No. _____

In The
Supreme Court of the United States

MICHAEL LEE MAC CLEARY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the due process right to be sentenced based on accurate information that the Court recognized in *Townsend v. Burke*, 334 U.S. 736 (1948), is limited to uncounseled defendants and errors about their criminal histories or applies to any assumption or fact cited as a basis of a sentence without giving the defendant a chance to object.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Michael Lee Mac Cleary and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Mac Cleary*, No. 21-50240 (9th Cir. April 25, 2023).
- *United States v. Mac Cleary*, No. 3:20-cr-2361-LAB-1 (S.D. Cal. Nov. 5, 2021).

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Petitioner Michael Lee Mac Cleary respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Nearly eighty years ago, this Court held that a person cannot, consistent with due process, be sentenced based on information "extensively and materially false, which the prisoner had no opportunity to correct." *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

In the decades since, and increasingly as of late, the courts of appeals have divided over that holding's meaning. The Second, Third, Fourth, and Seventh

Circuits hold that the Court, as it usually does, meant what it said in *Townsend*. A person cannot, consistent with due process, be sentenced based on false information. Meanwhile, the First, Fifth, Eighth, and Tenth Circuits have all-but limited *Townsend* to its facts. They hold that it governs only when the defendant lacks a lawyer or when the district court misstates a defendant's prior convictions. Finally, the Sixth, Ninth, and Eleventh Circuits have given conflicting and muddled holdings about whether *Townsend* merely requires that a person has a chance to object at sentencing or whether it also prohibits sentencing based on false or unreliable information. This case only added to that confusion.

After arrest and before sentencing, Mr. Mac Cleary spent his first year in jail with a mismanaged, infected colostomy bag. It leaked. Then there were surgeries. Then there were complications from those surgeries. Then, as of sentencing, there was at least one more surgery to come. Even the government argued that Mr. Mac Cleary should get a relative break because of his "significant" health challenges in jail.

Yet here: (1) the district court sua sponte declared that Mr. Mac Cleary was receiving adequate medical care, despite no party arguing or any evidence indicating as much; (2) imposed a sentence two years' longer than the government's recommendation; and (3) walked off the bench before giving Mr. Mac Cleary a full chance to object. Due Process that is not.

Clarity—and the kind that only the Court can provide—is needed. Thus, at a minimum, this Court should clarify that, under *Townsend*, a judge cannot premise a

sentence on a sua sponte assumption unless (1) the defendant is given a meaningful chance to challenge that assumption, and (2) that assumption is supported by at least a preponderance of the evidence.

OPINION BELOW

The Ninth Circuit affirmed Mr. Mac Cleary's sentence in a memorandum disposition holding that the district court's assumption that Mr. Mac Cleary was receiving adequate medical care was not an "abuse of discretion." *See* Appendix to the Petition ("Pet. App.") at 2a.

JURISDICTION

The Court of Appeals entered judgment on April 25, 2023. It then denied Mr. Mac Cleary's joint petition for rehearing and rehearing en banc on June 28, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A lot of people who try to walk drugs across the border lived tough lives. That is particularly true for Mr. Mac Cleary.

Mr. Mac Cleary was a military kid, and the family moved often. When he was eleven years old, a neighbor sexually abused him. He acted out. He had strained relationships with his parents, who divorced during his teens. In 2001, his only child died at the age of three. He and his first wife then separated. He married again, but his second wife was a frequent drug user, and they separated, too.

Mr. Mac Cleary, meanwhile, has been disabled since a 2007 construction accident. He got by with disability assistance and prescription pain medication. He

moved to Tijuana six years ago to save money. He had a colostomy bag installed in 2018.

In between all of that, he picked up a variety of smaller offenses. There was an apparent theft at twenty-two years old. During his thirties, he sold methamphetamine in Iowa. In 2004, the District of Nebraska sentenced him to forty-six months' imprisonment for being a felon in possession of a firearm. He was convicted of assault when he was thirty-eight.

In 2019, Mr. Mac Cleary started using what he sold. The methamphetamine eased the pain, he said. That year, he pleaded guilty to state charges in California for carrying more than 28.5 grams across the United States' border. He was released in March 2020. Then there was a pandemic.

Mr. Mac Cleary needed cash and had trouble restarting disability assistance. So, he went to Mexico with borrowed money and a plan to buy drugs that he could resell in the United States. It did not work; he was arrested trying to come back through the port of entry.

