

No. 21-

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IN THE  
**Supreme Court of the United States**

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ANDREW USSERY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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### **QUESTION PRESENTED FOR REVIEW**

Whether the decision of the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”)—which affirmed the decision of the District Court to grant a Guidelines increased based on an alleged one-pound of methamphetamine which was never seized—conflicts with decisions of this Court on an important matter, and thus the decision by the Fifth Circuit calls for an exercise of this Court’s supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

**PARTIES TO THE PROCEEDING**

The parties to the proceeding are listed in the caption:

Andrew Ussery:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner, ANDREW USSERY, requests that this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. Mr. Ussery submits the District Court committed reversible error by granting an increase to Mr. Ussery's offense level based on a alleged one pound of narcotics which was never seized. Respectfully, the decision by the Fifth Circuit is in conflict with decisions of this Court and therefore a compelling reason is presented in support of discretionary review.

### **CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE**

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Andrew Ussery*, No. 20-50585 (5th Cir. Jan. 5, 2022), appears at Appendix A to this Petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Western District of Texas, Midland/Odessa Division, appears at Appendix B to this Petition and is unreported.

From the State Courts:

None.

### **GROUND FOR JURISDICTION**

This Petition arises from a direct appeal of a sentence and the resulting final judgment entered by the District Court. A copy of the Judgment appears at Appendix B. A copy of the decision by the Appellate Court appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## **CONSTITUTIONAL PROVISIONS**

### **U.S. CONST. Amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **U.S. CONST. Amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

## **STATEMENT OF THE CASE**

### **Overview**

Andrew Ussery pleaded guilty to one count of conspiring to possess with intent to distribute fifty grams or more of actual methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(A). ROA.31-36. The District Court imposed a prison sentence of 188 months. ROA.31-36. The Indictment alleged that Destynii Hines was Mr. Ussery's co-defendant. ROA.18.



### The Guilty Plea Hearing

The Government and Mr. Ussery executed a “factual basis” for the plea and admitted certain facts were true and correct as recited by counsel for the United States. ROA.109-11.

These facts established:

- \* Odessa Detective Tyler Rogers found Mr. Ussery in a black vehicle at the MCM Grande Hotel & Fun Dome hotel parking lot;
- \* the detective knew there were warrants for Mr. Ussery and contacted the Odessa Police Department;
- \* the Odessa Police Department had the Texas Department of Public Safety law enforcement officers initiate a traffic stop on Mr. Ussery;
- \* Mr. Ussery fled in his vehicle and was pursued by the law enforcement officers;
- \* the vehicle pursuit ended when Mr. Ussery wrecked his vehicle;
- \* the law enforcement officers noticed Mr. Ussery throw a bag of “what appeared to be narcotics over a nearby barbed wire fence”;
- \* the bag was seized and it contained “approximately 326 grams of methamphetamine”;
- \* after Mr. Ussery was arrested, law enforcement officers learned that Mr. Ussery was in possession of two hotel rooms at the MCM Grande Hotel & Fun Dome with a female named Destynii;

- \* In securing rooms 260 and 205 at that hotel, detectives found Destynii Hines in room 260 with a quantity of methamphetamine on a counter in plain view;
- \* Ms. Hines advised that it was she who had rented the two hotel rooms;
- \* Ms. Hines also admitted that she possessed the methamphetamine in room 260, but “advised that it was not from Ussery”; and
- \* “[l]aw enforcement located additional methamphetamine in room 205.”

ROA.109-110; *see also* ROA.158 (setting forth full name of hotel).

Mr. Ussery stated that the factual basis of the plea agreement was true and correct and that he was pleading guilty as charged in the indictment. ROA.85-86. The Judge accepted Mr. Ussery’s plea, found him guilty, and ordered a Presentence Investigation Report (“PSR” or “the report”) be prepared. ROA.90-91.

#### The PSR: Overview

A United States Probation Officer prepared the PSR, and the final report was entered on June 23, 2020. ROA.204-24. Important to the issues in this Petition is the final version of the PSR, which provides: (1) a factual basis for the offense and relevant conduct of the offense, (2) the recognition of potential sentencing guideline provisions relevant to Mr. Ussery’s commission of the offense to which he pleaded guilty, and (3) a conclusion by the Probation Officer as to which guidelines are applicable in this case. ROA.204-24.

