

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

BILLY DEAN SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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SUBMITTED: December 16, 2021

QUESTION PRESENTED

Did the district court violate Mr. Smith's Fifth Amendment Due Process rights by relying on unreliable, unsupported hearsay to, first, find that Mr. Smith had committed an uncharged felony and, second, to base Mr. Smith's sentence on his unproven, unadmitted guilt of this alleged but uncharged felony?

TABLE OF CONTENTS

QUESTION PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
OPINION BELOW	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
PRIOR PROCEEDINGS	2
FACTUAL BACKGROUND	4
REASONS FOR GRANTING THE PETITION	18
A. Mr. Smith’s offense conduct under the Guidelines	19
B. 18 U.S.C. § 3553 and Rule 32 of the Federal Rules of Criminal Procedure direct criminal sentencing.	20
C. Accepting disputed PSR facts as true, without the government meeting its burden of proof violates due process	23
CONCLUSION	27
APPENDIX A	
APPENDIX B	

TABLE OF AUTHORITIES

Cases

<i>Gardner v. Florida</i> , 430 U.S. 349 (1977).....	23
<i>In re Winship</i> , 397 U.S. 358 (1970).....	23
<i>Irizarry v. United States</i> , 553 U.S. 708 (2008).....	22
<i>Townsend v. Burke</i> , 334 U.S. 736 (1948).....	18, 27
<i>United States v. Bibler</i> , 495 F.3d 621 (9th Cir. 2007)	18
<i>United States v. Holding</i> , 948 F.3d 864 (7th Cir. 2020)	25
<i>United States v. Pappas</i> , 715 F.3d 225 (8th Cir. 2013)	20
<i>United States v. Restrepo</i> , 546 F.2d 654 (9th Cir. 1991)	23
<i>United States v. Tucker</i> , 404 U.S. 443 (1972).....	25
<i>United States v. Yarrington</i> , 634 F.3d 440 (8th Cir. 2011)	20

STATUTES AND RULES

United States Code

18 U.S.C. § 2246	19, 20
18 U.S.C. § 3553	18, 20, 21, 24
§ 3553(a)(1)	21, 24
18 U.S.C. § 2251(a)	2-6, 19
18 U.S.C. § 2252(a)(2)	3
18 U.S.C. § 2252A(a)(5)(B)	2, 3
18 U.S.C. § 2256(2)(A)	4
18 U.S.C. § 3742	5
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2241	5
28 U.S.C. § 2255	5

Montana Code Annotated

Mont. Code Ann. § 45-5-502	17-18
Mont. Code Ann. § 43-5-503	17-18

Federal Rules of Criminal Procedure

Rule 26.2	21, 22
Rule 32	9-12, 20-24
Rule 35	3

United States Sentencing Guidelines

U.S.S.G. § 2G2.1.....	19, <i>as below</i>
§ 2G2.1(b)(2)(A).....	19, 20
Application Note 2.....	19, 20
U.S.S.G. § 6A1.3.....	<i>as below</i>
§ 6A1.3(a).....	24
§ 6A1.3(b).....	24
Commentary	22, 25

United States Constitution

Fifth Amendment (also as Due Process).....	<i>passim</i>
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Billy Dean Smith (“Mr. Smith”) petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

The court of appeals published its opinion denying Mr. Smith’s request for appellate relief on March 12, 2019. Appendix A. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The order granting motion to dismiss of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. Smith*, 2021 U.S. App. LEXIS 28222 (9th Cir. 2021). Appendix A.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States. Appendix B.

STATEMENT OF THE CASE

Mr. Smith appeals his judgment, challenging the district court's reliance on unsupported, unreliable hearsay alleging a separate crime in imposing sentence.

Mr. Smith requests this Court grant his petition for certiorari.

PRIOR PROCEEDINGS

On February 7, 2020, Mr. Smith was arrested and charged by complaint with one count of sexual exploitation of a child in violation of 18 U.S.C. § 2251(a), one count of distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Mr. Smith made his initial appearance that same day, and was detained.