That is when Mr. Mac Cleary's real troubles began. Jail was not easy for Mr. Mac Cleary. There were problems caring for his colostomy bag early on. In October 2020, he tested positive for Covid-19. He had moderate to severe symptoms. That same month, doctors determined that he had "ineffective healthcare management." Pet. App. 63a. While in custody, he was not getting sufficient supplies for his colostomy bag. When he got extra bags, they were too thin and

broke. In other words, the bag collecting his feces would overfill, strain the opening his stomach, and leak. "He would wake up in his mess repeatedly." Pet. App. 16a.

On December 25, 2020, the doctors noted that his skin eroded back ten centimeters around the opening to the bag, which caused fluid to ooze. He asked for help but was told he had to handle it himself.

By the end of January 2021, he was in the emergency department and doctors said that he needed surgery. Meanwhile, his colostomy bag still leaked, tarnishing his clothes and underwear. That was "distressing." Pet. App. 70a.

In May, doctors put Mr. Mac Cleary under general anesthesia to remove his colostomy bag, reconnect his colon, repair a hernia containing his small bowel near the hole in his stomach, and remove his appendix along with scar tissue. That procedure came after repeated requests by his trial lawyer.

Doctors soon found signs of kidney failure and an infection. Twelve days after surgery, he was transferred to another hospital. Another week later, doctors noted that he was still dealing with a hernia, acute renal failure, "possible bowel leakage," an abdominal infection, hypertension, a wound infection, and acute hypoxic (low oxygen) respiratory failure. Pet. App. 82a. He had a fever, chills, diarrhea and "constant abdominal pain." Pet. App. 83a. His "[i]nfectious symptoms [had] not stabilized" and he was at risk of "rapid decompensation." *Id.* On June 10, there was another surgery to try to determine what was wrong with Mr. Mac Cleary's bladder. Nearly a month after his first surgery, doctors noted a list of fourteen problems that

might need specialist care.[1] They recommended another surgery. They noted "[b]arriers to [d]ischarge" back to jail included his future "caregiver limitations, [c]apacity for self-care, . . . [p]otential need for 24-hour care, [p]otential need for skill[ed]/nonskilled services." Pet. App. 88a.

On June 24, Mr. Mac Cleary was back in the emergency room with bleeding from a tube attached to his kidney and reoccurring pelvic abscesses, a "life-threatening" development.[2] In rehab, he was handcuffed and had two guards at his bedside. More than two months later—more than a year after he entered federal custody, he was back in the emergency room. Another surgery was scheduled for the spring of 2022. His sentencing hearing repeatedly was postponed.

In November, Mr. Mac Cleary asked to be sentenced. He hoped that he could then be designated to a BOP medical facility where he would not remain in restraints, which had caused blood clots and the need for another surgery.

The government recommended that the court credit Mr. Mac Cleary for participating in the district's Fast Track program, accepting responsibility, signing a plea agreement within two months of arrest, and for waiving indictment. It asked the court to vary downward and sentence Mr. Mac Cleary to sixty months' imprisonment.

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[1] Those were (1) wound infection at surgical site; (2) intra-abdominal abscess; (3) urinary retention; (4) hypertension; (5) obesity; (6) hyponatremia; (7) acute renal failure; (8) hypalbuminemia; (9) anemia, chronic; (10) parastomal hernia repair and appendectomy; (11) deep vein thrombosis; (12) restless leg syndrome; (13) hyperlipidemia; (14) fatty liver. Pet. App. 88a–89a.

[2] *See* Khalida Khaliq et al., Pelvic Abscess, PubMed.gov (May 8, 2022), https://pubmed.ncbi.nlm.nih.gov/31424876/#:~:text=A%20pelvic%20abscess%20is%20a,hematoma%20spreads%20to%20parametrial%20tissue.

The government cited three reasons for the additional variance. First, it "appreciated" the "very genuine" letter that Mr. Mac Cleary wrote to the district court. Pet. App. 21a. Second, the government noted that Mr. Mac Cleary had tried to smuggle a "small amount" of drugs, about 394 grams of methamphetamine. *Id.* Finally, the government noted Mr. Mac Cleary's "significant medical issues." *Id.*

The court determined that Mr. Mac Cleary's effective Guidelines range was 84–105 months of imprisonment. It also agreed that the amount of drugs "kind of pales in comparison to cases, even this day, I've had. The last one was 86 kilos of methamphetamine. Another one was 54 kilos." Pet. App. 24a. Mr. Mac Cleary, "compared to them[,] is a piker." *Id.*

Nevertheless, the court had concerns. It noted Mr. Mac Cleary's long record of mostly minor offenses. It also refused to consider that jail had been more harrowing for Mr. Mac Cleary than he could have anticipated. When Mr. Mac Cleary's trial lawyer tried to object, the court cut her off: "No, no, I've heard from you fully, Ms. Khan, I'm not going to revisit this." Pet. App. 29a.

