

NO. \_\_\_\_\_

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

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ROBERTO HERNANDEZ-ALDAMA,

*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 FOURTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether the court of appeals violated the defendant's Fifth Amendment right to due process where the government presented evidence regarding just one type of methamphetamine (Ice), the district court found the defendant responsible for a different type of methamphetamine (methamphetamine (actual)), and the court of appeals affirmed the district court's finding based on its inaccurate conclusion that the government and the district court had referred to the two types of methamphetamine interchangeably.

## **LIST OF PARTIES IN THE COURT OF APPEALS**

United States of America  
Roberto Hernandez-Aldama

### **STATEMENT PURSUANT TO RULE 14(1)(b)(iii)**

This case originated in the U.S. District Court for the Eastern District of North Carolina:

*United States v. Hernandez-Aldama*, No. 7:18-cr-00123-BO-3.  
Judgment entered October 11, 2019.

It was appealed to the United States Court of Appeals for the Fourth Circuit:

*United States v. Hernandez-Aldama*, No. 19-4763. Judgment entered April 14, 2022.

## TABLE OF CONTENTS

QUESTION PRESENTED.....	i
LIST OF PARTIES IN THE COURT OF APPEALS .....	ii
STATEMENT PURSUANT TO RULE 14(1)(b)(iii) .....	ii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW .....	1
JURISDICTION .....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE .....	3
A. District Court Procedural Background.....	3
B. Statement of Facts.....	4
C. The Appeal .....	8
REASONS FOR GRANTING THE PETITION .....	9
CONCLUSION .....	15
APPENDIX:	
Opinion of the United States Court of Appeals for the Fourth Circuit, filed April 14, 2022 .....	A1
Judgment of the United States District Court for the Eastern District of North Carolina, filed October 2, 2109.....	A12
Sentencing Transcript of October 2, 2019 .....	A19

## TABLE OF AUTHORITIES

### CASES

<i>Molina-Martinez v. United States</i> , 578 U.S. 189 (2016) .....	15
<i>United States v. Bell</i> , 667 F.3d 431 (4th Cir. 2011) .....	14
<i>United States v. Coonce</i> , 961 F.2d 1268 (7th Cir. 1992) .....	12
<i>United States v. Inglesi</i> , 988 F.2d 500 (4th Cir. 1993) .....	12
<i>United States v. Tucker</i> , 404 U.S. 443 (1972) .....	13

### STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. V .....	2, 12
21 U.S.C. § 846 .....	3
28 U.S.C. § 1254(1) .....	1
Fed. R. Crim. P. 32(i)(3)(B) .....	13
U.S.S.G. § 2D1.1 .....	<i>passim</i>
U.S.S.G. § 3E1.1 .....	8

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

Roberto Hernandez-Aldama, through undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App. A1, *infra*) is not published in the Federal Reporter. The Judgment of Conviction and the Findings of Fact of the district court (App. A12 and A19, *infra*) are not published in the Federal Supplement.

**JURISDICTION**

The judgment of the court of appeals was entered on April 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **United States Constitution, Amendment V, Due Process Clause**

No person shall...be deprived of life, liberty, or property, without due process of law....

### **United States Sentencing Guidelines, Section 2D1.1(c), Notes to Drug Quantity Table, (A), (B), (C)**

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance....

(B) The terms “PCP (actual)”, “Amphetamine (actual)”, and “Methamphetamine (actual)” refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual)....

(C) “Ice,” for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

## STATEMENT OF THE CASE

### A. District Court Procedural Background

Roberto Hernandez-Aldama pleaded guilty to a charge of conspiring to distribute and possess with intent to distribute five kilograms or more of cocaine (21 U.S.C. § 846). C.A. App. 34-35., 42.<sup>1</sup>

A United States Probation Officer prepared a presentence investigation report (PSR) prior to the sentencing hearing and calculated a Sentencing Guidelines range of 168-210 months. C.A. App. 97. The calculation of the base offense level included reliance on an allegation that Hernandez-Aldama had obtained 907.2 grams of methamphetamine (actual). C.A. App. 88, 96. Hernandez-Aldama submitted objections to the calculation of his Sentencing Guidelines range, including an argument that the methamphetamine attributed to him should be treated as a mixture or substance containing a detectable amount of methamphetamine rather than methamphetamine (actual).