Mr. Smith was indicted by the grand jury on March 5, 2020. The indictment charged one count of sexual exploitation of a child in violation of 18 U.S.C. § 2251(a), four counts of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Mr. Smith was arraigned on March 6, 2020, and detained pending trial.

On July 9, 2020, Mr. Smith filed a motion to change his plea to guilty. On July 10, 2020, Mr. Smith filed a signed plea agreement in which he pled guilty to count I, sexual exploitation of a child. This charge carries a mandatory minimum punishment of fifteen years imprisonment. The government filed its offer of proof on July 10, 2020.

On July 23, 2020, Mr. Smith appeared before the district court and pled guilty to count I of the indictment.

On November 6, 2020, the district court imposed judgment. The district court sentenced Mr. Smith to 240 months imprisonment, followed by ten years supervised release.

On November 16, 2020, in response to a motion filed by Mr. Smith pursuant to Rule 35 of the Federal Rules of Criminal Procedure, the district court issued an amended judgment which corrected two clerical errors in the original judgment.

Mr. Smith appealed on November 20, 2020. On July 6, 2021, the government filed a motion to dismiss the appeal in lieu of a response brief. The government claimed that Mr. Smith's appeal was precluded by the appeal waiver in his plea agreement. On September 17, 2021, the Ninth Circuit granted the government's motion and dismissed Mr. Smith's appeal.

This petition follows.

FACTUAL BACKGROUND

Pursuant to a plea agreement, Mr. Smith pled guilty to count I of the indictment, charging sexual exploitation of a child in violation of 18 U.S.C. § 2251(a). Count I of the indictment alleged:

That between in or about January 2020, and February 6, 2020, at Big Arm, in Lake County, in the State and District of Montana and the Flathead Indian Reservation, the defendant, BILLY DEAN SMITH, did knowingly employ, use, persuade, induce, entice, and coerce any minor, Jane Doe 1, who is known to the defendant but whose name is withheld to protect her identity, to engage in sexually explicit conduct, as defined in 18 U.S.C. § 2256(2)(A), for the purpose of producing any visual depiction of such conduct and for the purpose of transmitting a live visual depiction of such conduct, and that the visual depiction was produced and transported using materials that had been mailed, shipped and transported in and affecting interstate and foreign commerce by any means, including by computer, in violation of 18 U.S.C. § 2251(a)(and (e).

The plea agreement detailed Mr. Smith would plead guilty to Count I and recited Mr. Smith's admission of the elements of child exploitation and admitted the forfeiture:

4. Admission of Guilt: The defendant will plead guilty because the defendant is guilty of the charge contained in count I of the indictment. In pleading guilty, the defendant acknowledges that:

Count I: Sexual Exploitation of a Child, in violation of 18 U.S.C. § 2251(a):

First, that between on or about January 2002 and February 6, 2020, "Jane Doe 1 was under the age of eighteen years;

Second, the defendant knowingly employed, used, persuaded, induced, enticed or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of such conduct; and

Third, the defendant knew or had reason to know that the visual depiction was produced using materials that had been mailed, shipped, or transported in and affecting interstate or foreign commerce by any means, including by computer.

The defendant admits that he used an iPhone 7, Model A1660 (Serial number C7CY78P6HG6W), to facilitate the commission of the offense.

The plea agreement contained an appeal waiver:

10. Appeal Waiver – Conditional: The defendant understands that the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a); 28 U.S.C. §§ 2241, 2255. The prosecution has a comparable right of appeal. 18 U.S.C. § 3742(b). By this agreement the defendant waives the right to appeal or collaterally attack any aspect of the sentence, including conditions of probation or supervised release or any orders of restitution, if the sentence imposed is within or below the guideline range calculated by

the Court, regardless of whether the defendant agrees with that range. This waiver includes challenges to the constitutionality of any statute of conviction and arguments that the admitted conduct does not fall within any statute of conviction. This waiver does not prohibit the right to pursue a collateral challenge alleging ineffective assistance of counsel. The United States waives its right to appeal any aspect of the sentence if the sentence imposed is within or above the guideline range calculated by the Court.

