

No. _____

In the
Supreme Court of the United States

ALFRED JOHN MCDONALD,
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**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether McDonald's right to due process was violated when the drug quantity attributed to McDonald was based in part on vague ledgers, unrebutted evidence showed McDonald sold both marijuana and hemp, and the Government introduced zero evidence to show the amounts listed on the ledgers were marijuana rather than hemp?
2. Whether McDonald's right to due process was violated when the drug quantity attributed to McDonald was based in part on a transaction in Oregon about which the Government introduced no evidence to show McDonald had control or involvement?
3. Whether McDonald's right to due process was violated when his criminal history level was drastically increased as a result of purported relevant conduct, when the existence and relevant nature of such conduct was not supported by the evidence?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Alfred John McDonald 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. McDonald*, No. 4:20-CR-242-1, U.S. District Court for the Northern District of Texas. Judgment imposed March 31, 2022.
2. *United States v. McDonald*, No. 22-10352, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 15, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alfred John McDonald 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-3a to the petition and is reported at 2023 U.S. App. LEXIS 14911 and 2023 WL 4044435.

JURISDICTION

The Fifth Circuit rendered judgment on June 15, 2023. 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 Fifth Amendment to the United States Constitution provides in relevant part:

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

Likewise, Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

Alfred John McDonald was charged with conspiring to possess with intent to distribute 100 kilograms or more of mixture and substance containing a detectable amount of marijuana, in violation of 21 U.S.C. § 846. App., *infra*, at 1a; 5th Cir. R. 24-27. The indictment alleged McDonald committed this violation before July 2019 and continuing until in and around August 2020. 5th Cir. R. 24.

McDonald pleaded guilty, and on April 7, 2021, as part of his plea, McDonald signed a factual resume which stipulated that “[o]n August 18, 2020, . . . DEA agents/officers arrested McDonald and another person with approximately 300 pounds [approximately 136 kilograms] of marijuana.” 5th Cir. R. 72-73, 232. At sentencing, however, the district court held McDonald responsible for the equivalent of what the presentence investigation report (“PSR”) deemed over 2,500 pounds (1,139.9 kilograms) of marijuana. App., *infra*, at 1a; 5th Cir. R. 314. This was more than eight times the amount seized.

The PSR arrived at this amount, first, by including amounts listed on ledgers **assumed** to be marijuana sales ledgers. 5th Cir. R. 498-99 (PSR ¶ 15). It is unclear from the ledgers whether the ledgers refer to

marijuana, hemp, or something else. *See* 5th Cir. R. 433-63, 490-92. The ledgers contain no references to marijuana. *See* 5th Cir. R. 433-63, 490-92. It is also unclear which ledgers document sales, pre-orders, or inventory logs. *See* 5th Cir. R. 433-63, 490-92. Next, the PSR added approximately 330 pounds of marijuana referenced in a document detailing the transport of the marijuana within Oregon despite the absence of any indication that McDonald was involved in the transaction. 5th Cir. R. 499 (PSR ¶ 15).

The PSR calculated McDonald's criminal history score as fourteen, placing him in criminal history category VI. 5th Cir. R. 505 (PSR ¶ 48). The vast majority of McDonald's criminal history score, 12 out of the 14 points, was attributed to McDonald because of four aggravated robberies McDonald (then age 21) committed in 1995 over the course of three weeks almost 25 years prior to McDonald's arrest in this case. 5th Cir. R. 503-05.

With a Total Offense Level of 40 and a Criminal History Category of VI, the advisory guidelines sentencing range stated in the PSR was 360 months to life. 5th Cir. R. 517 (PSR ¶ 86). Because the statutorily authorized maximum sentence was 40 years (480 months), the guideline

range was reduced to 360 months to 480 months. 5th Cir. R. 517 (PSR ¶ 86).

At a hearing on a(n ultimately unsuccessful) motion to withdraw his guilty plea, McDonald testified that he dealt and sold “[m]assive quantities of hemp.” 5th Cir. R. 264. Hemp is not an illegal substance.¹

At sentencing, and on appeal, McDonald argued that the drug quantity attributed to him was not supported by the evidence and that his criminal history had been improperly calculated. App., *infra*, at 1a-2a; 5th Cir. R. 348-39, 383-87, 355, 523-29, 542-46. The district court and the court of appeals rejected these arguments. App., *infra*, at 1a-2a; 5th Cir. R. 389-92. However, the district court imposed a significant downward departure, sentencing McDonald to 150 months imprisonment. 5th Cir. R. 408.

¹ The Agriculture Improvement Act of 2018 (the “2018 Farm Bill”) modified marijuana and tetrahydrocannabinol (THC) provisions, legalizing the possession and cultivation of hemp. “Hemp” is exempted from the definition of marijuana. 21 U.S.C. § 802(16)(B). Hemp is defined as any part of the cannabis plant with a delta-9 THC concentration of not more than 0.3% on a dry weight basis. 7 U.S.C. § 1639o.