And in the breath before the court imposed sentence, it announced an assumption that Mr. Mac Cleary was "getting adequate treatment." Pet App. 31a. No party had asserted that. Without skipping a beat, the court sentenced Mr. Mac Cleary to seven years' imprisonment and five years' supervised release.

The court then offered Mr. Mac Cleary's lawyer a chance to object. When she argued that the court should have assessed if Mr. Mac Cleary was physically well enough to be sentenced, the court called her "disingenuous." Pet App. 36a. When

she tried to explain, the court cut her off, again, and said, "That's enough. That's all. We're in recess." *Id.* The sentencing judge left the courtroom.

Mr. Mac Cleary appealed. As relevant here, he argued that the district court violated this right to due process and this Court's decision in *Townsend* when it premised his sentence on a baseless assumption: that he was receiving adequate medical care. No party had asserted as much and, indeed, could not have based on this appeal's harrowing record.

The Ninth Circuit affirmed. It held that the district court "did not procedurally err in its consideration of Mac Cleary's medical condition." Pet. App. 2a. Reviewing for abuse of discretion, it reasoned that "[a]lthough Mac Cleary received inadequate medical care for his colostomy bag in the past, the district court's conclusion that he was getting adequate medical treatment in the Bureau of Prisons at the time of sentencing was 'plausible, rational, and based on the record; therefore, it [was] not clearly erroneous.'" *Id.* (quoting *United States v. Graf*, 610 F.3d 1148, 1158 (9th Cir. 2010)).

The panel then offered its own sua sponte interpretation of a single notation in Mr. Mac Cleary's medical records to support that holding. Specifically, it highlighted an October 2020 note that described "ineffective health care maintenance."[3] *Id.* It then reasoned that this passage "refers to his previous issues with inadequate medical care but does not mention continued inadequacy." *Id.* at

[3] That appeared to be a rough quote of page 78 of the excerpts of record, which quoted an October 26, 2020, note from Mr. Mac Cleary's medical records that he was receiving "ineffective healthcare management." *Compare* Pet. App. 2a *with* Pet. App. 63a.

2a–3a. The panel, like the district court, did not acknowledge the months of undisputed complications that occurred after October 2021.

Mr. Mac Cleary sought rehearing and rehearing en banc, arguing that the panel disregarded Mr. Mac Cleary's *Townsend*-based claim. Because the panel and the broader Ninth Circuit declined to provide relief, Mr. Mac Cleary now respectfully petitions the Court for certiorari.

REASONS FOR GRANTING THE WRIT

After decades of disagreement, the courts of appeals remain divided on a foundational issue in federal prosecutions: Whether due process requires a person to be sentenced on accurate and reliable information and a chance to object to information expressly cited in selecting a sentence. That split means that a court can premise a person's sentence on baseless assumptions in one circuit that are prohibited in another.

The Court should use this case to resolve that split. Mr. Mac Cleary squarely presents the issue, and it is outcome determinative. The Ninth Circuit also is just wrong. Its permissive attitude towards sentences based on inaccurate information is incompatible with due process and this Court's clear precedent. The Court should grant the petition.

I. The courts of appeals are divided as to whether it offends due process to sentence a person based on inaccurate information.

The courts of appeals have long been divided about whether a sentencing court violates due process when it premises a term of imprisonment on an erroneous

assumption and does not give the defendant a chance to respond. That dispute can be traced back to how one reads the Court's decision in *Townsend*.

In *Townsend*, the sentencing court read aloud a lawyer-less defendant's criminal record and made assertions about past offenses just before imposing sentence. 334 U.S. at 739–40. Some assumptions were wrong. *Id.* at 740. The sentencing court did not recognize that the defendant had been acquitted of two of the charges it cited and that a third had been dismissed. *Id.*

Because those false assumptions were "given such emphasis" by the sentencing judge, the Court held that it was "not at liberty to assume that . . . [those assumptions] did not influence the sentence which the prisoner is now serving." *Id.* Thus, the person "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *Id.* at 741. And the Court held that "[s]uch a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." *Id.*

The Court placed some limits on its holding. It made clear that due process does not guarantee faultless fact-finding at sentencing, especially when the judge engaged in a "scrupulous and diligent search for truth." *Id.* Rather, it held that due process prohibits "the careless or designed pronouncement of sentence on a foundation *so extensively and materially false, which the prisoner had no opportunity to correct* by the services which counsel would provide." *Id.* (emphasis added).

