

No. 23-5310

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH FAVORITE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The government concedes that “A . . . disagreement exists in the Court of Appeals on whether a bare objection to the factual accuracy of findings in a presentence report requires the government to introduce evidence to support those findings. . . .” Brief for the United States in Opposition (“Opp.”) 11.

The government acknowledges that four circuits require the government to present evidence to prove a disputed fact, even if the defendant’s objection to a fact finding in a presentence report is unsupported by any rebuttal evidence. (Opp. at 12–13 citing *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004), *United States v. Flores*, 725 F.3d 1028, 1040–41 (9th Cir. 2013), *United States v. Martinez*, 584 F.3d 1022, 1027 (11th Cir. 2009), *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005)).

Seven circuits say a defendant must make an affirmative showing that information he objects to in a PSR is inaccurate. (Opp. at 11–12).

This case, in short, implicates an acknowledged and entrenched circuit split. The issue warrants review because it affects how federal courts conduct sentencing hearings and federal courts sentence thousands of people each year.

ARGUMENT

1. There is an entrenched circuit split about when the government must prove facts in a PSR that a defendant disputes.
 - A. Due process requires that courts rely on accurate information at sentencing.

A defendant has the right under the Due Process Clause to have his criminal sentence based on accurate information. *United States v. Tucker*, 404 U.S. 443, 447 (1972). In federal criminal cases that right is implemented through Fed. R. Crim. P. 32(i)(3)(A), and USSG § 6A1.3. The rule requires the court to rule on “any disputed portion of the presentence report”, unless the matter will not affect sentencing or the court will not consider the matter at sentencing. Fed. R. Crim. P. 32(i)(3)(B).

The Sentencing Guidelines require the court to give the parties an opportunity to present information regarding a sentencing factor that is “reasonably in dispute” and say that the court may rely on information only if it determines that the “information has sufficient indicia of reliability to support its probable accuracy.” USSG § 6A1.3(a).

B. Four circuits require the government to prove facts the defendant disputes at sentencing but others say that unless the defendant produces evidence in opposition, the court may rely on unsupported out-of-court accusations in a PSR to enhance the defendant’s Guidelines sentence range.

Here, as the government concedes, four circuit courts say that Favorite did enough to invoke the duty to resolve the dispute at sentencing when he

said that the out-of-court statement of Ms. Carter accusing him of hitting her on the head with a loaded firearm which discharged was not true and that he was not the person with the gun. (Sentencing Tr., R.50, Page ID # 174–76).

The dispute was crucial to the sentencing because the PSR said the district court should enhance Favorite's offense level score by four levels for possessing a firearm in connection with another felony—the assault on Carter. (PSR, R. 39, ¶ 37, Page ID # 112).

Thus, the district court was faced with the PSR's summary of a police report of what Ms. Carter said and Favorite's statement to the contrary made through counsel.¹ That should have been enough to invoke the court's duty to resolve the dispute and to require the government, as the proponent of the sentencing enhancement, to produce evidence in support of the enhancement. It is of no moment that Favorite's specific denial that Carter falsely accused him came at the sentencing hearing: the court had authority to consider it and the government said that it was willing to have the court consider the objection, provided that it gave the government time to bring in evidence. (Sentencing Tr., R. 50, pp. 6–7, Page ID # 175–76). The dispute was no

¹The government says that Carter's accusation came from more than one report, so that it was not “uncorroborated accusations taken from a police report.” Opp. 10–11 n. 1. Not true. Paragraphs 12–14 of the PSR recount a single statement Carter made to Benton Township police officers. No one else said Favorite assaulted Carter with a gun.

surprise: the PSR said that Favorite objected to the enhancement, although his reason was unclear. (PSR, R. 39, p. 10, ¶ 37 and p. 26, Addendum, Page ID # 112, 128).

Due process requires the government, as the party seeking to diminish the defendant's liberty, to bear the burden of production as well as the burden of proof, when the defendant objects to the truth of facts contained in the PSR. Cf. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1970) (recognizing a due process right to challenge unreliable evidence at a revocation hearing). To make the defendant who objects to the factual accuracy of information in the presentence report show that the information is inaccurate before requiring the government to produce evidence or other corroborating information puts the cart before the horse: "The government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process . . ." *Mitchell v. United States*, 526 U.S. 314, 330 (1999).

Yet several circuits say that the defendant must make an affirmative showing that information in a PSR is inaccurate and must give reasons why it is false. Opp. at 11–12 and n. 1, citing *United States v. Terry*, 916 F.2d 157, 162 (4th Cir 1990) and other cases from the First, Second, Third, Fifth, Sixth, Seventh, and Tenth Circuits.

But the Seventh and Tenth circuits back away from holding that an objecting defendant must come forth with affirmative evidence when the defendant says that unsupported out-of-court statements in the PSR are false. “[I]n response to a bare assertion by the PSR, a bare denial by the defendant may suffice to suggest inaccuracy.” *United States v. Mustread*, 43 F.3d 1097, 1102 (7th Cir. 1994), *United States v. McDonald*, 43 F.4th 1090, 1096, n. 3 (10th Cir. 2022) (“In other words, the defendant must assert that the facts alleged in the PSR are false. The burden of proof still remains on the government”). And the Fourth Circuit sees a distinction between saying information is false and saying that it is unreliable. *United States v. Terry*, 916 F.2d at 162 (“appellant merely claimed the information concerning his breached agreement with the Maryland State’s Attorney’s office was unreliable. He never claimed it was inaccurate or untrue.”).

C. The circuit split warrants review and this case is a good vehicle for review.

The government argues that similar petitions presenting this circuit split have been denied. Opp. at 13–14. But that is no reason to deny Favorite’s petition. The denial of certiorari is not a precedential decision. “The variety of considerations [that] underlie denials of the writ counsels against according denials of certiorari any precedential value.” *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quotation omitted).

And at least some of the petitions the government cites differ from Favorite's petition. For example, in *Parkerson v United States*, 142 S. Ct. 753 (2022) (No. 20-8345), the government argued that the Court should deny the petition because in sentencing the defendant to 120 months in prison the district court said it gave not much weight to an out-of-court psychologist's opinion, so the claimed error in considering the information did not affect the sentence. *Parkerson v United States*, Brief in Opposition at 19–20.

Likewise, in *Tshiansi v. United States*, 139 S. Ct. 2748 (2019) (No. 18-8524), the government argued that any error was harmless because other evidence supported the sentence apart from the disputed out-of-court statement that the defendant pointed a gun at his co-defendant. *Tshiansi v. United States*, Brief in Opposition at pp. 18–19. Neither case involved an enhancement to the defendant's Guidelines offense level score.

In contrast to its response to those prior petitions, here the government does not say that the error was harmless. And it could not. The district court accepted the uncorroborated out-of-court statement of Ms. Carter to increase Favorite's offense level score by four levels. That significantly increased his Guidelines sentence range and the court then sentenced him to serve a sentence at the top end of that range. Favorite's case, thus, is not like *Parkerson* and *Tishiani* where the complaint was that the disputed

statement was considered, not that it supported a Guidelines enhancement.

Favorite clearly presented this issue on appeal and it is clear from the list of prior petitions (to which this Court has requested a government response) that this question comes up frequently. The circuit split is entrenched. The issue is ripe for review.

CONCLUSION

Favorite's petition presents a good vehicle for this Court's consideration. The issue it poses is important—it affects how sentences are imposed. To make sure that defendants are sentenced based on accurate information and that the government bears its burden on proof in all the circuit courts, not in just a few, the Court should grant the petition for certiorari.

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Respectfully submitted,

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