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<sup>1</sup> Hernandez-Aldama was charged in a separate indictment with being found in the United States after previously having been excluded, deported, and removed, and the two cases were consolidated for sentencing. The prosecution on the immigration offense is not material to this petition.



C.A. App. 77, 100. The district court overruled all objections and imposed a 180-month term of imprisonment. C.A. App. 59-60, 62-63.

### **B. Statement of Facts**

Hernandez-Aldama pleaded guilty to a drug conspiracy offense involving five or more kilograms of cocaine. C.A. App. 34-35, 42. No other drug was mentioned in the indictment. C.A. App. 34-35.

The PSR reported that a cooperating witness stated Hernandez-Aldama “obtained at least 2 pounds (907.2 grams) of methamphetamine (actual) from the U.S./Mexican border in Tucson, Arizona.” C.A. App. 88.

In a drug case, a defendant’s base offense level under the U.S. Sentencing Guidelines is determined by the quantity of drugs attributed to the defendant. *See* U.S.S.G. § 2D1.1(c) (Drug Quantity Table). In determining Hernandez-Aldama’s Sentencing Guidelines range, the probation officer assigned a base offense level of 34, attributing the following drug quantities to him: 12.26 kilograms of cocaine, 472.0 grams of heroin, and 907.2 grams of methamphetamine (actual). C.A. App. 96.

Hernandez-Aldama submitted written objections to the PSR. C.A. App. 75-77. Regarding the base offense level calculation, he argued that because the purity of the methamphetamine attributed to him had not been tested, it should have been treated as a mixture or substance containing a detectable amount of methamphetamine rather than methamphetamine (actual). C.A. App. 77.

The Sentencing Guidelines identify three categories of methamphetamine: methamphetamine, methamphetamine (actual), and Ice. U.S.S.G. § 2D1.1(c). Drug weight ordinarily is calculated based on the “entire weight of any mixture or substance containing a detectable amount of the controlled substance.” U.S.S.G. § 2D1.1(c), Notes to Drug Quantity Table, (A). This treatment is applied to the category of methamphetamine. Methamphetamine (actual) is defined as “the weight of the controlled substance, itself, contained in the mixture or substance,” *i.e.*, pure methamphetamine. U.S.S.G. § 2D1.1(c), Notes to Drug Quantity Table, (B). Ice is defined as “a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.” U.S.S.G. § 2D1.1(c), Notes to Drug Quantity Table, (C). Methamphetamine (actual) and Ice are treated more harshly under the

Sentencing Guidelines than a mixture or substance containing methamphetamine. *See* U.S.S.G. § 2D1.1(c), resulting in a higher Sentencing Guidelines range.

Because Hernandez-Aldama was held responsible for other drugs in addition to methamphetamine, the district court used a Drug Conversion Table set forth in U.S.S.G. § 2D1.1, comment. (n.8(D)), to obtain a single offense level. The Drug Conversion Tables provide formulas for use in calculating a “converted drug weight” for each type of drug. *Id.*

One gram of a mixture or substance containing a detectable amount of methamphetamine has a converted drug weight of 2 kilograms. U.S.S.G. § 2D1.1, Comment. (N.8(D)) (Drug Conversion Tables) (Cocaine and Other Schedule I and II Stimulants...). If the methamphetamine is identified as methamphetamine (actual) or Ice, one gram has a converted drug weight of 20 kilograms. *Id.*; *see also* § 2D1.1(c), Notes to Drug Quantity Table, (B), (C) (defining “Methamphetamine (actual),” and “Ice”).

During the sentencing hearing, defense counsel reiterated the objection regarding the type of methamphetamine attributed to

Hernandez-Aldama. C.A. App. 48-49. The government presented the testimony of a law enforcement officer in opposition to the objection. C.A. App. 50-54. The cooperating witness who allegedly linked Hernandez-Aldama to the methamphetamine did not testify.