At the change of plea hearing, the district court asked Mr. Smith to explain “[i]n your own words, what are they saying that you did, alleging that you did, that’s a violation of federal law.” Mr. Smith admitted his criminal conduct: “That I took, knowingly took pictures that I knew was illegal and sent them.”

Later, the court asked defense counsel, “are you satisfied that there are no viable legal or factual defenses to Count I of the indictment, sexual exploitation of a child[,]” to which counsel responded: “Yes, your honor.”

The government detailed the elements of sexual exploitation of a child in violation of 18 U.S. Code § 2251(a).

MS. PETERSON: Your Honor, the United States would have to prove:

First, that in or about January of 2020 and February 6 of 2020, Jane Doe 1 was under the age of 18 years;

Second, that the defendant knowingly employed, used, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of such conduct; and

Third, that the defendant knew or had reason to know that the visual depiction was produced using materials that had been mailed, shipped, or transported in and affecting interstate or foreign commerce by any means, including by a computer.

For the forfeiture allegation, the United States would have to prove that the iPhone Model A1660 that's identified in the indictment was used to facilitate the commission of the offense.

Defense counsel agreed that was “an accurate statement of the elements that must be proved beyond a reasonable doubt before Mr. Smith could be found guilty.”

The court then asked Mr. Smith to explain “[w]hy do you think you’re guilty of the sexual exploitation of a child? What happened?”

In an exchange with the court, Mr. Smith admitted taking sexually explicit pictures of an underage child and sending them to an undercover agent via an online chat room.

The court then asked the government, “if you had to prove the allegations in Count I of the indictment, what would your proof be?”

The government responded by reading from the offer of proof it filed with the court.

MS. PETERSON: Your Honor, in January of 2020, an undercover FBI agent was investigating a Kik chat group that was known to exchange child pornography. Kik is a mobile phone app that allows users to exchange instant messages over the internet, and it has different groups or rooms within the app.

Mr. Smith exchanged messages with the undercover agent where he described sexually abusing a 12-year-old child who we have referenced as Jane Doe. He sent a sexually explicit image of the child to the undercover agent.

Agents obtained a search warrant for Mr. Smith's cell phone, which is an iPhone 7, Model A1660. The cell phone was not manufactured in Montana. The agents seized the phone, and it was submitted for forensic analysis and review, and the examiner located sexually explicit images of Jane Doe that Smith sent the undercover agent via the phone. He also located other videos and images of Jane Doe. The videos were created in January and February of 2020 using the iPhone.

At least one video depicts the lewd and lascivious exhibition of Jane Doe's genitals. The video meets the federal definition of "child pornography," and at least one video depicts Smith's hand touching Jane Doe.

During an interview with the agents, Smith admitted that he had filmed the sexually explicit videos of Jane Doe, and Jane Doe is under the age of 18 years old.

Mr. Smith did not disagree with that proof. Defense counsel noted one possible objection, to whether one video depicted Mr. Smith touching the victim, but conceded it was not relevant to the elements of the offense.

The district court reviewed the appeal waiver with Mr. Smith.

Following the change of plea hearing, the probation office prepared a draft presentence report (“PSR”). The PSR contained the victim’s allegations that Mr. Smith had sexually assaulted her (“MF”). PSR ¶¶ 9-29. Mr. Smith objected to those allegations of child molestation and aggravated sexual abuse; in his PSR objection letter, he objected to the “offense conduct” section of the PSR, which spanned paragraph 9 to paragraph 29.

Offense Conduct: Mr. Smith disputes sexually assaulting the victim (i.e. child molestation and aggravated sexual assault). Mr. Smith recognizes the asserted facts result from law enforcement investigation and reports from the victim. Pursuant to Rule 32(i)(3)(B), Mr. Smith believes that a ruling on those factual issues “is unnecessary either because the matter will not affect sentencing,” or because the Court, in his opinion, does not have to consider the matters in sentencing.

Consistent with Mr. Smith’s statements to the Court at his change of plea hearing, he does not dispute the facts in the Offer of Proof nor their incorporation into the PSR.

Mr. Smith’s objections were noted in the final PSR submitted to the district court.