#### The Offense Conduct in the PSR

On December 27, 2019, the Odessa Police Department received a tip that Mr. Ussery was in possession of methamphetamine at the MCM Grande Hotel and Fun Dome (“the

hotel”) in Odessa, Texas. Law enforcement officers initiated a traffic stop as Mr. Ussery attempted to drive out of the parking lot. ROA.206. Mr. Ussery evaded the officers “at a high rate of speed,” but then wrecked his vehicle close to a fence line. ROA.206. At that point, Mr. Ussery exited his car and threw a large bag over the fence. ROA.206.

Detectives located the bag and it contained 292.0 grams of actual methamphetamine. ROA.206. The detectives also found psilocybin mushrooms in the vehicle and \$3,688 in U.S. currency. ROA.206-07. It was determined that Mr. Ussery was in “possession” of two rooms at the hotel and that there was a female named Destynii at the location. ROA.207.

Law enforcement officers went to the hotel and found Destynii Hines and her infant child in room 260. ROA.207. 2.61 grams of actual methamphetamine were found on a counter in the room. ROA.207. Ms. Hines stated she was not sure if there was methamphetamine in room 205, but that there was a “little bit” in the room she was in, *i.e.*, room 260. ROA.207. Law enforcement found 10.09 grams of methamphetamine and other drugs classified as THC in room 205. ROA.207. Ms. Hines was clear that she did not obtain her methamphetamine from Mr. Ussery and that she had “no knowledge of Mr. Ussery distributing methamphetamine.” ROA.207.

The PSR next provides the following observations:

[L]aw enforcement officers located a female subject [not referring to Ms. Hines] at the MCM Grande Hotel & Fun Dome who was currently being investigated by the DEA. A DEA Special Agent read the subject her *Miranda* Warning. She stated she was at the hotel to visit **Ussery**, and they were romantically involved but not in a relationship. She advised she was on the phone with **Ussery** when he was stopped by law enforcement officers in Odessa. **Ussery** did not tell her why he failed to stop for law enforcement officers, but she claimed **Ussery** was high on a substance she believed to be

mushrooms. The female subject further stated she distributed approximately one pound (453.592 grams) of methamphetamine for **Ussery** beginning in approximately October 2019.

ROA.207 (emphasis in original). From this, the Probation Officer presented the following theory to the Court:

Law enforcement located a total of 304.7 grams of actual methamphetamine accountable to **Ussery**. A female subject [no name provided and no mention that the subject was a confidential informant] also stated she distributed a pound (453.592 grams) of methamphetamine for **Ussery** beginning in approximately October 2019.

ROA.207 (emphasis in original) (text added in brackets). Thus, the PSR determined that Mr. “**Ussery** is accountable for 758.292 grams of actual methamphetamine.” ROA.208 (emphasis in original).

#### PSR: Calculations

As noted above, Mr. Ussery pleaded guilty to conspiracy to possess with intent to distribute methamphetamine. ROA.208. In the PSR, the Probation Officer first determined that the 758.292 grams of methamphetamine noted above resulted in a Base Offense Level of 34. ROA.208. Two (2) levels were added pursuant to U.S.S.G. § 3C1.2 because Mr. Ussery “recklessly created a substantial risk of serious bodily injury to another person in the course of fleeing from a law enforcement officer.” ROA.208. Next, the Probation Officer deducted 3 levels for acceptance of responsibility. ROA.208-09. The PSR therefore reflects that Mr. Ussery’s Total Base Offense Level was 33. ROA.209.

The Probation Officer next addressed Mr. Ussery’s criminal history. ROA.210. His score-able criminal history consists of two possession of narcotics and three driving while

intoxicated convictions, which resulted in a subtotal criminal history score of 5. ROA.210-14. Two (2) points were added because Mr. Ussery committed the instant offense while he was on deferred adjudication probation for one of the above drug charges. ROA.214. Thus, the Probation Officer determined that Mr. Ussery's Criminal History Category was IV. ROA.214. This brought the recommended Guideline punishment range to 188 months to 235 months in the custody of the Bureau of Prisons ("BOP").

#### The PSR: Objections and Response

Mr. Ussery filed objections to the PSR, to which the Probation Officer responded. ROA.178-81, 229. Mr. Ussery's principal objection was that the undisclosed female's statement—that she distributed 453 grams of methamphetamine for Mr. Ussery—should not be included in the Base Offense Level. ROA.229. It should be noted that this female subject was not defined as a "confidential informant." *See* ROA.207. The Probation Officer took the position that the 453 grams were part of Mr. Ussery's relevant conduct.

