No. ________

In the

Supreme Court of the United States

MAYELI MOLINA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Molina's substantial rights were affected when two-thirds of the Government's witnesses testified in dual roles as experts and fact witnesses but no protective steps were taken to prevent the dual roles from confusing the jury?

2. Whether relying on inconsistent and unreliable testimony of cooperating witnesses to determine drug quantity and quality for sentencing purposes violates the Fourteenth Amendment and conflicts with precedent of the Seventh Circuit?

3. Whether the district court imposed a trial penalty in violation of the Sixth and/or Fourteenth Amendments?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Mayeli Molina was the defendant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff and respondent in the district court, the appellee in the court below, and is the Respondent here.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Molina*, No. 3:17-cr-00341, U.S. District Court for the Northern District of Texas. Judgment imposed December 10, 2020.
2. *United States v. Molina*, No. 20-11232, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 31, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mayeli Molina respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Fifth Circuit appears at Appendix 1a-10a to the petition and is reported at 2022 U.S. App. LEXIS 24602 and 2022 WL 3971588.

JURISDICTION

The Fifth Circuit rendered judgment on August 31, 2022. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 21, United States Code § 841 provides, in relevant part:

> Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

Title 21, United States Code § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as

> those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The Sixth Amendment of the United States Constitution provides:

> 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 the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Mayeli Molina was charged with conspiring to distribute over 500 grams of methamphetamine. App., *infra*, at 1a. Molina pleaded non-guilty and went to trial before a jury. At trial, the Government presented nine witnesses: two cooperating witnesses who "had an obvious self-interest in cooperating with the authorities," App., *infra*, at 5a, one officer who testified regarding the search of Molina's home, and six witnesses who were identified as "experts" in the jury charge. 5th Cir. R. 299. All witnesses except for the cooperating witnesses served as both fact witnesses and expert witnesses.

Despite the many risks associated with dual-role testimony, the district court did not take measures to ameliorate these risks. The district court did not provide cautionary instructions to the jury on how to evaluate dual-role testimony or otherwise delineate between the fact and expert testimony of the Government's fact/expert witnesses.

The jury found Molina guilty.

A presentence investigation report ("PSR") was prepared which calculated the Total Offense Level to be 40. Although the testimony presented by the Government's agents and officers pertained to one

kilogram of methamphetamine that was not tested, the PSR held Molina responsible for significantly more kilograms of "ice."

The PSR started with a base offense level of 38, explaining that under USSG § 2D1.1(a)(5), the base level offense was determined based on the drug quantity attributable to defendant and "defendant is accountable for the equivalent of 13 kilograms of 'Ice' methamphetamine."[1] 5th Cir. R. 1415 (PSR ¶ 32). The PSR explained that drug quantity was based on the testimony of the second cooperator and drug quality was based on the quality of drugs found in the possession of cooperators. 5th Cir. R. 1413-14 (PSR ¶¶ 25-26).

The PSR added two levels under USSG § 2D1.1(b)(5) because it concluded the drugs were imported from Mexico. 5th Cir. R. 1415 (PSR ¶ 32). With a Total Offense Level of 40 and a Criminal History Category of I, the advisory Guidelines sentence was 292 months to 365 months. 5th Cir. R. 1420 (PSR ¶ 77).

Molina's trial counsel objected to the PSR's conclusion regarding the quantity and quality of methamphetamine attributed to Molina. 5th

[1] Pursuant to USSG § 2D1.1(c)(1), if the offense involved at least 4.5 kilograms 'Ice' methamphetamine, the base offense level is 38.

Cir. R. 1423-25, 1586-96. Molina pointed out that the burden was on the Government to prove the quantity of drugs and the Government failed to provide adequate proof. 5th Cir. R. 1423, 1589. She argued there was no evidence at trial of the purity level of any methamphetamine she was alleged to have possessed. 5th Cir. R. 1423, 1580. No forensic chemist testified as to the purity of any drugs seized at any point during the investigation of the drug trafficking organization. 5th Cir. R. 1423, 1589.