In the years since, the Court has noted in passing that *Townsend* placed some limits on a sentencing court's use of materially false information. *See Beckles v. United States*, 580 U.S. 256, 268 (2017); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *see also Kinder v. United States*, 504 U.S. 946, 947 (1992) (White, J., dissenting from denial of certiorari) (citing *Townsend*). But the Court has never clarified the extent to which *Townsend*'s sweeping holding applies beyond its facts. The result is that the courts of appeals have applied various—and incompatible—glosses to the case in the many years since.

A. The Second, Third, Fourth, and Seventh Circuits hold that *Townsend* proscribes basing a sentence on an erroneous fact.

Four circuits give *Townsend*'s broad language a broad meaning: Due process proscribes a sentencing court's reliance on false information. The Third Circuit cites *Townsend* for the propostion that "be[ing] sentenced on the basis of materially false information[is] a well-established due-process violation." *United States v. Doe*, 810 F.3d 132, 156 (3d Cir. 2015); *see also United States v. Ausburn*, 502 F.3d 313, 322 (3d Cir. 2007) (same); *Moore v. United States*, 571 F.2d 179, 183 (3d Cir. 1978) (same).

Similarly, the Fourth Circuit reads *Townsend* to hold that "due process forbids reliance on materially false or unreliable information in imposing a sentence." *United States v. Yeigh*, 725 F. App'x 207, 209 (4th Cir. 2018) (per curiam) (unpublished) (citing *Townsend*, 334 U.S. at 740–41). Thus, that court "emphasize[s] that Supreme Court precedents 'recognize a due process right to be sentenced only on information which is accurate.'" *United States v. Dalzell*, 455 F.

App'x 306, 310 (4th Cir. 2011) (unpublished) (collecting cases, including *Townsend*); *see also United States v. Lee*, 540 F.2d 1205, 1211 (4th Cir. 1976).

So too in the Seventh Circuit, where "[a] convicted defendant has a due process right to be sentenced based on accurate information." *United States v. Propst*, 959 F.3d 298, 304 (7th Cir. 2020) (citing *Townsend*, 334 U.S. at 741); *see also United States v. Guajardo-Martinez*, 635 F.3d 1056, 1059 (7th Cir. 2011); *United States v. Jones*, 454 F.3d 642, 652 (7th Cir. 2006). There, a defendant makes out a *Townsend* violation when showing "that information before the sentencing court was inaccurate, and second, that the sentencing court relied on the misinformation in passing sentence." *Propst*, 959 F.3d at 304. A defendant shows such reliance simply by showing that the sentencing court gave "explicit attention to it." *Id.* (citation omitted).

The Second Circuit gives *Townsend* the most muscular reading. It cites it for the proposition that "what the Due Process Clause does require is that a defendant not be sentenced on the basis of 'materially untrue' assumptions or 'misinformation,' and that he have an opportunity to respond to material allegations that he disputes, in order that the court not sentence him in reliance on misinformation." *United States v. Delacruz*, 862 F.3d 163, 175 (2d Cir. 2017). In other words, regardless of whether the information can be proven false, the Due Process Clause guarantees the opportunity to respond to material allegations at sentencing.

B. The First, Fifth, Eighth, and Tenth Circuits have limited *Townsend* to cases involving uncounseled defendants or sentences premised on clear misreadings of past convictions.

By contrast, the Fifth, Eighth, and Tenth Circuits have all-but limited *Townsend* to its facts. The First Circuit limited the case to uncounseled defendants. In *Untied States v. Dupont*, that court dismissed concerns about people sentenced "on the basis of 'materially untrue assumptions or misinformation.'" 15 F.3d 5, 7 (1st Cir. 1994). It then distinguished *Townsend* by noting that it "involved a defendant, unrepresented by counsel at sentencing." *Id.* The Tenth Circuit appears to have done the same. *See United States v. Mulay*, 642 F. App'x 853, 854 (10th Cir. 2016) (unpublished) (holding that *Townsend* does not apply because it "involve[d] sentencing determinations at odds with the right to counsel").