#### The Sentencing Hearing

Mr. Ussery was sentenced on July 8, 2020. ROA.96. At the sentencing hearing, the Court asked Mr. Ussery if he had any objections to the PSR. ROA.96. The first and primary argument, as set forth in Mr. Ussery's written objections, was to the use of information from "an unnamed female" (separate and apart from Ms. Hines) who it "seemed like . . . she appeared at the scene back at the motel, and then stated she had . . . distributed 453 grams of meth for Ussery." ROA.97. Mr. Ussery's attorney observed "we don't remember anybody doing that." ROA.97. He added: "We don't have any information about that, and Mr. Ussery

just totally flat denies it.” ROA.97. Indeed, he concluded, such a person would have been a co-conspirator and should have been indicted as a co-defendant. ROA.97.

The Government initially relied on the Probation Officer’s response to the objections as its basis for overruling Mr. Ussery’s argument. ROA.97. The prosecutor further stated:

The only thing I would add, Judge, is this—the co-conspirator that the defendant is referring to was initially indicted in this. I understand Mr. Ussery’s position, trying to take the fall for this and trying to, you know, not include this, but I don’t think you get to walk out of relevant conduct just because of the way it gets charged at the guilty plea.

ROA.97. The prosecutor additionally observed that Ms. Hines had “pled as well for similar conduct” and “we believe the PSR contains an indicia of reliability based on her statements.” ROA.98. The prosecutor then added: “the discovery was provided to probation, . . . they reviewed it, . . . and they believed that it was appropriate.” ROA.98. Thus, the Government argued this was all part of “what is reasonably foreseeable in jointly undertaken criminal activity.” ROA.98.

The Judge addressed the objection and explained:

The Court overrules the objection, relying upon the probation officer’s response as well as Mr. Chriesman’s [referring to the prosecutor] and the facts and factual basis included in the case. The female’s statement has sufficient reliability, and the Court overrules the Objection No. 1.

ROA.98. The Judge also overruled the objection to the inclusion of the 2.61 grams found with Ms. Hines in the relevant conduct of Mr. Ussery. ROA.98-99.

Based on this, the Court found the PSR was accurate and adopted it for sentencing purposes. ROA.99. The Court set the Base Offense Level at 33, the Criminal History Category at IV. ROA.99. The Court further concluded that Mr. Ussery’s U.S.S.G. sentencing

Guidelines punishment range would be 188 to 235 months in the custody of the BOP. ROA.99.

The Court proceeded to sentencing with the initial observation that the Guideline range in this case is fair and reasonable. ROA.105. The Court set Mr. Ussery's punishment at 188 months in prison. ROA.105; *see also* ROA.31-36.

### Notice of Appeal

The Court entered the Judgment in this case on July 14, 2020. ROA.31-36. Mr. Ussery then timely filed his Notice of Appeal on July 16, 2020. ROA.39.

### The Decision by the Fifth Circuit

The Fifth Circuit received Mr. Ussery's opening brief, the Government's response and Mr. Ussery's reply brief. Subsequently, on January 5, 2022, the Fifth Circuit affirmed the District Court's decision on the addition of one pound of un-seized narcotics in calculating Mr. Ussery's relevant conduct. Exhibit A, pages 2-3. The Opinion is discussed in the Arguments section. Mr. Ussery now files this Petition for Writ of Certiorari with this Honorable Court.

## **ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT**

### **I.**

#### **Burdens of Proof and Standards of Review**

The PSR is essential in determining relevant findings and conclusions at sentencing. U.S.S.G. § 6A1.1 (Commentary); *see also Molina-Martinez v. United States*, 138 S. Ct. 1338, 1342 (2016) (observing that district court should rely on PSR to determine sentencing

issues). “Generally, a PSR ‘bears sufficient indicia of reliability to be considered as evidence by the sentencing judge making factual determinations. *United States v. Gentry*, 941 F.3d 767, 788 (5th Cir. 2019) (quoting *United States v. Dinh*, 920 F.3d 307, 313 (5th Cir. 2019)). Thus, as the Fifth Circuit has held, if findings and conclusions in the PSR are not rebutted, they are deemed to have the sufficient indicia of reliability for application by the Court. *United States v. Landreneau*, 967 F.3d 443, 451 (5th Cir. 2020); *see also United States v. Christman*, 509 F.3d 299, 305 (5th Cir. 2007) (explaining U.S.S.G. § 6A1.3(a) and FEDR. CRIM. P. 32 establish court must verify it uses evidence that has indicia of reliability). Furthermore, “any objections, unsupported by facts, generally do not carry [the] burden to rebut.” *Id.*

Due process is violated when a defendant is sentenced based on “materially untrue” information. *Townsend v. Burke*, 334 U.S. 736, 740 (1948). The Fifth Circuit has explained that “sentences based upon erroneous and material information or assumptions violate due process.” *United States v. Tobias*, 662 F.2d 281, 388 (5th Cir. 1981). This Court has further observed that the sentencing court must consider all relevant matters relating to sentencing. *Irizarry v. United States*, 553 U.S. 708, 716 (2008).

