this burden, the Fifth Circuit requires from the defendant “a demonstration that the information is ‘materially untrue, inaccurate or unreliable.’” *Zuniga*, 720 F.2d at 591 (quoting *Harris*, 702 F.3d at 230).

The result of this practice is that a factual assertion once placed in the presentence report, such as the assertion in this case that a threat had been made, is essentially conclusive. This is so even if the defendant objects to the reliability of the source of the information and even if the government presents no verifying or

corroborating information. This practice diminishes, and possibly eliminates, a defendant's due process right to be sentenced on reliable information.

The Fifth Circuit is not alone in this practice. Several other circuit courts have imposed on the defendant the burden of production when he objects to supposed facts set forth in a PSR. *See, e.g., United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005) *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002); *United States v. Mustread*, 42 F.3d 1097, 1101-02 (7th Cir. 1994). In these circuits also a district court may adopt the factual assertions of a presentence report unless the defendant can disprove those assertions. *See, e.g., Prochner*, 417 F.3d at 66; *Mustread*, 42 F.3d at 1102.

This deferential approach contrasts with the method favored by Second, Eighth, Ninth, Eleventh and District of Columbia circuits. Rather than accord determinative deference to claims in a presentence report, these courts require the government to establish the facts supporting an increased sentence (or guideline offense level). These circuits hold that an objection to facts stated in a presentence report shifts the burden of production to the government to provide supporting evidence. The government may not simply rely on the presentence report. *See, e.g., United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004); *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009); *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005); *United States v. Helmsley*, 941 F.2d 71, 98 (2d Cir. 1991). As the Ninth Circuit has explained, "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. Ameline*, 409 F.3d 1073, 1085-86 (9th Cir. 2005) (*en banc*).

The division among the circuits is well defined and longstanding. The division affects crucial decisions about sentence length in individual cases and it creates questions about the fairness and (relative) uniformity of procedures and punishments in our criminal justice system. Assertions in presentence reports affect guideline calculations that must be made to start the sentencing process, *Gall v. United States*, 552 U.S. 38, 51 (2007), and that anchor the determination of a final sentence, *Peugh v. United States*, 569 U.S. 530, 549 (2013). The split also means that it is easier for the government, which is usually the party furnishing the police reports and investigative hearsay that underlie some assertions in the PSR, to get a higher sentence without the solid evidence that the application of the preponderance standard would bring out. Sentencing without solid proof of the facts supposedly justifying the sentence affects the public’s perception of the fairness of the system. Because of the importance of the issues implicated by the circuit split, the Court should grant certiorari and resolve the division among the circuits.

### **Conclusion**

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH  
*Counsel of Record for Petitioner*

DATED: September 15, 2021.