

No. _____

In the Supreme Court of the United States

EDUARDO MELENDREZ-SOBERANES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

The Fifth Circuit affirmed a district court's reliance on a case agent's approximation of the weight of unseized cocaine. The agent's approximation was based primarily on pictures of the packaged cocaine. The agent testified that the packages could have ranged from 2 kilograms to .15 kilograms but from his experience in other cases, 1 kilogram was the standard. The presentence report had initially calculated the amount of cocaine Melendrez distributed from the money he received for it, concluding 5 kilograms. The district court accepted the agent's estimate of 25 kilograms or 1 kilogram per package. The Fifth Circuit found that "Melendrez-Soberanes proffered no evidence that the cash seized reflected the scale of his trade in cocaine better than the testimony derived from the photographs." Appendix at 2. This case presents two issues for review:

Whether the Fifth Circuit's practice of shifting the burden of production and proof to the defendant at sentencing violates a defendant's Due Process rights.

Whether a district court must err on the side of caution in choosing between estimated weights of unseized drugs.

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Petition for Writ of Certiorari

Eduardo Melendrez-Soberanes asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on November 29, 2022.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The unpublished opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on November 29, 2022. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that “no person shall be ... deprived of life, liberty, or property without due process of law.”

STATEMENT OF THE CASE

Petitioner Eduardo Melendrez-Soberanes pleaded guilty to conspiring to possess an amount of cocaine with intent to distribute it, in violation of 21 U.S.C. §§ 841(b)(1)(C) and 846.¹ Melendrez agreed to a factual basis for the plea that stated he had distributed 25 packages of a white substance that had an appearance consistent with cocaine. Specifically, Melendrez was arrested with \$48,869 in cash and explained that he had received that money in exchange for 10 of the packages and made a previous trip in which he delivered 15 packages.

Following Melendrez's plea, a probation officer prepared a presentence report. The report originally calculated that Melendrez was responsible for more than 5 kilograms of cocaine. It reasoned that Melendrez likely distributed 2 kilograms of cocaine on this trip because he had approximately \$50,000 and 1 kilogram of cocaine typically sells for \$25,000. Both Melendrez and the government objected to the report. Melendrez objected to the report rounding up as not a conservative estimate. The government objected that the photographs of the packages showed they

¹ The district court exercised jurisdiction under 18 U.S.C. § 3231.

were in the shape of bricks and promised to introduce evidence at sentencing that brick-shaped packages of cocaine weigh one kilogram each.

At sentencing, the government called Homeland Security Investigations Special Agent Jaime Sanchez. Sanchez was the investigating agent in this case. Sanchez testified about conclusions he drew from his training and experience, which totaled an unknown number of cocaine investigations, fewer than five.

Agent Sanchez testified that he believed the packages in the photographs were the size of bricks. His experience told him that a brick-sized package of cocaine weighs approximately one kilogram.

On cross examination, Agent Sanchez was asked to look at photographs of packages like the photographs he had found in Melendrez's phone. Sanchez testified that they were the kind of packages he believed he saw photographed on Melendrez's phone. When Sanchez weighed the photographed packages, they weighed .15 kilograms and .5 kilograms. Sanchez concluded that the brick-sized packages given to him by the defense weighed less than he anticipated because the product inside was less dense. Sanchez was unfamiliar with the process of pressing cocaine into bricks

and whether different pressing processes could yield different densities.

Agent Sanchez's knowledge about the amount of cocaine depicted in the photographs on Melendrez's phone was most clearly summarized on redirect:

Q: It is pretty standard and pretty well understood in law enforcement circles that a brick of cocaine is approximately a kilogram?

A: Yes, it is.

Q: It could be more.

A: Could be more.

Q: It could be less.

A: Could be less.

Q: Somebody could package it really light and it could be .15 kilograms?

A: Yes.

Q: Somebody could package it and it could be 2.2 kilograms.

A: Yes.

Q: Or 1.2 kilograms.

A: 1.2, yes, correct.

Q: Standard – understanding standard best information and best practice is a brick packaged that way of cocaine is approximately a kilogram?

A: That is correct.