The defendant has provided a written assertion disputing that he sexually assaulted the MF victim (i.e. child molestation and aggravated sexual assault). The defendant recognizes the asserted facts result from law enforcement investigation and reports from the victim. Pursuant to Rule 32(i)(3)(B), he believes that a ruling on those factual issues “is unnecessary ether [sic] because the matter will not affect sentencing,” or because the Court, in his opinion, does not have to consider the matters in sentencing. Consistent with the defendant’s statements to the Court at his Change of Plea Hearing, he does not dispute the facts in the Offer of Proof, nor their incorporation into the PSR.

Mr. Smith reiterated this objection in his sentencing brief, stating: “Mr. Smith disputes sexually assaulting the victim (i.e. child molestation and aggravated sexual assault).” Mr. Smith recognized that, per Rule 32(i)(3)(B) of the Federal Rules of Criminal Procedure, resolving the factual dispute could be “unnecessary either because the matter will not affect sentencing” or because it would not be considered in sentencing. *Id.*

At sentencing, the district acknowledged Mr. Smith’s objections. Mr. Smith detailed the aggravated sexual abuse and child molestation allegations were summarized in paragraph 29 and mentioned earlier in the PSR. The government declined to be heard on that objection.

The court explained that it considered the disputed facts to be the offense conduct, so it was relying on the disputed facts in the PSR.

THE COURT: I am relying on the offense conduct that is stated there, and I also think that there is certain – in the mother’s statement, the victim is afraid of having to face the defendant and tell her side of the story. She is afraid that the defendant will deny having committed these sexual assaults against her.

So while I agree with Mr. Rhodes’ characterization, I do think that the description in the presentence investigation report plays a – I mean, that’s the offense conduct, and I am relying on the presentence investigation report.

The court immediately asked if there “are any other factual or legal issues that have to be resolved.” After inviting argument on monetary penalties, the district court ruled that Mr. Smith was indigent and thus a potential enhanced special assessment of \$5,000 did not apply.

The Court recited the relevant statutory and guideline provisions and calculations.

Mr. Smith reiterated his objection, arguing that the court could not rely on the PSR alone to resolve the dispute. “In that regard, going to the Court’s ruling on the PSR objection, which goes to the nature and circumstances of the offense, the Court cannot, alone, rely on the PSR, so we continue to object to the assertions that we specified going to allegations of aggravated sexual abuse, to use the federal offense phrase, more commonly known as child molestation.”

The court asked for clarification on Mr. Smith’s objection, acknowledging that Mr. Smith was disputing the child molestation assertions throughout the PSR on which the court was going to rely to impose sentence.

THE COURT: As I explained, whether that’s limited to paragraph 29 or objects to the entire presentence investigation report, if it’s the latter, then it does impact my view of the sentencing, and you just said that you continue to object.

So clarify what it is that you’re objecting to, because do I have to rule on it? It seems like, from what you just said, I have to rule on it.

MR. RHODES: I think you do, Your Honor, if the Court is going to determine that it's going to affect sentencing, whether those allegations are true or not.

Our position is we think those allegations can be extracted, not considered, and the Court can proceed with sentencing under Rule 32(i)(3)(B). But if the Court is going to consider those allegations, which I believe are going to be – or they are alleged, my understanding is they're alleged in the civil lawsuit so they're gonna be potentially resolved in that proceeding, in order to rely on them here for the imposition of sentence, the Court would have to resolve those disputes.

Relying on the PSR, the court made it clear it was sentencing Mr. Smith based on the disputed sex crimes described in PSR paragraphs 9 through 29.

THE COURT: I am going to rely on the presentence investigation report. And I believe that the description of the offense conduct, which is obtained from the investigative reports prepared by the FBI and other information, it is very clear to me, just reading through paragraphs 9 through 29, that the conduct that was involved was insidious and that there is a factual basis set forth in the record to find that there is reason, sufficient reason and considerable reason, to find what is alleged is true.