Addressing these objections at sentencing, the Government responded that the first cooperator testified to delivering one kilo of methamphetamine to Molina and the second cooperator "indicated that he dealt with Molina on several occasions and has distributed at least two to three, somewhere upwards of seven kilos to her at a time." The Government further stated the second cooperator "indicated that he remembered at least three occasions." 5th Cir. R. 1010-11. Addressing drug quality, the Government responded that "the dope that was found in relationship to the [first cooperator] was Ice." 5th Cir. R. 1012. The Government further stated that the second cooperator "indicated that he would . . . cook it, and make it into Ice." 5th Cir. R. 1012.

The district court overruled Molina's objections and adopted the PSR. 5th Cir. R. 1013, 1015.

Molina's counsel made an impassioned plea for the court to consider Molina's circumstances and sentence her to the statutory minimum, 10 years. 5th Cir. R. 1017-20. In response, the district court explained that Molina would be punished more severely because she went to trial. 5th Cir. R. 1029-32. Ultimately, Molina was sentenced to 292 months' imprisonment. App., *infra*, at 1a.

On appeal, Molina first argued that the Government's presentation of extensive dual-role testimony was obvious error which affected her substantial rights. The Fifth Circuit held that even assuming error was obvious, it did not harm Molina's substantial rights. App., *infra*, at 4a. The Fifth Circuit concluded that Molina "could have" been convicted "even if the testimony of the six witnesses had been excluded." App., *infra*, at 4a.

Next, Petitioner argued that the the district court erred by sentencing Molina based on its adoption of the PSR's conclusions regarding the alleged quantity and quality of methamphetamine. Although the PSR concluded that Molina was responsible for 13

kilograms of "Ice", this purity level was not proven by the preponderance of the evidence. The evidence presented to support this amount and purity level lacked indicia of reliability to support the conclusion that, more likely than not, Molina was responsible for 13 kilograms of "Ice." The Fifth Circuit disagreed. Although it noted "[n]o meth belonging to Molina was seized," the Fifth Circuit determined this quantity and quality of methamphetamine could be inferred from the testimony of cooperating witnesses and testing on methamphetamine recovered from the second cooperating witness. App., *infra*, at 7a-8a.

Third and finally, Molina complained on appeal that the trial penalty imposed by the district court was constitutional error. The Fifth Circuit found none. The Fifth Circuit noted that the district court's statements in this regard—for example, the court's repeated complaint that Molina "insisted on going to trial," 5th Cir. R. 1029-32—"raise[d] eyebrows." However, the Fifth Circuit concluded that the district court's complaints actually related to the district court's distaste for what the district court concluded was false testimony by Molina. App., *infra*, at 10a.

REASONS TO GRANT THE PETITION

I. The Fifth Circuit's decision that Molina's substantial rights were not affected by obvious error in the dual-role testimony of the majority of witnesses conflicts with Eleventh Circuit Precedent, Sixth Circuit Precedent, and Fourth Circuit Precedent.

The Fifth Circuit erred by holding Molina's substantial rights were not impacted[2] by the testimony of six Government witnesses who testified as both fact and expert witnesses without any jury instruction or other measures taken to delineate their dual roles.

To satisfy this third prong of the plain error standard, a defendant must "show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles v. United States*, 585 U.S. ___, ___, 138 S. Ct. 1897, 1904-05 (2018).

Several Courts of Appeals have held that where a witness testifies in a dual role without delineation of those roles to the jury, and the testimony is important to the case, the error impacts the substantial rights of the defendant.

[2] Because Molina did not object to this error at trial, the plain error standard of review applies. *United States v. Kirkland*, 851 F.3d 499, 502-03 (5th Cir. 2017).

The Eleventh Circuit has held that when a government agent testifies improperly, and that testimony is important to the government's case, there is a reasonable probability of a different result absent the erroneous testimony. *United States v. Hawkins*, 934 F.3d 1251, 1267 (11th Cir. 2019). In *Hawkins*, the offending testimony came from one important prosecution witness and lasted for more than half of the trial. *Id.*

The Sixth Circuit likewise held a defendant's substantial rights were affected where DEA agents testified in dual-roles without a proper instruction and the testimony was some of the "most powerful evidence tying [the defendant] to a conspiracy." *United States v. Lopez-Medina*, 461 F.3d 724, 749 (6th Cir. 2006).