Inaccurate information, be it in the PSR or provided by the Government, can lead to mistakes of constitutional proportion. Indeed, even on plain error review, “this Court ‘routinely remands cases involving inadvertent or unintentional errors, including sentencing errors,’ . . . that such errors may qualify for relief.” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (quoting *Hicks v. United States*, 137 S. Ct. 2000, 2000-01 (2017)



(Gorsuch, J., concurring)). Mr. Ussery contends that, for the reasons discussed below, the Fifth Circuit did not adhere to the essential burdens of proof when considering the evidence before the District Court and, likewise, did not follow the applicable standards of review for evaluating sentencing decisions by the District Court. Therefore, he respectfully requests that this Court grant this Petition.

## II.

### The Un-weighed, Unfound Pound of Narcotics

As noted above, per the PSR, a “Ms. Hines” was found in one of the two hotel rooms occupied by Mr. Ussery and Ms. Hines. ROA.207. The PSR then makes reference to “a female subject” located at the hotel where Mr. Ussery was staying. ROA.267. This female subject claimed she had distributed approximately one pound of narcotics for Mr. Ussery over the past three months. ROA.207. There was no mention as to whether this subject was, or was not, Ms. Hines or that this subject was a confidential informant.

Thus, at sentencing the attorney for Mr. Ussery argued there was no basis to believe the “unnamed” subject (who was not yet described as a confidential informant) had any indicia of reliability. ROA.97. The Government then decided to describe this subject as Mr. Ussery’s co-defendant, *i.e.*, Ms. Hines, who was initially indicted with Mr. Ussery in this case. ROA.97. ROA.97. Again, the words “confidential informant” were not used by the prosecution and likewise the Government offered no additional evidence to corroborate that the subject had indeed distributed one pound of narcotics for Mr. Ussery.

Thus, Mr. Ussery agreed that when the Government can use statements by confidential informants to establish the quantity of drugs for determining the Base Offense

Level, it must sufficiently corroborate the statements by other means. Opening Brief, page 19 (citing *United States v. Rogers*, 1 F.3d 341, 343-44 (5th Cir. 1993)). Mr. Ussery pointed out that the Fifth Circuit “has observed this corroboration typically includes a review of the factual resume, law enforcement reports, interviews of law enforcement by the Probation Officer, and, significantly, that law enforcement deemed the informant reliable. *Id.* (citing *United States v. Godinez*, 640 F. App’x 385, 388 (5th Cir. 2016)). Importantly, the Fifth Circuit had urged the use of “conservative estimates” in this context because of “possible exaggerations.” *Id.* (citing *Godinez*, 640 F. App’x at 389; *United States v. Young*, 981 F.2d 180, 186 (5th Cir. 1992) (observing that cutting in half by district court of amount of drugs reported by confidential informant was affirmed to “take into account uncertainty and the possibility of exaggeration”)).

As argued to the Fifth Circuit, the statement of this female subject was not corroborated. Opening Brief, pages 19-24. Indeed, the PSR only mentions the female subject was at the same hotel where Mr. Ussery was seen leaving, and her statement “fits within the timeline provided in the indictment. ROA.226. This is of little value considering the indictment came after the events at the hotel. Furthermore, it was never established as to what information was reviewed by the Probation Officer in preparing the PSR.

In any event, even presuming without deciding that corroboration of the unidentified female subject’s statement can be implied from the facts of the case without an affirmative representation by the Probation Officer or the Government that such a review has been undertaken, the record in this case is without any evidence to support such a conclusion.

