

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH TYSHAWN DARREN FAVORITE, 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 Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

May the Court rely on an uncorroborated accusation of criminal conduct in a police report to enhance a defendant's sentence when the report is not part of the record and the defendant says the accusation is false?

## STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Western District of Michigan (Southern Division) and the United States Court of Appeals for the Sixth Circuit:

- United States of America v. Joseph Tyshawn Darren Favorite, W.D. Mich. Case No.1:21-cr-152, Judgment of Sentence entered April 21, 2022
- United States of America v. Joseph Tyshawn Darren Favorite, Case No. 22-1396, 2023 U.S. App. LEXIS 15741 (6th Cir. June 21, 2023)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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## PETITION FOR WRIT OF CERTIORARI

Joseph Favorite respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINION BELOW

The United States Court of Appeals for the Sixth Circuit affirmed Favorite’s sentence in an opinion not recommended for publication filed on June 21, 2023. (Pet. App. 1a).

## JURISDICTION

The Sixth Circuit’s unpublished opinion was filed on June 21, 2023. There was no petition for rehearing. The mandate issued on July 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to be sentenced on the basis of accurate information— a right secured by the Fifth Amendment to the Constitution. The amendment says that “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. V.

## STATEMENT OF THE CASE

This case began on June 27, 2021, when Benton Township, Michigan police officers took a report from Demetria Carter. She told them of a fight that she had that day with Mr. Favorite. She said the fight culminated when he took a black handgun with a drum magazine from his car and hit her on the head with it and the gun discharged. (PSR, R. 39, ¶¶ 12–14, Page ID # 107–108).

Favorite was on parole following a felony conviction. On June 27, 2021, he was in parole absconder status. (Id., ¶¶ 10–11, Page ID # 107). After Ms. Carter's report, the Michigan Department of Corrections issued a parole violation and warrant. Officers arrested Favorite on July 1, 2021, at his residence (Id., ¶¶ 16–17, Page ID # 108).

In his bedroom officers found a loaded Glock Model G-48 9 mm pistol with a 50-round drum magazine attached. The gun had one round in the chamber. The gun looked like the gun Ms. Carter described seeing on June 27, 2021. (Id., ¶ 20, Page ID # 109).

The government charged that on July 1, 2021, Favorite knowingly possessed the firearm and did so knowing he had been previously been convicted of a felony, contrary to 18 U.S.C. § 922(g). (Indictment, R. 1, Page ID # 1-2). Favorite pled guilty, without a written plea agreement. (Guilty



Plea Tr., R. 35, Page ID # 68–69).

The presentence investigation report (“PSR”) assessed a four-level increase to Favorite’s offense level score for possessing a firearm in connection with another felony offense. The report said he possessed the Glock pistol in connection with the felony offense of assault with a dangerous weapon on June 27, 2021. (Sentencing Tr., R. 50, Page ID # 174, 178, PSR, R. 39, ¶ 37, Page ID # 112). Favorite objected, but it was not until sentencing that he said, through counsel, that he did not assault Carter. (Sentencing Tr., R. 50, Page ID # 175–76).

The court declined to consider the objection because it was untimely and it referred to the assault on Carter to support the 120-month sentence it imposed and to support its decision to deny Favorite’s request that the sentence run concurrent with his state parole violation sentence. (Id., Page ID # 194–97).

On appeal Favorite argued that his objection, although late, required the trial court to determine if the enhancement was based on reliable facts. He said that he had a due process right to be sentenced on the basis of accurate information and that he had met his burden of production of evidence by disputing the unsupported allegations contained in the police report that the PSR relied on. He also argued that his lawyer did not

properly represent him because she did not timely objected to the sentencing enhancement, did not assert that there was good cause for the delay in presenting the objection, and did not seek a continuance so the district court could consider the objection.

The Court of Appeals said that the district court acted within its discretion by declining to consider Favorite's untimely objection and that even if it should have considered the objection, the objection was insufficient to dispute the PSR. United States v. Favorite, Case No. 22-1396, 2023 U.S. App. LEXIS 15741 at \*7–8. Relying on previously published decisions, the Sixth Circuit said that its case law did not support Favorite's argument that his "bare denial" was enough to contest uncorroborated facts in the PSR. United States v. Favorite, 2023 U.S. App. LEXIS 15741 at \*8–9. The Sixth Circuit did not rule on Favorite's ineffective assistance of counsel claim, but said that he could raise it in a motion under 28 U.S.C. § 2255. United States v. Favorite, 2023 U.S. App. LEXIS 15741 at \*9–10.

#### REASONS FOR GRANTING THE WRIT

The Sixth Circuit's ruling that a defendant's claim that his PSR contains false uncorroborated accusations taken from a police report does not require the district court to decide if the accusations are sufficiently reliable to support a sentencing enhancement conflicts with rulings in the Seventh

and Tenth Circuits. The Court should resolve the conflict because it affects sentencing procedures in the federal courts, and sentencing is an important part of the work of the federal courts.

Favorite's objection was to a four-level enhancement under USSG § 2K2.1(b)(1)(A), for possessing a firearm in connection with another felony offense. His sentencing guideline range with the enhancement was 100 to 120 months and without the enhancement his sentencing range was 70 to 87 months. (Sentencing Tr., R. 50, Page ID # 183, PSR, R. 39, Page ID # 128).

Federal Rule of Criminal Procedure 32 requires the trial court to rule on "any disputed portion of the presentence report or other controverted matter." Fed. R. Crim. P. 32(i)(3)(B). This rule protects the defendant's due process right to be sentenced on the basis of accurate information. United States v. Tucker, 404 U.S. 443, 447 (1972). A district court may not just adopt the findings of the PSR when a defendant contests them. United States v. Mack, 817 F. App'x 176, 177–78 (6th Cir. 2020).