In a similar case, the Fourth Circuit held that where the testimony of the government's agent took place on six out of twelve days of trial, and the testimony was important to the government's case, it was not harmless. *United States v. Garcia*, 752 F.3d 382, 397-98 (4th Cir. 2014).

Significantly, the Fourth Circuit noted, "this Court's inquiry is not "merely whether there was enough [evidence] to support the result, apart from the phase affected by error. It is rather, even so, whether the error

itself had substantial influence." *Id.* at 398. This is in direct conflict with the Fifth Circuit's interpretation of the standard below, articulated in its rule that the erroneous testimony "is not prejudicial if the remaining evidence of guilt, after errors are excised, was strong enough to make a guilty verdict the much more likely outcome." App., *infra*, at 1a-2a.

In this case, it was not only one or two agents whose testimony was error. Seven government witnesses testified in dual-roles without proper delineation regarding their roles. Six of these witnesses were identified as "experts" in the jury charge. 5th Cir. R. 299. Special Agent David Phillips, Task Force Officer Johnny Sosa, Special Agent Steve McBain, Elsa Carreon, Mark Mize, and Priscilla Thomas all testified as experts. Each one of them also testified as a fact witness to the specific investigation involving Molina. Their collective testimony was substantial. The testimony of these six witnesses constituted approximately 50% of the total testimony.[3]

Their collective testimony was also significant. Task Force Officer Johnny Sosa, Special Agent David Phillips, and Special Agent Steve

[3] This does not include the testimony of George Jones who also testified as an expert but was not identified as such in the jury charge.

McBain expressed opinions concerning drug trafficking pertaining to their own investigation of Molina and her co-defendants. 5th Cir. R. 595-681, 708-51, 854-64. Elsa Carreon expressed opinions about interpreting, transcribing, and translating phone calls and texts from Spanish to English and the use of slang with regard to her work on the same investigation. 5th Cir. R. 682-707. Mark Mize expressed opinions concerning downloading cell phone data and obtaining forensic data and the data generated as a result of cell phone extraction, as it pertained to the investigation. 5th Cir. R. 774-95. Priscilla Thomas expressed opinions about collecting, analyzing, and evaluating data from various sources, generally and with respect to the investigation. 5th Cir. R. 805-52.

The government's only other witness besides these witnesses and cooperating witnesses was Officer George Jones. Officer Jones testified regarding his search of Molina's home and phone, finding scales, baggies, and receipts for large transfers of money to Mexico. Jones also testified based on his expertise and experience as an officer that these items were connected to drug trafficking. *See* 5th Cir. R. 751-71. Even if his testimony is not considered dual-role testimony, it is not enough to prove

Molina guilty of conspiring to distribute over 500 grams of methamphetamine.

Because there was no instruction or other delineation between the fact and expert testimony of any of the Government's fact/expert witnesses, and because the scope and breadth of this testimony was significant, Molina's substantial rights were affected. Without this testimony, there is a reasonable probability the jury's verdict would have been different. The Fifth Circuit's conclusion to the contrary should be reversed.

II. The Fifth Circuit's affirmance of inferences regarding the quantity and quality of drugs attributable to Molina violates the Fourteenth Amendment and conflicts with Seventh Circuit Precedent.

Although the majority of evidence centered around the alleged transfer of one kilogram of methamphetamine by Molina, and no methamphetamine was seized from Molina and tested, the Fifth Circuit affirmed the district court's sentencing Molina based on her purported responsibility for 13 kilograms of ice.

Under the Sentencing Guidelines, a defendant convicted under 21 U.S.C. § 846 is generally sentenced based on the Drug Quantity Table in U.S.S.G. § 2D1.1(c). *See* U.S.S.G. § 2D1.1(a)(5), (c) (2018). For

methamphetamine, the base offense level is determined by the weight and purity of the controlled substance. The Table lists various qualities of methamphetamine—"methamphetamine," "methamphetamine (actual)," and "ice." *See generally* U.S.S.G. § 2D1.1(c). According to the Drug Quantity Table, "45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of 'Ice'" results in a base offense level of 38. U.S.S.G. § 2D1.1(a)(5),(c)(1). By contrast, "at least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of 'Ice'" results in a base offense level of 34. U.S.S.G. § 2D1.1(a)(5),(c)(3). For the purposes of U.S.S.G. § 2D1.1(c), "ice" means "a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity." U.S.S.G. § 2D1.1(c) n.(C).