The law enforcement officer testified about Ice being the most prevalent form of methamphetamine in Latin America, about Hernandez-Aldama's ties to other persons who had been linked to Ice, about a phone call in which Hernandez-Aldama allegedly negotiated a price for Ice, and about an informant's statement that Hernandez-Aldama claimed to have access to Ice. C.A. App. 50-54. In his argument and examination of the witness, the prosecutor uttered the word Ice ten times; the witness uttered the word "Ice" eight times. C.A. App. 48-54. The prosecutor mentioned "actual methamphetamine" once, when he asked if a confidential informant ordered "actual methamphetamine or ICE from this group." C.A. App. 52. The witness never mentioned actual methamphetamine.

After hearing argument and evidence, the district court overruled Hernandez-Aldama's objection and found that the preponderance of the

evidence established “907.2 grams of methamphetamine actual.” C.A. App. 54. The district court did not mention Ice.

The district court applied a Sentencing Guidelines range of 168-210 months, based on a total offense level of 31 (base offense level 34 minus three levels for acceptance of responsibility per U.S.S.G. § 3E1.1), and a criminal history category of V. C.A. App. 95-97. If the district court had found Hernandez-Aldama responsible for a mixture or substance containing a detectable amount of methamphetamine, his base offense level would have been 29 and his Sentencing Guidelines range would have been 140-175 months. The district court imposed a 180-month term of imprisonment. C.A. App. 66.

### **C. The Appeal**

Hernandez-Aldama appealed his sentence and challenged the district court’s finding that he possessed 907.2 grams of methamphetamine (actual) rather than a mixture or substance containing a detectable amount of methamphetamine. *See* App. A. The court of appeals affirmed the district court’s finding on the grounds that “the government and the district court used the terms ‘methamphetamine (actual)’ and ‘Ice’ interchangeably.” App. A at 7. The

court of appeals concluded, “[A]ny imprecise language the government or district court used had no impact on the converted drug weight or on Hernandez-Aldama’s offense level.” *Id.*<sup>2</sup>

## **REASONS FOR GRANTING THE PETITION**

Hernandez-Aldama pleaded guilty to participating in a cocaine conspiracy. C.A. App. 34-35, 42. His sentence was increased because a cooperating witness claimed Hernandez-Aldama had obtained two pounds of methamphetamine (actual). C.A. App. 88. Although Hernandez-Aldama disputed the allegation that he obtained pure methamphetamine rather than a mixture or substance containing methamphetamine, and the government never seized or tested the drugs, the district court treated the drugs as methamphetamine (actual) at the government’s request.

On appeal, Hernandez-Aldama challenged the district court’s finding that he obtained 907.2 grams of methamphetamine (actual). The court of appeals affirmed this finding. App. A at 7. In doing so, the

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<sup>2</sup> The court of appeals concluded Hernandez-Aldama was entitled to be resentenced on other grounds, *i.e.*, because the district court failed to explain its reasons for the sentence imposed or why it rejected non-frivolous arguments in support of a lesser sentence. App. A at 9-10.

court of appeals did not conclude that the government proved Hernandez-Aldama's involvement with 907.2 grams of pure methamphetamine. Indeed, the government did not. As established by the court of appeals' recitation of the facts, the government's evidence instead related only to Ice. *See* App. A at 7.

The court of appeals overlooked the conflict between the government's presentation of evidence exclusively addressing Ice and the district court's finding exclusively addressing methamphetamine (actual). It stated inaccurately that "the government and the district court used the terms 'methamphetamine (actual)' and 'Ice' interchangeably." App. A at 7. The court of appeals acknowledged that "the drugs are legally distinct" but noted they have the same converted drug weight. *Id.* (citing U.S.S.G. § 2D1.1, comment. (n.8(D) (Drug Conversion Tables))). The court of appeals concluded, "[A]ny imprecise language the government or district court used had no impact on the converted drug weight or on Hernandez-Aldama's offense level." *Id.*

The court of appeals violated Hernandez-Aldama's Fifth Amendment right to due process when it relied on demonstrably inaccurate information to affirm the judgment, *i.e.*, that the government

and the district court referred to the two categories of methamphetamine interchangeably, and that the language they used was imprecise. Additionally, the court of appeals departed from the accepted and usual course of judicial proceedings when it affirmed the district court's finding that Hernandez-Aldama was responsible for 907.2 grams of methamphetamine (actual) based exclusively on evidence that Hernandez-Aldama possessed Ice, a "legally distinct drug." App. A at 7.