REASONS TO GRANT THE PETITION

- I. McDonald's right to due process was violated when the drug quantity attributed to McDonald was based in part on vague ledgers, unrebutted evidence showed McDonald sold both marijuana and hemp, and the Government introduced zero evidence to show the amounts listed on the ledgers were marijuana rather than hemp.**

The Fifth Circuit erred by upholding the plausibility of the district court's interpretation of the ledgers in this case. Under their own precedent, due process requires that sentencing facts be established by a preponderance of the evidence. *United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013). “Sentences based upon erroneous and material information or assumptions violate due process.” *United States v. Gentry*, 951 F.3d 767, 788 (5th Cir. 2019). *See also United States v. Helding*, 948 F.3d 864, 870 (7th Cir. 2020) (“Reliability is a central ingredient of the due process analysis: where the district court sentences a defendant based on the drug-quantity guidelines, it must find the government’s information sufficiently reliable to determine drug quantity by a preponderance of the evidence.”).

Cases across several districts demonstrate that when a district court's drug quantity determination is based on a hunch or intuition, that determination cannot be upheld. For example, in *United States v.*

Candelaria-Silva, the First Circuit overturned the defendant's sentence after finding that drugs listed in ledgers were attributed to him without a proper basis. 714 F.3d 651, 659 (1st Cir. 2013). In *Candelaria-Silva*, drugs were attributed to the defendant by the lower court based on drug ledgers for drug houses that were not tied to the defendant in any way. *Id.* at 658. The First Circuit found that the totality of the circumstances did not indicate the defendant had knowledge of the drugs from a different location in the conspiracy and ruled that only the drugs related to his part of the conspiracy could be attributed to him. *Id.* The First Circuit held that the district court's factual conclusions about the quantity of drugs recorded in the ledgers were problematic, explaining that such records require multiple inferences which leads to significant uncertainty. *Id.* at 658 ("The risk of error inherent in these loose calculations is simply too high."). The First Circuit also pointed out that the ledgers did not mention the defendant or his family, and there was no evidence the defendant participated in the preparation of the ledgers. *Id.* at 656.

Likewise, in *United States v. Helding*, the Seventh Circuit upheld the due process right of a defendant to be sentenced based on accurate

information. 948 F.3d 864, 870 (7th Cir. 2020). *Helding* involved a defendant who was arrested with 143.7 kilograms of marijuana but was sentenced based on multiple quantities of methamphetamine that confidential informants had told law enforcement the defendant was dealing. The Seventh Circuit reversed the district court's sentence and remanded for resentencing because the district court did not take steps to ensure the information provided by confidential informants was reliable although the defendant objected. *Id.* at 871-72. The Seventh Circuit explained the PSR did not contain any information that the informants' statements were known to be reliable, and although specific dates and quantities were provided, this did not make the information reliable in the face of defendant's objection. *Id.*

In a similar case, *United States v. Williams*, the Tenth Circuit remanded for resentencing where the district court made its drug quantity determination based on packages delivered to the defendant's brother's house rather than packages delivered to the defendant's home. 48 F.4th 1125, 1133-35 (10th Cir. 2022). The Tenth Circuit concluded it was clear error to rely on contested allegations in the PSR for which the government presented no evidence. *Id.* at 1134. The Tenth Circuit was

guided by its precedent that, “Although estimates are not forbidden, the need to estimate drug quantities at times is not a license to calculate drug quantities by guesswork.” *Id.* at 1133 (quotation omitted). “Moreover, when choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution.” *Id.* (quotation omitted).

In the present case, the district court reached a drug quantity determination without addressing troublesome evidentiary gaps. The district court’s conclusion that the ledgers in this case demonstrated marijuana sales is purely an assumption. Although McDonald’s trial counsel conceded that the substance seized from McDonald was marijuana, there was no evidence that the ledgers represented marijuana sales. The ledgers do not show that McDonald engaged in a certain amount of marijuana sales, much less marijuana sales made as part of the charged conspiracy. It is unclear from the ledgers whether the entries therein refer to marijuana, hemp, or something else. *See* 5th Cir. R. 432-449. There is no reference to marijuana in the ledgers, and there is no evidence that all entries in the ledgers were part of the charged conspiracy. *See* 5th Cir. R. 432-449. The PSR and the

Government simply assumed every entry in every ledger constituted evidence relating to marijuana sales and the conspiracy.

McDonald presented rebuttal evidence showing that the ledgers included significant hemp transactions, and the Government was unable to counter this evidence. At his motion to withdraw hearing, McDonald testified that he sold massive quantities of hemp. 5th Cir. R. 264. At sentencing, McDonald presented a witness corroborating his testimony.