A criminal defendant has a due process right to be sentenced based on accurate information. *United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Helding*, 948 F.3d 864, 870 (7th Cir. 2020). Where the district court sentences a defendant based on drug quantity and quality, it must find the government's evidence sufficiently reliable by a preponderance of the evidence. *United States v. Carnell*, 972 F.3d

932, 938-39 (7th Cir. 2020); *Helding*, 948 F.3d at 870. "[B]ecause the quantity of drugs is so important to sentencing in drug cases, 'the court must make an explicit finding as to drug quantity and offense level and how it arrived at the sentence.'" *United States v. McEntire*, 153 F.3d 424, 435 (7th Cir. 1998) (citation omitted). Unreliable allegations must not be considered. U.S.S.G. § 6A1.3 cmt. "[W]here there is inconsistent evidence, the district court must conduct a sufficiently searching inquiry into the government's evidence to ensure its probable accuracy." *McEntire*, 153 F.3d at 436.

Here, the district court did not even make explicit findings as to drug quantity or drug quality. Instead, it simply adopted the PSR. And the PSR's conclusions regarding drug quantity and drug quality were not proven by a preponderance of reliable evidence. The PSR relied upon testimony of the second cooperator that was unreliable and contradictory.

With respect to quantity of methamphetamine, the second cooperator testified on direct and re-direct examination that when he first sold drugs to Molina, she wanted to buy, "maybe two, three kilos. And then from there it was just five, seven." 5th Cir. R. 1140. He testified that in their first meeting in late August 2017, Molina asked for two kilos,

but he brought four or five kilos to her home to show her, her uncle, and her husband. 5th Cir. R. 1145-55. He testified to a second transaction involving payment for one kilogram of methamphetamine. 5th Cir. R. 1161. He then testified that he stopped dealing methamphetamine to Molina the very next month, September 2017, because she was arrested. 5th Cir. R. 1161-62, 1179. The second cooperator testified that he continued dealing with Molina's uncle after she was arrested. 5th Cir. R. 1162. From this testimony, it could reasonably be inferred that he met twice with Molina and sold Molina herself a total of three kilos of methamphetamine.

On cross-examination and re-cross, the second cooperator increased the number of his alleged deliveries to Molina each time he was asked. First, he testified that he knew he delivered methamphetamine to Molina's house "more than once." 5th Cir. R. 1168. When asked again how many times he delivered methamphetamine to Molina, he answered, "I don't know. But it was more than two, three times. I know that for a fact." 5th Cir. R. 1170. Finally, he testified that he did not remember the last time he delivered to Molina but "[i]t was more than three times. I know that for a fact." 5th Cir. R. 1181. The second cooperator's

testimony also lacks sufficient indicia of reliability to support its probable accuracy because, given the passage of time and his drug use, the cooperator could have easily confused his alleged dealings with Molina and her uncle. Nonetheless, the PSR and the district court concluded Molina was responsible for 13 kilograms of methamphetamine.

With respect to quality of methamphetamine, the second cooperator testified that he "cooked" crystal methamphetamine. 5th Cir. R. 1134-47. He did not generally testify as to the purity of the methamphetamine he cooked, and he did not specifically testify to the purity of the methamphetamine he allegedly sold to Molina. None of the methamphetamine attributed to Molina was seized or tested. The Government did not introduce evidence regarding the purity or concentration of the substance attributed to Molina. Nonetheless, the PSR concluded that all the methamphetamine attributable to Molina was "ice."

Although the court was entitled to credit uncorroborated testimony coming from an admitted liar, convicted felon, large scale drug dealing, paid government informant, such as the second cooperator (5th Cir. R. 1131-39), there must be "sufficient indicia of reliability."

In this case, the second cooperator made several conclusory statements and estimates but did not support his conclusions with explanations or details. His recollection of the number of deliveries changed every time he was asked. First, he answered "more than once," next he answered "more than two [or] three times" and finally, he answered, "more than three times." The reliability of the second cooperator's testimony was also impacted by his admitted drug use (5th Cir. R. 1138-39), impacting his memory. *McEntire*, 153 F.3d at 436-37.