As I pointed out earlier, in the mother's letter she states that the daughter herself is afraid that if she participated in the manner other than what's described in the presentence investigation report, that the defendant, Mr. Smith, would deny that there was any kind of contact. If you look at the descriptions set forth in those paragraphs by the – from paragraph 9 through 29, it is clear that they

have documented evidence about the conversations that occurred on the Kik chat group, including descriptions, lurid descriptions, of the conduct that Mr. Smith bragged about engaging in with a 10- to 12-year-old girl.

And the language, which I'm not going to repeat here, reflects somebody who had engaged in physical contact, including vaginal/penile contact, anal/penile contact, and masturbation and photographing and bragging about what he was engaged in.

And all of those things, I believe, that are set forth in the paragraphs I've mentioned negate the suggestion that the defendant has provided a written assertion disputing that he sexually assaulted the victim, and he recognizes that the asserted facts from law enforcement and reports of the victim are set forth. And pursuant to 32(i)(3)(B), he believes that a ruling on those factual issues is unnecessary because the matter will not affect sentencing or because the Court, in the defendant's opinion, does not have to consider the matters in sentencing.

Consistent with the defendant's statements to the Court at his change of plea, he does not dispute the facts that are set forth in the offer of proof, and that is in the record. And when he was given an opportunity to deny those things set forth in the offer of proof, he found that there was no – my memory is that he did not have any specific objection to the offer of proof.

Consequently, if that is an objection other than a waiver, I am overruling the objection, and I am relying on the information, the factual recitation of the offense conduct that's set forth in paragraphs 9 through 29.

Mr. Smith spoke on his own behalf.

The government described its view of the offense, referencing its sentencing brief's assertion that Mr. Smith sexually abused the victim. The government made its sentencing recommendation.

The parents of the victim spoke. They were not sworn as witnesses nor subject to questioning. The victim's mother asserted child molestation:

You raped and sodomized her for two years. . . . [Y]ou not only raped her vaginally, you forced yourself on this little girl. You disregarded her screams and tears and pain and emotional pain.

The victim's mother acknowledged Mr. Smith was not charged with, tried for, or convicted of aggravated sexual abuse (a/k/a child rape or molestation).

Now I know Bill is not on trial here for rape, but I believe it is important for you, Judge, to know that he has done more than just post the pictures of my daughter on the internet.

The victim's mother also acknowledged Mr. Smith denied the rape accusation but continued to accuse him of child rape: "you are denying raping Cxxx to this point," but "who coerced you to rape my daughter?"

The court described the sentencing factors at issue; the selections below are pertinent to the present appeal. The court first recognized the parents' awareness that Mr. Smith raped the victim:

THE COURT: And while I understand the desires and completely understand your view that Mr. Smith, based upon

the conduct that you are aware of as it relates to your daughter, should be locked up for the rest of his life, that is not a possibility based upon the law.

The court expressly relied on the PSR section in which the victim reported to investigators that Mr. Smith had raped her.

THE COURT: Paragraph 24 of the presentence investigation report shows that the victim in this case indicated that she had been touched on her breasts, her vagina, and her buttocks and that – by the defendant. And that he had penetrated her sexually with his penis, with fingers, and with other objects. And, of course, she described in some detail what the physical consequences of his horrendous conduct was for her as a child.

The judge ruled, based on the victim's layered hearsay in the PSR, that Mr. Smith had sexually assaulted her by touching her breasts, her vagina, and her buttocks. Also based on the PSR, the court further ruled Mr. Smith sexually penetrated the victim with his penis, his fingers and other objects.

The district court imposed sentence on Mr. Smith, sentencing him to 240 months imprisonment, followed by ten years supervised release. The district court ordered the conditions of supervised release. The district court imposed restitution of \$43,307.03.

The government moved to dismiss the remaining counts. The district court dismissed the counts with prejudice.

The district court addressed Mr. Smith's right to appeal.

THE COURT: And pursuant to the plea agreement, when there's a sentence, I believe, within the guidelines, is there a waiver of the right to appeal?

MS. PETERSON: There is a full appeal waiver, Your Honor, including a 2255 challenge.

THE COURT: All right.

Mr. Rhodes, is there any legal reason why that sentence should not be the judgment of the Court?