During the sentencing hearing, the prosecutor argued exclusively and precisely that the methamphetamine attributed to Hernandez-Aldama was Ice, and he called a witness to testify in support of this position. C.A. App. 48-54. The witness testified exclusively about Ice and did not mention methamphetamine (actual). C.A. App. 50-54. Likewise, the prosecutor uttered the word Ice ten times during his argument and his examination of the witness. C.A. App. 48-53. The prosecutor mentioned "actual methamphetamine" just once, when he asked the witness if a confidential informant ordered "actual methamphetamine or ICE from this group." C.A. App. 52. The witness's answer contained no reference to actual or pure methamphetamine. *Id.*



The district court did not make any finding regarding Ice or even mention Ice. Instead, the district court made a precise finding that the preponderance of the evidence established “907.2 grams of methamphetamine actual.” C.A. App. 54.

These facts establish that the government and the district court did not use the terms methamphetamine (actual) and Ice interchangeably, and the court of appeals’ statement to the contrary was inaccurate. Moreover, as the court of appeals recognized, App. A at 4 n.4; App. A at 7, Ice and methamphetamine (actual) are legally distinct. *See* U.S.S.G. § 2D1.1(c), Notes to Drug Quantity Table, (B), (C). The court of appeals’ reliance on inaccurate information to affirm the district court’s factual finding and the resulting 180-month sentence violated Hernandez-Aldama’s Fifth Amendment right to due process. *See* U.S. Const. amend. V (“No person shall...be deprived of life, liberty, or property, without due process of law...”); *Cf. United States v. Inglesi*, 988 F.2d 500, 502 (4th Cir. 1993) (“Due process may be violated in sentencing by the use of inaccurate information....”); *United States v. Coonce*, 961 F.2d 1268, 1275 (7th Cir. 1992) (“There is no doubt that a criminal defendant has a due process right to have the court consider

only accurate information when imposing sentence, and that this right may be violated when the court considers information which is inaccurate.”) (citing *United States v. Tucker*, 404 U.S. 443, 447 (1972)).

Additionally, the court of appeals departed from the accepted and usual course of judicial proceedings when it affirmed the district court’s finding in the absence of *any* supporting evidence. It is a fundamental rule of law that a district court’s sentencing findings on disputed facts may be affirmed only if they are supported by a preponderance of the evidence. In this case, the evidence upon which the court of appeals relied to affirm the district court’s finding that Hernandez-Aldama was responsible for methamphetamine (actual) was based exclusively on evidence that the drug was Ice.

When a party challenges the accuracy of a fact recited in the PSR, the district court is required to “rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing or because the court will not consider the matter in sentencing....” Fed. R. Crim. P. 32(i)(3)(B). Hernandez-Aldama’s objection to the drug type allegation in the PSR triggered an obligation on the part of the government to prove the disputed fact by a

preponderance of the evidence. *See United States v. Bell*, 667 F.3d 431, 441 (4th Cir. 2011) (“For sentencing purposes, the government must prove the drug quantity attributable to a particular defendant by a preponderance of the evidence.”). Likewise, the foundation for the court of appeals’ ruling must be the evidence presented.

Here, the district court’s finding that Hernandez-Aldama was responsible for 907.2 grams of methamphetamine (actual) lacked any evidentiary support, because all of the evidence addressed Ice. This is not a case of the district court relying on meager evidence. No evidence supported the district court’s ruling. The district court, and ultimately the court of appeals, relied on evidence that simply did not address the finding that was made.

The errors made by the court of appeals and the district court prejudiced Hernandez-Aldama, and a repetition of the error would place other defendants at risk of unjustifiably harsh punishment. Hernandez-Aldama disputed any connection with either methamphetamine (actual) or Ice. If Hernandez-Aldama had been sentenced based on obtaining 907.2 grams of a mixture or substance containing methamphetamine rather than methamphetamine (actual), *i.e.*, pure methamphetamine,

his Sentencing Guidelines range would have been 140-175 months instead of 168-210 months. This Court has held that the use of an incorrect Guidelines range “most often” will be prejudicial, even for purposes of plain error review, and even if “the defendant’s ultimate sentence falls within the correct range.” *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016). The preserved error presented here, which resulted in the imposition of a sentence exceeding Hernandez-Aldama’s properly calculated Sentencing Guidelines range, constitutes prejudicial error that should be remedied.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 13, 2022