

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

IN THE SUPREME COURT OF THE UNITED STATES

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AHMED OSMAN FARAH,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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

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### **QUESTION PRESENTED**

Does a district court violate a defendant's right to due process by enhancing a sentence based on unreliable arrest history, as the Third and Seventh Circuits have held, or is relying on a defendant's bare arrest record not erroneous, as the Eighth Circuit has held?

## **LIST OF PARTIES**

All parties appear in the caption on the cover page of this Petition.

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Petitioner Ahmed Osman Farah respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on May 25, 2021.

**OPINION BELOW**

The decision of the court of appeals is a published opinion and is attached as Appendix A.

**JURISDICTION**

The Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals affirmed Mr. Farah's sentence on May 25, 2021. *See* App'x A. Under the Court's March 19, 2020, order, the deadline to file petitions of certiorari was extended to 150 days from the date of the lower-court judgment. The Court's order of July 19, 2021, rescinded the March 19, 2020, order only for those cases in which the lower-court judgment was issued on or after July 19, 2021. Because the Eighth Circuit's affirmance in Mr. Farah's appeal was issued on May 25, 2021, the 150-day deadline remains in effect. And because October 22, 2021, is 150 days after May 25, 2021, this petition is timely.

## **CONSTITUTIONAL PROVISION INVOLVED**

The Due-Process Clause of the Fifth Amendment to the Constitution of the United States is attached as Appendix B.

## **STATEMENT OF THE CASE**

In March 2018, Mr. Farah and his acquaintance, Mario Spencer, borrowed a car from Mr. Spencer's friend and drove to the Penn-Wood Market, a mom-and-pop corner store in Minneapolis. Mr. Spencer stood at the end of the clerk's counter holding a gun while Mr. Farah took money out of the cash registers. Mr. Farah and Mr. Spencer then left the store and drove away in Mr. Spencer's friend's car. Police found the abandoned car a short time later, and eventually apprehended Mr. Farah and Mr. Spencer during a foot chase.

Mr. Farah was indicted on one count of Hobbs Act robbery (Count 1) and one count of brandishing a firearm in relation to the robbery (Count 2). A jury convicted him on both counts.

At sentencing, the government argued that Mr. Farah was the likely driver of the getaway vehicle and, on that basis, recommended a two-level Guideline enhancement for "creat[ing] a substantial risk of death or serious bodily injury to another person when fleeing from police," under U.S.S.G. § 3C1.1 The government contended that:

That conclusion . . . that it is at least slightly more likely that defendant Farah was the driver . . . is reinforced by defendant Farah's own criminal history, which includes numerous instances of fleeing from police and resisting arrest to attempt to avoid capture. (See Farah PSR ¶¶ 38 (resisting arrest), 42 (resisting arrest), 43 (fled on foot) 47 (evading or eluding police), 48 (fleeing police). Although not mentioned in the PSR, defendant Farah also attempted to flee police when he was arrested for kidnapping and aggravated robbery in 2009. [Citing complaint.]

In other words, the government acknowledged that the evidence was in near-equipose as to whether Mr. Farah or his co-defendant drove the car; the government relied on Mr. Farah's bare arrest record to tip the scales toward the conclusion that Mr. Farah was the driver.

Defense counsel argued that the court should not rely on any prior flight allegations to support the conclusion that Mr. Farah was the likely driver. Counsel pointed out that most of these prior alleged incidents had been dismissed, “so it’s misleading to look at those as either being found proven in fact . . . and in the absence of knowing anything more about that case, to place any weight on that.” Counsel argued that the two charges resulting in conviction—one from 2005, when Mr. Farah was 18, and the other from a year later—were not relevant, as they involved “flight-on-foot scenarios” and did not “involve[] a vehicle.”