Elizabeth Bobek, a compliance consultant to the cannabis industry in Oregon, testified that she met McDonald and did business with him in 2019. 5th Cir. R. 359-60. She testified that McDonald was dealing in large amounts of hemp. 5th Cir. R. 362, 372. She also testified that with respect to the ledgers at issue in this case, it was “impossible” to tell whether they referenced marijuana or hemp. 5th Cir. R. 364-67.

Moreover, the Government’s own lab reports show that not all of the substance seized was marijuana. 5th Cir. R. 417-18. Lab reports obtained by McDonald’s trial counsel and the testimony of Ms. Bobek also confirm that some of the substance seized was CBD. 5th Cir. R. 368-70, 419-22. Text messages from a confidential informant show that

McDonald previously sold him CBD. 5th Cir. R. 423. It is undisputed that McDonald sold hemp.

With unrebutted evidence presented that McDonald sold both marijuana and hemp, it was the Government's burden to prove that the ledger listed amounts of marijuana rather than hemp. The Government introduced zero evidence proving the amounts listed on the ledgers were marijuana. The Government did not put on a witness at sentencing to testify that any specific product names listed on the ledgers represented marijuana. The Government did not present any affidavit regarding the products named in the documents. Although Government attorneys repeatedly asserted the products were marijuana, unsworn assertions by the Government's attorneys are insufficient to show by a preponderance of evidence that the names on the ledgers represented marijuana.

The PSR's statements that the ledgers and records supported McDonald being held responsible for 2,513 pounds of marijuana are bald conclusionary statements, especially considering the Government's own evidence that McDonald also dealt in hemp. 5th Cir. R. 423. McDonald's participation in a conspiracy involving nearly 300 pounds of marijuana seized does not mean he was responsible for 2,513 pounds of marijuana.

Moreover, because the ledgers show “pre-orders” or “inventory logs,” the calculation of the amounts of any product are unreliable and duplicative. Certain records in the ledgers appear to be inventories or wishlists, *see* 5th Cir. R. 5th Cir. R. 436, 455, while others show sales. *See, e.g.*, 5th Cir. R. 443. This means adding up all the product listed, whether inventory or sale, probably resulted in double-counting.

The Government did not establish by a preponderance of evidence that the records in the ledger represented marijuana, sales, or part of the charged conspiracy. While a district court may use reasonable extrapolation, that is not what occurred at McDonald’s sentencing. The district court did not extrapolate from any specific testimony that McDonald sold X amount of marijuana for three to five months to determine that McDonald sold 5X marijuana. Instead, the Government and the court simply assumed that all the amounts listed on the documents reflected marijuana sales and were relevant conduct. Because the district court’s drug quantity determination was based on its own hunch or intuition regarding the contents and meaning of the ledgers, that determination violated McDonald’s right to due process.

II. McDonald's right to due process was violated when the drug quantity attributed to McDonald was based in part on a transaction in Oregon about which the Government introduced no evidence to show McDonald had control or involvement.

The district court further erred by attributing an additional 330 pounds to McDonald based on a document he possessed detailing the transport of the marijuana within Oregon *by someone else* (not McDonald). 5th Cir. R. 499 (PSR ¶ 15).

Again, a criminal defendant has a due process right to be sentenced based on accurate information. *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.

In this case, the Oregon document does not provide a sufficient basis for additional marijuana to be attributed to McDonald. The Government presented no evidence whatsoever to show McDonald had control over the transfer reflected in the document. The Government presented no evidence whatsoever to show the transfer within Oregon resulted in drugs being sold in Texas.

McDonald testified, “all this was[,] was a receipt showing prices for me to have pricing and to—because I was fixing to buy an extractor.” 5th Cir. R. 314-16. The document itself does not show any apparent connection to McDonald. 5th Cir. R. 556-64. In the document, the person transporting the cannabis is identified as Andrew Galligan. 5th Cir. R. 424. The Government has made no connection between Mr. Galligan and McDonald.

Confronted with this lack of evidence, and defendant’s objections thereto, the district court failed to conduct a sufficiently searching inquiry into the government’s evidence to ensure its probable accuracy. McDonald’s sentence based on unreliable and insufficient evidence

cannot stand. The Fifth Circuit's erroneous affirmance of the district court's reliance on the PSR should be reversed.

III. McDonald's right to due process was violated when his criminal history score and level were drastically increased as a result of purported relevant conduct, while the existence and relevant nature of such conduct was not supported by the evidence.

Finally, the district court violated McDonald's right to due process by accepting the PSR's assessment of McDonald's criminal history score and level despite the absence of evidence supporting the inclusion of decades-old criminal history. The Fifth Circuit erred by concluding there was no clear error in this regard. App., *infra*, at 2a.