The information the confidential informant provided was not included in the factual basis; it was never established the information came from any law enforcement reports or interviews; and there is no indication law enforcement, or even the Probation Officer for that matter, deemed the unidentified, female subject reliable. *See Godinez*, 640 F. App'x at 388 (explaining that corroboration can include review of Factual Basis, law enforcement reports, interviews of law enforcement by the Probation Officer, and explaining that law enforcement must deem that informant was reliable). Furthermore, the process was wholly lacking in any conservative estimates of the weight of the methamphetamine at issue to prevent the possibility of exaggeration or uncertainty. *Id.* at 389. Thus, in the absence of any corroboration and pursuant to Circuit precedent, it was error to deny the objection to the increase in the drug amounts included in Mr. Ussery's relevant conduct for his Base Offense Level. *Id.* at 388-89; *Rogers*, 1 F.3d at 344; *Young*, 981 F.2d at 186.

The Government added arguments to its reliance on the Probation Officer's response to Mr. Ussery's objection on this issue. ROA.97. The prosecutor began with the observation that "the co-conspirator that the defendant is referring to was initially indicted in this." ROA.97. However, the female's name was not used so this could not be verified. Moreover, such a comment presupposes the defendant knew the identity of this alleged "co-conspirator." *See* ROA.97. In fact, there were no other defendants in the indictment in this case other than Mr. Ussery and Ms. Hines. ROA.18. Hence, the Government's argument is not supported by the facts of this case and is predicated upon facts which are contrary to the record.

Finally, the Fifth Circuit's guidance in the above referenced cases (regarding the uncertainty and possibilities of exaggeration in these circumstances) dictates that the Courts should err on the side of caution where, as here, an unidentified informant guesses she had moved "a pound" of narcotics for Mr. Ussery. *See Rogers*, 1 F.3d at 344. These narcotics were never found. They were never verified as methamphetamine or weighed by anyone in law enforcement. It was never established that the unidentified female was proficient in weighing narcotics. In other words, this evidence was not sufficiently corroborated to be included in Mr. Ussery's relevant conduct. Therefore, Mr. Ussery argued this case should be remanded for resentencing without the enhancement. Opening Brief, pages 19-24.

### III.

#### The Fifth Circuit's and the Government's New Theory

Before the Government filed its responsive brief with the Fifth Circuit, there was nothing to suggest there was an "ambiguity" before the District Court that the female subject who allegedly distributed a pound of methamphetamine for Mr. Ussery was not Ms. Hines. Nonetheless, the Government divulges in its response to Mr. Ussery's opening brief that "[t]he transcript of Ussery's sentencing proceeding is ambiguous about whether this interviewee was Destynii Hines." Government's Brief, page 6 n.1. The PSR makes no mention of any "ambiguity" as to whether this was or was not Ms. Hines. Indeed, the Probation Officer observed that Ms. Hines was interviewed and "denied obtaining methamphetamine from the Defendant and made no mention of any October dates or events." ROA.220.

However, despite the Government's concession on appeal that there was an ambiguity as to whether the subject female was or was not Ms. Hines, the Fifth Circuit decided the subject female was a confidential informant who was not Ms. Hines. Relying on the PSR, the Fifth Circuit concludes:

[O]n the night in question, officers at the hotel located a woman—different from the one in Ussery's hotel room—under investigation by the DEA. After being read her Miranda rights, the woman stated that she was talking with Ussery on the phone when he was stopped by law enforcement, that she believed Ussery to be high on mushrooms at the time, and that she had distributed "approximately one pound (543.592 grams) of methamphetamine for Ussery beginning in approximately October 2019."

Based on the woman's statement and the amount of methamphetamine in the hotel rooms and the bag Ussery threw over the fence, the PSR concluded that Ussery was responsible for a total of 758.292 grams of methamphetamine.

Exhibit A, pages 2-3. Thus, the Fifth Circuit affirmed the District Court's decision to increase Mr. Ussery's Total Offense Level. *Id.*

Thus, based on the PSR, the Fifth Circuit went on to conclude:

The facts have an adequate evidentiary basis with sufficient indicia of reliability. The woman was at the MCM hotel; Ussery had two rooms at the MCM. The woman stated that she distributed methamphetamine for Ussery in the past; Ussery pleaded guilty to conspiring to distribute methamphetamine. The woman believed that Ussery was high on mushrooms in his car; and Ussery had mushrooms in his car. This is an adequate evidentiary basis with sufficient indicia of reliability. Because Ussery presented no rebuttal evidence, the district court did not err in relying on those facts.

*Id.* at pages 3-4.