MR. RHODES: Yes, Your Honor.

Relying on the hearsay allegations of child molestation, the PSR violates the right to confrontation and the due process right at sentencing.

And with respect to the appeal waiver, because of what we believe are those violations, the appeal waiver doesn't apply in this case.

THE COURT: Well, I think you're wrong. You didn't object at all to any of the calculations of the advisory guideline range, and you didn't object to any criminal history, and you conceded that you did not believe that any of the problems that you had would impact any sentence. And, consequently, I don't believe that Mr. Smith has a right to appeal.

However, in order to be cautious:

Billy Dean Smith, I believe you have waived your right to appeal. That's set forth in detail in the plea agreement in this case. And you've waived the right under the plea agreement to challenge any sentence collaterally by habeas corpus, and the only issue that you may have a right to raise is the ineffective

assistance of counsel. And the United States has waived its right to appeal. I believe that unequivocally you have waived the right to appeal and that it's kind of sandbagging everybody for the argument just made by Mr. Rhodes.

Be that as it may, if you have a right to appeal, and I do not believe you do, you must file a written notice of appeal within 14 days of today's date if you want to appeal, and that must be in writing, must be filed with the United States Clerk of Court in Montana. And I don't think you have a right to appeal, but, if you do, if you don't file that notice of appeal within 14 days, in writing, at the right place, you're out of luck. You lose, you waive, you give up the right to appeal.

On November 20, 2020, Mr. Smith appealed to the Ninth Circuit Court of Appeals. On July 6, 2021, the government filed a motion to dismiss the appeal in lieu of a response brief. The government claimed that Mr. Smith's appeal was precluded by the appeal waiver in his plea agreement. On September 17, 2021, the Ninth Circuit granted the government's motion and dismissed Mr. Smith's appeal.

This petition follows.

State of Montana proceedings

On March 10, 2021, following the issuance of Mr. Smith's federal judgment, Mr. Smith was charged in the Twentieth Judicial District Court of Montana, Lake County, with one count of sexual assault, in violation of Mont. Code Ann. § 45-5-

502, and one count of sexual intercourse without consent, in violation of Mont. Code Ann. § 45-5-503. *State of Montana v. Billy Dean Smith*, DC 21-54.

On September 8, 2021, *State of Montana v. Billy Dean Smith*, DC 21-54, was dismissed with prejudice upon motion of the State.

REASONS FOR GRANTING THE PETITION

A constitutional due process violation occurs if hearsay is relied upon at sentencing without adequate indicia of reliability. *See Townsend v. Burke*, 334 U.S. 736 (1978). The district court repeatedly relied upon layers of hearsay alleging an uncharged offense when weighing the § 3553(a) factors and imposing sentence. The hearsay was unsworn, uncontroverted, and unreliable. It was central to the court's imposition of sentence. The hearsay statements accusing Mr. Smith of child rape did not possess reliability. Because Mr. Smith's sentence violates the Fifth Amendment right to due process; the appeal waiver does not apply. *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007).

Last year, 97.8% of federal convictions were secured via guilty plea. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2020/9c20.pdf>. Federal courts sentenced 64,565 defendants. *Id.* Sentencing is the process paradigm in the world of federal criminal justice.

A. Mr. Smith’s offense conduct under the Guidelines.

Mr. Smith was convicted of sexual exploitation of children under 18 U.S.C. § 2251(a). U.S.S.G. § 2G2.1 covers Mr. Smith’s statute of conviction. The PSR applied an enhancement for “sexual contact” pursuant to U.S.S.G. 2G2.1(b)(2)(A). That enhancement directs that “if the offense involved the commission of a sexual act or sexual contact, increase by 2 levels.”

“Sexual act,” as it is used in the Guideline, is cross-referenced at 18 U.S.C. § 2246.

(2) the term “sexual act” means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

Application Note 2 to U.S.S.G. § 2G2.1 and 18 U.S.C. § 2246(2).

“Sexual contact” is also cross-referenced in statute.

(3) the term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

Application Note 2 to U.S.S.G. § 2G2.1 and 18 U.S.C. § 2246(3).