The vast majority of McDonald's criminal history score, 12 out of the 14 points, was attributed to McDonald because of four aggravated robberies McDonald committed over the course of three weeks in 1995 at age 21, almost 25 years prior to McDonald's arrest in this case. 5th Cir. R. 503-05.

USSG § 4A1.2(e)(1) provides:

Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment, exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

McDonald's sentence for the robberies was *not* imposed within fifteen years of the defendant's commencement of the instant offense. 5th Cir. R. 503-04 (sentences for the 1995 robberies were imposed in 1998 and 1999). McDonald's sentence for the robberies did *not* result in his incarceration during the fifteen-year period prior to July 2019, the beginning date identified in McDonald's indictment and factual resume. 5th Cir. R. 503-04 (McDonald was released from prison in February 2004).

The PSR asserts discovery indicated there was relevant conduct on the last day of 2017 and in December 2018. 5th Cir. R. 498-99 (PSR ¶ 15), 503 (PSR ¶ 40). The implication is that McDonald's sentence for the robberies resulted in his incarceration during the fifteen-year period prior to these dates of relevant conduct in 2017 and 2018. Pursuant to § 1B1.3(a)(1)(A), to qualify as relevant conduct, the defendant's conduct must have "occurred during the commission of the offense of conviction, in preparation for that offense" or "in the course of attempting to avoid detection or responsibility for that offense." USSG § 1B1.3.

The PSR states that a review of McDonald's cell phone revealed "text or Snapchat messages that were consistent with marijuana

trafficking dating back to 2017.” 5th Cir. R. 498 (PSR ¶ 15). This is a conclusory statement, and conclusory statements are not rendered reliable by mere inclusion in the PSR. Simply because an action is consistent with certain behavior does not mean it proves that behavior by a preponderance of the evidence. Indeed, in the PSR, the probation officer admitted it had very little information about these messages. With regard to the evidence of defendant’s alleged drug trafficking activities in 2017, the probation officer stated in its Third Addendum to the PSR, “Due to the fact that there was no specific date given in 2017, the probation officer conservatively used December 31, 2017, as the defendant’s relevant conduct date.” 5th Cir. R. 577. The vague assertion that defendant was engaged in drug trafficking activities without any detail or even a date does not bear sufficient indicia of reliability to support its probable accuracy.

Moreover, there is no evidence to suggest these messages bore any connection whatsoever to the charged conspiracy, or that they occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. The unspecified messages might evidence simple

marijuana sales rather than conspiracy or they might evidence some other business altogether. McDonald’s trial counsel, an officer of the court obligated to be truthful to the court, represented to the district court that he “scoured the discovery and scoured the defendant’s phone” but could not “find any text messages from 2017 that deal with anything associated with this.” 5th Cir. R. 385-86. The Government provided no evidence to the contrary.

Similarly, the PSR improperly holds McDonald responsible for relevant conduct dating back to December 2018 because of the ledgers. As discussed above, the ledgers do not show whether the entries documented sales, orders, or inventory logs; whether the entries referred to marijuana, hemp, or something else.

Even if there was evidence of McDonald engaging in marijuana transactions in 2017 or 2018, there is no similarity between, or regularity in, transactions from 2017 to 2020. “For the concept of the same course of conduct, offenses must be ‘sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.’” *United States v. Lindsey*, 969 F.3d 136, 141 (5th Cir. 2020) (quoting USSG § 1B1.3, cmt. n.5(b)(ii)). To

determine whether offenses so qualify, courts should consider “the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses.” *Id.*

Here, even assuming marijuana was involved in each offense, the transactions were for widely different amounts, and there was no evidence of other similarities, such as a common source, supplier, or destination of the drugs, and there was no evidence of co-conspirators or common co-conspirators with respect to the different transactions. This suggests there was not sufficient similarity for any offenses to be considered relevant conduct. *See Lindsey*, 969 F.3d at 142. In addition, there is not a repeated pattern of conduct linking the purported relevant conduct. The Oregon document does not evidence a transaction in Texas, and there is more than one ledger involved in this case. The products listed are not the same in each ledger. *Compare* 5th Cir. R. 424-432, 5th Cir. R. 433-449, and 5th Cir. R. 450-463. The transactions were not sufficiently similar or regular; hence, the transactions should not be considered part of the same course of conduct. *See Lindsey*, 969 F.3d 136, 143.

Because the preponderance of evidence does not reliably show relevant conduct in 2017 or 2018, McDonald's prior sentence for robberies should not have been counted in his criminal history score and level. The district court erred by accepting the PSR's assessment in this regard, and the 5th Circuit erred by affirming that acceptance.

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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