The district court overruled the defendant's objection and adopted the quantity urged by the government, holding Melendrez responsible for 25 kilograms of cocaine. The district court found

Melendrez's total offense level was 31, his Criminal History Category I, which yielded a Guideline range of 108 to 135 months' imprisonment. The district court sentenced Melendrez to 120 months' imprisonment.

Melendrez appealed, challenging the accuracy of the weight of cocaine determination. The Fifth Circuit affirmed the sentence. It wrote that "Melendrez-Soberanes proffered no evidence that the cash seized reflected the scale of his trade in cocaine better than the testimony derived from the photographs. Thus, Melendrez-Soberanes fails to show that the district court clearly erred in relying on the quantity derived from those approximations." Appendix at 2 (citing *United States v. Valdez*, 453 F.3d 252, 267 (5th Cir. 2006)).

REASONS FOR GRANTING CERT

Federal courts have broad discretion as to what evidence they may consider in sentencing a defendant. 18 U.S.C. § 3661. That broad discretion is limited by the Due Process clause. Although the Due Process Clause does not impose particular limits on the types of evidence a sentencing court may consider, *Williams v. New York*, 337 U.S. 241 (1949), due process does mandate that a district court's sentencing determinations be supported by information bearing reasonable indica of reliability, a threshold the Court has indicated is satisfied by proof by a preponderance of the evidence, *United States v. Watts*, 519 U.S. 148, 156 (1997). *See also United States v. Johnson*, 648 F.3d 273, 277 (5th Cir. 2011) (observing that sufficient-indicia-of-reliability standard equates to “due process requirement that sentencing facts must be established by a preponderance of the evidence.”). This case presents two questions that have divided the circuits: (1) whether an agent’s guess about the weight of unrecovered drugs, based on photographs of them, become sufficiently reliable to satisfy due process when the defendant does not offer rebuttal evidence and

(2) whether, when presented with two reliable estimates of unseized drugs, due process requires courts to choose the lower estimate.

The Circuits are divided over a trained officer’s ability to guess drug weights from photographs, part of a greater divide over the defendant’s burden at sentencing to show information provided by the government is unreliable.

The Fifth and other circuits have established various reliable methods of estimating the weight of unseized drugs: (a) multiplying the amount seized upon arrest by the number of previous similar transactions, *United States v. Oleson*, 44 F.3d 381, 385 (6th Cir. 1995), (b) converting cash seized to a quantity of drugs by relying on drug prices, *United States v. Perez*, 785 Fed. App’x 207, 208-09 (5th Cir. 2019), and (c) approximating from a co-conspirator’s estimation, *United States v. Lucio*, 985 F.3d 482, 487-88 (5th Cir. 2021).

In this case, the Fifth Circuit relied on “testimony derived from photographs”—an agent’s estimate of the weight of drug packages from observing photographs of those packages and concluding they align with a “standard” derived from other cases. Appendix at 2. The Tenth and Ninth Circuits have rejected that approach. *See, e.g., United States v. Aragon*, 922 F.3d 1102, 1111 (10th Cir. 2019)

(rejecting an estimate of weight derived from the known net weight less an estimated packaging weight derived by viewing photographs of the packages); *United States v. Garcia*, 994 F.2d 1499 (10th Cir. 1993) (rejecting an estimate of unseized marijuana based on agent’s testimony about “standard” weights, instead of “evidence particular to th[e] case”); *United States v. Kilby*, 443 F.3d 1135, 1138 (9th Cir. 2006) (rejecting an attempt to prove the weight of hallucinogenic tablets by using the weight of tablets seized in other cases).

The Fifth Circuit’s reason for accepting the weight-from-photographs method—that Melendrez “proffered no evidence that the cash seized reflected the scale of his trade in cocaine better than the testimony derived from photographs”—reflects a larger split. The Fifth Circuit has repeatedly held a district court may adopt facts contained in a presentence report, derived from the government’s investigation, “without further inquiry if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable.”

United States v. Harris, 702 F.3d 226, 230 (5th Cir. 2012) (quoting *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007)).