As noted, the PSR applied the two-level enhancement based on “sexual contact,” not a sexual act. And, per its statutory definition, “‘sexual contact’ under § 2G2.1(b)(2)(A) need not involve penetration.” *United States v. Pappas*, 715 F.3d 225, 228 (8th Cir. 2013) (citing 18 U.S.C. § 2246(2)-(3); and *United States v. Yarrington*, 634 F.3d 440, 452 (8th Cir. 2011)).

Neither party objected to the PSR Guidelines calculations. The court adopted those calculations and expressly applied the sexual contact specific offense characteristic. Unlike the sexual contact enhancement, during the entire sentencing process, from Mr. Smith’s change of plea, to the draft PSR, to the PSR objections, to the Final PSR, to sentencing briefs, during oral advocacy at the sentencing hearing, and most importantly, in the court’s calculation of the Guidelines, the sexual act enhancement was never mentioned.

B. 18 U.S.C. § 3553 and Rule 32 of the Federal Rules of Criminal Procedure direct criminal sentencing.

18 U.S.C. § 3553 controls the substantive imposition of federal sentences. Subsection (a) delineates the factors the district court must review when imposing sentence; most specifically relevant here: “(1) the nature and circumstances of the

offense and the history and characteristics of the defendant[.]” 18 U.S.C. § 3553(a)(1).

Federal Rule of Criminal Procedure 32 provides for focused, adversarial development of the factual and legal issues relevant to sentencing. *See Burns v. United States*, 501 U.S. 129, 134 (1991). “Rule 32 frames these issues by directing the probation officer to prepare a presentence report addressing all matters germane to the defendant’s sentence.” *Id.* (citing Rule 32(c)(2)).

Before sentencing, a probation officer must prepare a presentence investigation report (PSR), and the report must calculate the defendant’s offense level and criminal history category. Fed.R.Crim.P. 32(c), (d)(1)(B). The PSR must be disclosed at least 35 days before sentencing. Fed.R.Crim.P. 32(e)(2). That permits enough time for either party to file formal objections and for the probation officer to resolve or respond to the objections. Fed.R.Crim.P. 32(f). Before sentencing, the probation officer must then submit the PSR to the court along with an addendum containing “any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.” Fed.R.Crim.P. 32(g).

At sentencing, the court may hear evidence on the objections. Fed.R.Crim.P. 32(i)(2). If a witness testifies at sentencing, the provisions of Rule 26.2(a)–(d) and (f) of the Federal Rules of Criminal Procedure apply. Fed.R.Crim.P. 32(i)(2). In other words, the party who calls the witness must produce any statement of the

witness in its possession that relates to the subject matter of the testimony after the witness testifies on direct examination. Fed.R.Crim.P. 26.2(a). Failure to adhere to Rule 26.2 renders the witness's testimony unavailable for consideration by the district court. Fed.R.Crim.P. 32(i)(2).

After permitting the parties to argue the objection, the court “must – for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that a ruling is unnecessary.” Fed.R.Crim.P. 32(i)(3)(B).

As canvassed in the above paragraphs, Rule 32 sets forth procedural protections that ensure criminal defendants receive notice and an opportunity to object to factual allegations. *Irizarry v. United States*, 553 U.S. 708, 716 & n.2 (2008). The Sentencing Commission cautions “disputes about sentencing factors must be resolved with care.” U.S.S.G. § 6A1.3 cmt.

Here, Mr. Smith disputed the victim's reports that he raped her in paragraphs 9 through 29 of the draft PSR in his PSR objection letter. He maintained that objection before the district court. The district court did not call for any evidence on the disputed facts. The government introduced no evidence to meet its burden of proof. Instead, when solicited for input by the court, the government expressly elected not to address the issue. Subsequently, because they were in the PSR, the court adopted as proven the allegations of child molestation and aggravated sexual assault.

C. Accepting disputed PSR facts as true, without the government meeting its burden of proof violates due process.

The preponderance of the evidence burden of proof at sentencing assures due process. *United States v. Restrepo*, 546 F.2d 654, 661 (9th Cir. 1991).