The Guidelines also promote sentencing based on reliable facts. They exclude any evidence that does not have "sufficient indicia of reliability to support its probable accuracy." USSG § 6A1.3. The commentary to § 6A1.3 recognizes "[t]his due process limit on the evidence a sentencing court may properly consider . . ." United States v. Smith, 887 F.2d 104, 108 (6th Cir.

1989).

By challenging the accuracy of Ms. Carter's statement, Favorite did enough to invoke the court's duty to resolve the dispute. To be sure, the Sixth Circuit has frequently stated that simply denying the truth of a statement in the PSR is not enough; that a defendant must produce more than a bare denial. United States v. Lang, 333 F.3d 678, 681 (6th Cir. 2003), citing United States v. Mustread, 42 F.3d 1097, 1102 (7th Cir. 1994), United States v. Mack, 817 F. App'x at 177–78.

But this burden of production only applies only if the information in the PSR has “sufficient indicia of reliability.” It is only when the facts alleged in a presentence report bear “sufficient indicia of reliability” that the burden shifts to the defendant to produce some evidence to show that those facts are incorrect or are not reliable. United States v. Acosta, 85 F.3d 275, 283 (7th Cir. 1996). Thus, reference to use of a knife in an indictment that did not result in a conviction was not reliable enough to establish that the defendant used a knife, and the defendant was not required to produce evidence to contest the claim. United States v. Crowell, 997 F.2d 146, 149 (6th Cir. 1993).

In Lang, the court approved Mustread's statement that the defendant may not rest on a bare denial. But the Mustread court qualified its statement. The court said that a bare denial is enough in some circumstances

to put an unsupported charge in dispute:

In some instances, however, the defendant may escape his burden of producing some evidence to contradict the PSR. This can occur when the PSR contains nothing but a “naked or unsupported charge.” (citations omitted). That is because in response to a bare assertion by the PSR, a bare denial by the defendant may suffice to suggest inaccuracy.

United States v. Mustread, 42 F.3d at 1102.

Here, the PSR detailed an assault on Demetria Carter. The PSR repeated statements that she made to the Benton Township Police Department. Her statements were not corroborated. No one else accused Favorite. No weapon, shell casings, or bullets were recovered, and no other forensic evidence linked Favorite to the assault. (PSR, R. 39, ¶¶ 12–14, Page ID # 107–108). Nothing confirmed that the gun found on July 1, 2021, was the same gun Ms. Carter said she saw on June 27, 2021. The police report was not even made part of the district court record.

In addition, multiple state charges against Favorite based on the June 27, 2021, incident were dismissed. (PSR, R. 39, ¶ 51, Page ID # 115).

At the sentencing hearing Mr. Favorite said that what happened as recounted in the PSR is not what took place: that the June 27, 2021, charges were dismissed, and that “he was not the individual with the firearm.” Through counsel he referred to “some conversation in Mr. Favorite’s Facebook which supports that the cousin who was there had said that was her firearm

that had discharged.” (Sentencing Tr., R. 50, Page ID # 174–75).

Instead of holding a hearing, the court relied on the police report in the PSR. But police reports have deficiencies: they are not sworn to, they are not filed in court, and they are developed for investigation. They may be reliable evidence that an arrest was made, but “they are significantly less reliable evidence of whether the allegations of criminal conduct are true.” United States v. Jones, 815 F. App’x 870, 884–85 (6th Cir. 2020) (Moore, J., dissenting) quoting United States v. Bell, 785 F.2d 640, 644 (8th Cir. 1986). Courts cannot resolve a disputed fact simply by assuming that information contained in a police report “meets the due-process ‘reliability floor.’” United States v. Padilla, 793 F. App’x 749, 757 (10th Cir. 2019).

Courts should not use police reports unless (1) there is evidence in the record that corroborates the information in the report, (2) the report is in evidence, and (3) the report contains sufficient indicia of reliability to support the probable accuracy of the information. United States v. Padilla, 793 F. App’x at 762. None of these conditions was met here.

But the Sixth Circuit sees it differently. It says that even when the defendant says that the facts in the PSR are false his “bare denial” is not enough to invoke the courts duty to resolve the dispute. United States v. Lang, 333 F.3d at 681. The Sixth Circuit says that statements taken from a

police report may support a sentencing enhancement. United States v. Ford, 571 F. App'x 378, 383 (6th Cir 2014). This position conflicts with the holdings of other circuits which require a case-by-case analysis of the report to determine if it is sufficiently reliable for use at sentencing. United States v. Padilla, 793 F. App'x at 757.

The Fourth, Seventh, and Tenth Circuits say that when the defendant says that out-of-court statements in a PSR are false the district court must resolve the dispute. United States v. McDonald, 43 F.4th 1090, 1096–97 (10th Cir. 2023), United States v. Coonce, 961 F.2d 1268, 1279–80 (7th Cir. 1992) (as to naked and unsupported charges), United States v. Terry, 916 F.2d 157, 162 (4th Cir. 1990). Favorite's assertion though counsel that someone else, not him, assaulted Carter with a gun was specific enough to invoke the district court's duty to resolve the dispute. The district court was wrong to rely on Carter's uncorroborated statement taken from a police report.

The Court should grant the petition to make clear that uncorroborated hearsay claims of criminal conduct fail to support a sentencing enhancement when a defendant says the claims are false.

## CONCLUSION

The Court should grant the petition for writ of certiorari.

Dated: August 4, 2023

Respectfully submitted,

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