In support of its decision, the Fifth Circuit added the following footnote:

In his reply brief, Ussery also notes the government's admission of ambiguity in the sentencing transcript about whether the woman in Ussery's room and the unidentified informant were one and the same. Although the sentencing transcript was ambiguous, the PSR was not. Furthermore, we do not "entertain arguments raised for the first time in a reply brief." *United States v. Ramirez*, 557 F.3d 200, 203 (5th Cir. 2009). Because the alleged ambiguity occurred at sentencing, Ussery should have objected at that time.

*Id.* at page 2 n.1 (emphasis added).

#### IV. Due Process

As an initial matter, it must always be remembered that the Government knows who was the subject woman and that she was a confidential informant. All knowledge of law enforcement is implied to the Government. *Giglio v. United States*, 405 U.S. 150, 154 (1977). Because the Government stated that the facts were ambiguous, it has effectively declared for the first time on appeal that the PSR's findings and conclusions were not reliable. In other words, while the Courts were being tendered an alleged accurate PSR, the Government later confessed to the Fifth Circuit that the facts were not accurate. This is what Mr. Ussery argued in his Reply Brief. Reply Brief, pages 1-10.

In sum, the PSR must be accurate and reliable if Mr. Ussery's sentence is to be enhanced based upon the statement from a female subject that she sold one pound of methamphetamine for Mr. Ussery. According to the undisputed facts in the PSR, Ms. Hines told police that she did not sell drugs for Mr. Ussery. Therefore, in the Opening Brief, Mr. Ussery reviewed the information in the PSR and argued there was insufficient corroboration that a female subject did in fact sell narcotics for Mr. Ussery. The Government declared in

its responsive brief that, based on its review of the PSR, there was an ambiguity as to whether Ms. Hines was, in fact, the female subject who said that she sold a pound of narcotics for Mr. Ussery. Therefore, Mr. Ussery argued in his responsive brief that the Government was thus necessarily taking the position that the PSR was not accurate and reliable as to who actually said she sold drugs for Mr. Ussery. Accordingly, Mr. Ussery concluded that, based on the Government's own theory, the PSR cannot be relied upon to enhance Mr. Ussery's offense level based on the alleged statement from a woman that she sold drugs for Mr. Ussery. Accordingly, the decision of the Fifth Circuit was in violation of Mr. Ussery's due process rights to a fair and just sentence.

Thus, the jurisprudence of this Court supports the granting of this Petition. As discussed above, the PSR is essential in determining facts at sentencing. *Molina-Martinez*, 138 S. Ct. at 1342. Furthermore, due process is violated when a defendant is sentenced based on materially untrue facts. *Townsend*, 334 U.S. at 740. Finally, the Sentencing Court must consider all relevant matters relating to sentencing. *Irizarry*, 553 U.S. at 716.

## V.

### Arguments in the Reply Brief

As noted above, citing *Ramirez*, 557 F.3d at 203, the Fifth Circuit held that the Government's "ambiguity" argument was not properly before the Court because it was not raised in Appellant's opening brief. Exhibit A, page 2 n.1. In *Ramirez*, the Fifth Circuit explained that it "does not entertain arguments raised for the first time in a reply brief." 557 F.3d at 203. However, the Fifth Circuit went on to explain that "this Court views the situation differently when a new issue is raised in the appellee's brief and the appellant

responds in his reply brief.” *Id.* (citing *Cousins v. Trans Union Corp.*, 246 F.3d 359 n.2 (5th Cir. 2001)). The D.C. Circuit Court of Appeals agrees:

[A]n appellant generally may, in a reply brief, “respond to arguments raised for the first time in the appellee’s brief. 16AA Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* § 3974.3 (4th ed. 2017); *see MBI Grp., Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 575 (D. Cir. 2010).

*United States v. Powers*, 855 F.3d 728, 732 (D.C. Cir. 2018).

Respectfully, the ambiguous nature of the facts in this case were never mentioned until the Government filed its responsive brief. Thus, the reply brief was the only brief where appellant could have made such an argument. There is no requirement that an appellant anticipate an argument that had never been made, particularly in this case where the PSR was accepted by all parties and the Court without ambiguity.

### **CONCLUSION**

Mr. Ussery respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit, which affirmed the decision of the District Court enhancing Mr. Ussery’s sentence based on an uncorroborated and ambiguous statement from an unidentified witness that she sold drugs for Mr. Ussery, conflicts with decisions of this Court. Therefore the decision by the Fifth Circuit calls for an exercise of this Court’s supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.



WHEREFORE, PREMISES CONSIDERED, Petitioner, ANDREW USSERY, respectfully requests that this Court grant this petition and issue a Writ of Certiorari.

Respectfully Submitted,

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