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” *In re Winship*, 397 U.S. 358, 370 [25 L. Ed. 2d 368, 90 S. Ct. 1068] (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. Texas, 441 U.S. 418, 423 (1979). *See also id.* at 425 (standard of proof “reflects the value society places on individual liberty”).

Relying on disputed PSR facts, simply because they are in the PSR, to excuse the government from meeting its burden of proof violates due process. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977) (“it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause”).

Nonetheless, the court accepted disputed PSR facts as “sufficient reason and considerable reason, to find what is alleged is true[.]” Endorsing disputed facts as true ignores that “[t]he Supreme Court has recognized that due process protects a defendant’s interest in a fair sentencing[.]” *Restrepo*, 946 F.2d at 659.

Without any dispute resolution process, other than adopting the layered hearsay in the PSR, the district court relied on contested, incendiary facts to impose

sentence. Although Mr. Smith pled guilty to making child pornography, the district court expressly sentenced Mr. Smith for raping and molesting the child, based on disputed facts in the PSR.

As reviewed *supra*, the district court has a statutory obligation to consider “the nature and circumstances of the offense and the history and characteristics of the defendant” before imposing sentence. 18 U.S.C. § 3553(a)(1). That information is provided to the district court in the Presentence Report. Fed.R.Crim.P. 32(d)(1)-(2). When that information is in dispute, the district court is obligated to either rule on the dispute or disregard the disputed information and not consider it in imposing sentence. Fed.R.Crim.P. 32(i)(3)(B).

The Sentencing Commission incorporates Rule 32 into the sentencing process. The Sentencing Guidelines provide:

When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

U.S.S.G. § 6A1.3(a). And it expressly incorporates Rule 32. “The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed.R.Crim.P.” U.S.S.G. § 6A1.3(b). Here, the district court’s post-guilty

plea, sentencing scheduling order stated that, “[t]he Court will resolve disputes in accordance with § 6A1.3 of the guidelines at the sentencing hearing.”

The Sentencing Commission’s commentary to § 6A1.3 instructs: “disputes about sentencing factors must be resolved with care.” U.S.S.G. § 6A1.3 cmt. The Commission recognizes “[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues.” *Id.* (citations omitted). And the Guidelines further provide “[t]he sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.” *Id.*

Finally, the Commission recognizes the role of due process in resolving factual disputes at sentencing. “The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.” *Id.*

Mr. Smith “has a due process right to be sentenced based on accurate information.” *United States v. Holding*, 948 F.3d 864, 870 (7th Cir. 2020) (citing *United States v. Tucker*, 404 U.S. 443, 447 (1972)).

As briefed *supra*, the district court excused the government from meeting its burden of proof by deeming true disputed facts alleged in the PSR. The PSR attributes those allegations to investigators who reported them as reported by the

victim first during a forensic interview at a hospital, then later during a medical examination.

During the latter examination, the victim alleged: Mr. “Smith had been having sexual intercourse with her for about a year and a half. She stated Smith had vaginal and anal sex with her. Additionally, Smith had placed his fingers in her vagina, as well as a vibrator that was believed to be her mother’s.”

Neither the government nor the court addressed the conflict between those claims and the PSR report that the victim’s medical “examination was ultimately documented as normal.”

In short, Mr. Smith pled guilty to child exploitation; that is, taking sexually explicit pictures of a child. Based on disputed allegations in the presentence report, he was sentenced for vaginally and anally raping the victim. Those allegations led to his being charged by the State of Montana sexual assault and sexual intercourse without consent; however, all State criminal charges have since been dismissed with prejudice. *State of Montana v. Billy Dean Smith*, DC 21-54 (Twentieth Judicial District Court of Montana, Lake County, Montana).

A defendant cannot be “sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction

cannot stand.” *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). Here Mr. Smith was expressly sentenced for vaginally and anally raping a child, even though he was convicted only of taking sexually explicit pictures of that child, and even though the actual rape charges were dismissed against him. Mr. Smith has been sentenced based on an unproven crime. That procedure violates the Fifth Amendment right to due process.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Dated this 16th day of December, 2021.

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