Confronted with this inconsistent and conclusory evidence, the district court failed to conduct a sufficiently searching inquiry into the government's evidence to ensure its probable accuracy. The district court did not provide even a brief explanation as to why the court credited one of the second cooperator's estimates of drug quantity over the other or why his representation that he "cooked" crystal methamphetamine led her to conclude that the methamphetamine attributed to Molina was "a mixture or substance containing dmethamphetamine hydrochloride of at least 80% purity."

The Fifth Circuit affirmed the district court's reliance on this testimony, but the Seventh Circuit has held that testimony about drug

quality by those familiar with the drug is not sufficiently reliable. *United States v. Carnell*, 972 F.3d 932, 941-45 (7th Cir. 2020). The Fifth Circuit also concluded that it could infer the quality of methamphetamine attributable to Molina was the same as methamphetamine seized from co-conspirators, but this is also unreliable. The Fifth Circuit stated the methamphetamine recovered from the second cooperating witness was tested and proven to be ice, App., *infra*, at 7a-8a, but this information is not in the record. The PSR noted that the co-operating witnesses were found to be in possession of ice, but it did not mention any testing. 5th Cir. R. 1414. Moreover, the second cooperating witness whose methamphetamine, according to the Fifth Circuit, was tested and proven to be ice, was not prosecuted as a co-conspirator of Molina; he was not Molina's co-defendant.

The PSR's calculation was based on unreliable and insufficient evidence. The sentence imposed based on such evidence cannot stand. The Fifth Circuit's erroneous affirmance of the district court's reliance on the PSR should be reversed.

III. The Fifth Circuit's decision to affirm the imposition of a trial penalty violates the Sixth Amendment, the Fourteenth Amendment, and conflicts with Supreme Court Precedent.

Finally, the district court imposed an unconstitutional trial penalty when it sentenced Molina, a non-violent, first-time offender, to more than 24 years in prison because she "insisted on going to trial."

A defendant cannot be punished by a more severe sentence because she unsuccessfully exercised her constitutional right to stand trial. *United States v. Gozes-Wagner*, 977 F.3d 323, 335 (5th Cir. 2020). The Sixth Amendment gives criminal defendants a right to trial. U.S Const. amend. VI. This Court has stated that to punish a person because she has done what the law plainly allows is a due process violation of the most basic sort. *Gozes-Wagner*, 977 F.3d at 334-35 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

"[I]f the district court stated that it was punishing the defendant more severely than it otherwise would *because* she went to trial, that would clearly amount to a constitutional violation even absent a comparison to others similarly situated to the defendant." *Gozes-Wagner*, 977 F.3d at 337 (emphasis original).

In this case, the district court explicitly and repeatedly stated that she was punishing Molina more severely because she went to trial:

- "You know, if you . . . came in here and . . . pled to this and—and fessed up to everything, I'd be looking at this far differently. I would be looking at this like your attorney is asking me to."
- . . . "[T]he problem is we all sat through the trial."
- "[Y]ou sat through a full proffer, and you saw all the evidence, and you still wouldn't take, what, four or five years. Any, you know—and then you insisted on going to trial."
- "[Y]ou know, so I'm going to sentence [] you to what I think you deserve. The . . . safety of the community and the deterrent effect of someone who insisted on going to trial; looked at a proffer, first proffer, and saw all the evidence and then went to trial anyway and then testified.

5th Cir. R. 1029-32. This was error of constitutional proportions.

The 5th Circuit concluded there was no error because the district court also referenced Molina's testimony, and therefore, according to the Fifth Circuit, it was the testimony that drove the district court's sentence. App., *infra*, at 9a-10a. While Molina's testimony at trial does seem to have been a factor considered by the district court, the district court also *explicitly* stated it was punishing Molina more severely *because* she went to trial. 5th Cir. R. 1029-32. Such an explicit, unconstitutional error

cannot be ignored. The Fifth Circuit's cherry-picking analysis of the district court's statements should be reversed.

CONCLUSION

Petitioner respectfully asks that this Court grant this petition and set the case for a decision on the merits.

Respectfully submitted,

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