The result of the Fifth Circuit’s holding—as reflected in this case—is that once the government asserts a fact it does not have a burden to prove it; rather, it is deemed reliable unless the defendant disproves it. The Fifth Circuit is not alone in this practice. Several other circuit courts have imposed on the defendant the burden of production when he objects to supposed facts alleged by the government at sentencing. *See, e.g., United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005); *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002); *United States v. Mustread*, 42 F.3d 1097, 1101-02 (7th Cir. 1994).

This deferential approach contrasts that favored by the Second, Eighth, Ninth, Eleventh, and District of Columbia circuits. These circuits hold that a defendant who objects to facts—alleged by the government and incorporated in the presentence report—requires the government to provide supporting evidence. *See, e.g., United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004); *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009); *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005); *United States v. Helmsley*, 941 F.2d 71, 98 (2d Cir. 1991). As the Ninth Circuit has explained, “When a defendant raises objections to the PSR, the district court is obligated to resolve the factual dispute,

and the government bears the burden of proof. *United States v. Ameline*, 409 F.3d 1073, 1085-86 (9th Cir. 2004) (*en banc*).

This division among the circuits is well defined and longstanding. The Court should grant certiorari and resolve the division.

The Circuits are divided over whether courts must err on the side of caution when presented with two reliable estimates of drug quantity.

A small minority of courts have held that when choosing between multiple reliable estimates of drug quantities, a district court may choose any estimate supported by sufficiently reliable evidence. The Fifth Circuit has repeatedly held that a “district judge may consider any information that has ‘sufficient indicia of reliability to support its probable accuracy,’ including a probation officer’s testimony, a policeman’s approximation of unrecovered drugs, and even hearsay.” *United States v. Huskey*, 137 F.3d 283, 291 (5th Cir. 1998) (quoting U.S.S.G. § 6A1.3(a)); *see also United States v. Betancourt*, 422 F.3d 240, 247 (5th Cir. 2005). In this case, the Fifth Circuit preferred the government’s estimate of drug quantities because the defendant “proffered no evidence that the cash seized reflected the scale of his trade in cocaine better than the testimony derived from the photographs.” Appendix at 2.

The Fifth Circuit is not alone in this practice. At least two other circuit courts have held that any estimate supported by reliable evidence may be used in determining the weight of unseized drugs. *See, e.g., United States v. Miele*, 989 F.2d 659, 665-66 (3d Cir. 1993); *United States v. Kiulin*, 360 F.3d 456, 461 (4th Cir. 2004).

That approach contrasts with the method favored by the First, Sixth, Seventh, Ninth, Tenth, and District of Columbia circuits. Those circuits require district courts to err on the side of caution when deciding between multiple reliable estimates. They require: first, that the government prove a quantity by a preponderance of the evidence; second, that the information supporting the approximation possess sufficient indicia of reliability; and third, that the district court err on the side of caution in choosing between multiple reliable quantities. *See, e.g., United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990); *United States v. Culps*, 300 F.3d 1069, 1076 (9th Cir. 2002); *United States v. Sklar*, 920 F.2d 107, 113 (1st Cir. 1990); *United States v. Bozovich*, 782 F.3d 814, 818 (7th Cir. 2015); *United States v. Battle*, 706 F.3d 1313, 1320 (10th Cir. 2013); *United States v. Leyva*, 916 F.3d 14, 30 (D.C. Cir. 2019). As the Ninth Circuit has explained, “[a]pproximations of drug quantity,” “by definition imprecise,” require “the district court [to] err

on the side of caution in calculating approximated drug quantity.

... A district court's failure to consider the margin of error when arriving at the quantity of drugs on which the sentence was based constitutes error." *Culps*, 300 F.3d at 1076.

This division among the circuits is well defined and longstanding. The Court should grant certiorari and resolve the division.

CONCLUSION

Both divisions affect crucial decisions about sentence length in individual cases and create questions about the fairness and uniformity of punishments in our criminal justice system. The drug calculation drastically affects the guideline range that must be made to start the sentencing process, *Gall v. United States*, 552 U.S. 38, 51 (2007), and that anchors the determination of a final sentence, *Peugh v. United States*, 569 U.S. 530, 549 (2013).

For these reasons, Petitioner asks that this Court grant a writ of certiorari and review the judgment of the court of appeals.

s/ Shane O'Neal
Counsel of Record for Petitioner
Dated: February 27, 2023