The district court found that the government had proven that it was more likely that Mr. Farah, not Mr. Spencer, was the driver. In support of this finding, the court pointed out that “the PSR observes that Mr. Farah has a documented history of resisting arrest and fleeing police.” The court stated that “Mr. Farah has an extensive history of fleeing police and resisting arrest that is not comparable to his co-defendant’s criminal history.” The court therefore applied the enhancement; calculated a total offense level of 22, a criminal history category of III, and a Guideline range of 51 to 63 months on Count 1 and 84 months on Count 2; and imposed a total of sentence of 120 months (36 months on Count 1 and 84 months on Count 2, to run consecutively).

On appeal, Mr. Farah claims that the district court erred by relying on unproven allegations and remote criminal history to conclude that he had likely driven the car and was subject to the reckless-endangerment enhancement. The Eighth Circuit rejected the claim. The court of appeals reasoned that the court relied only in part on Mr. Farah’s bare arrest record to enhance his sentence, and that doing so was not inappropriate. *See* App’x A at 12 (citing *United States v. Never Misses A Shot*, 715 F.3d 1048, 1051–52 (8th Cir. 2013)). This petition follows.



## REASON FOR GRANTING THE PETITION

Defendants have a constitutional right to be sentenced based on reliable evidence. *See United States v. Berry*, 553 F.3d 273, 280 (3d Cir. 2009). This right stems from the principle that “[n]o individual or body of men has a discretionary or arbitrary power to commit any person to prison.” *Hurtado v. California*, 110 U.S. 516, 537 (1884).

The district court here sentenced Mr. Farah based on a finding that was unsupported by any reliable evidence. The court enhanced Mr. Farah’s sentence under the Guidelines and the 18 U.S.C. § 3553(a) factors upon finding that Mr. Farah was the likely driver of the vehicle given his prior arrests for resisting arrest and flight on foot. But virtually all of the prior charges were dismissed. Nonetheless, the district court cited Mr. Farah’s criminal history as justification for applying a Guidelines enhancement and as an aggravating factor in its § 3553(a) analysis.

Several circuits have held that relying on unproven allegations to increase a sentence “is tantamount to saying that once a defendant has been [charged with] offense A, . . . the judge can then say to the defendant, ‘You say it isn’t so; prove that to me!’” *United States v. Weston*, 448 F.2d 626, 634 (9th Cir. 1971). “In addition to the difficulty of ‘proving a negative,’” it is “a great miscarriage of justice to expect [a defendant] or [his] attorney to assume the burden and expense of proving to the court” that he is not the violent person the unproven allegations in the PSR make him out to be. *Id.* Moreover, it violates the “due process standard of reliability.” *Berry*, 553 F.3d at 280 (internal quotation marks and citation omitted). “A bare arrest record—without more—does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity.” *Id.* at 284; *see also United States v. Walker*, 98 F.3d 944, 947–48 (7th Cir. 1996) (holding that sentencing judge erred in relying on mere arrests, where defendant had been arrested but not convicted on 25 previous occasions and had 13 convictions in 19 years).

Had Mr. Farah been sentenced in the Third or Seventh Circuits, the district court would not have relied on his bare arrest record to enhance his sentence. But the Eighth Circuit found no error in the district court's enhancement based on this unreliable evidence. Instead, relying on *United States v. Never Misses A Shot*, 715 F.3d 1048, 1051–52 (8th Cir. 2013), the Eighth Circuit suggested that it was not inappropriate for the district court to consider “an arrest record featuring allegations of flight from law enforcement.” App’x A at 12.

Review is necessary to rectify a split among the circuits as to whether reliance on a defendant's bare arrest record at sentencing violates the defendant's right to due process. Until the Court resolves the issue, the split is likely to become more entrenched, leading to widely disparate sentencing procedures and results. By granting the petition, the Court can ensure uniformity and coherence among the circuits. And Mr. Farah's petition presents an ideal vehicle for doing so, as the issue was preserved below and presents no procedural obstacles to review.

## CONCLUSION

Because the decision below was on the bases of the foregoing, the Court should grant the petition for a writ of certiorari.

Dated: October 22, 2021

Respectfully submitted,

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