The Fifth Circuit, by contrast, limits *Townsend* to when a sentence is based on a "nonexistent or constitutionally invalid conviction." *Roussell v. Jeane*, 842 F.2d 1512, 1524 (5th Cir. 1988); *see also Long v. Collins*, 988 F.2d 1210 (5th Cir. 1993) (rejecting *Townsend*'s applicability because "[t]he inaccurate information . . . did not focus on [the defendant's] criminal record at all"). The Eighth Circuit limits *Townsend* to cases where "the defendant was uncounseled and [the] sentenced [was] based upon inaccurate information in his criminal record." *United States v. Oaks*, 606 F.3d 530, 542 (8th Cir. 2010).

C. The Sixth, Eleventh, and Ninth Circuits continue to issue conflicting holdings about *Townsend*'s scope.

Finally, the Sixth, Eleventh, and Ninth Circuits appear to have chosen a middle and muddled path. The Sixth Circuit has held that *Townsend* guarantees

"that a defendant be afforded *the opportunity of rebutting* derogatory information demonstrably relied upon by the sentencing judge, when such information can in fact be shown to have been materially false." *Collins v. Buchkoe*, 493 F.2d 343, 345 (6th Cir. 1974); *see also Stewart v. Erwin*, 503 F.3d 488, 495 (6th Cir. 2007) (same). That arguably limits *Townsend* to a chance to object and present contrary evidence. But the Sixth Circuit also has held, in passing, that *Townsend* "provide[s] the general rule that a violation of due process exists when a sentencing judge relies upon 'erroneous information.'" *Arnett v. Jackson*, 393 F.3d 681, 686 (6th Cir. 2005). Another panel has held that *Townsend* proscribes sentences based on erroneous information of "constitutional magnitude," without explaining what that term means. *United States v. Key*, 256 F. App'x 775, 779 (6th Cir. 2007) (per curiam) (unpublished).

Similarly, the Eleventh Circuit has indicated that *Townsend* merely "assures the defendant he will be given adequate notice and an opportunity to contest the facts relied upon to support his criminal penalty." *United States v. Satterfield*, 743 F.2d 827, 840 (11th Cir. 1984).

The Ninth Circuit's cases meanwhile contain glaring tension. Nearly fifty years ago, that court held that "[t]he clear teaching of *Townsend* and [its progeny] is that a sentence will be vacated on appeal if the challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence." *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978). That would seem to put the Ninth Circuit in the company of the Second, Third, Fourth, and Seventh Circuits.

But in *United States v. Franklin*, the Ninth Circuit addressed how *Townsend* and its progeny applied to a court's reliance on hearsay at sentencing. 18 F.4th 1105, 1115–25 (9th Cir. 2021), *cert. denied*, 143 S. Ct. 219 (2022). And in doing so, it adopted a contrary synthesis of its caselaw. It held that that a sentencing court can rely on hearsay—and presumably other information—so long as it is "*either* procedurally reliable *or* substantively reliable." *Id.* at 1125 (emphases added).

And according to the Ninth Circuit, such information is procedurally reliable so long as the court applied the correct burden of proof and gave the defendant a chance to test its accuracy with cross-examination. *Id.* at 1124–25. It seemingly would not matter if the information at sentencing appeared to be false, simply "applying the correct burden of proof would suffice." *Id.* at 1128 (Berzon, J., concurring in the judgment).

In other words, the lower courts have deeply divergent views about what satisfies due process at sentencing under *Townsend*. Four circuits hold that people cannot be sentenced based on false information. Another four circuits hold that they can, so long as they had lawyers or that the false information was not a blatant misreading of their criminal histories. And three circuits seem to hold that people can be sentenced based on at least some false information, so long as they had an opportunity to object. Again, clarity is needed.

II. Whether courts can sentence people based on erroneous assumptions without a chance to object is a question of profound importance for millions of people.

More than 400,000 people in the United States go to prison each year. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2021—STATISTICAL TABLES 17 (2022). Those people are sentenced not just based on what they did, but based on who judges determines them to be. *See, e.g.*, 18 U.S.C. § 3553(a). Indeed, there generally is no limitation on the kinds of information that a sentencing court can consider in increasing or decreasing a term of imprisonment. *United States v. Tucker*, 404 U.S. 443, 446 (1972).

But a sentencing court's expansive discretion comes with a catch. "A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process." *United States v. Weston*, 448 F.2d 626, 634 (9th Cir. 1971). That requirement is foundational not just to the Constitution, but to the legitimacy of the criminal legal system.

The Fifth and Fourteenth Amendments provide that no person shall be deprived "of life, liberty, or property, without due process of law." U.S. Const. amends. V, XIV. And even in cases that "may not involve the stigma and hardships of a criminal conviction," due process "recogniz[es] that the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). In criminal cases, however, the right to be heard is not

the thing itself. Rather, it is a mechanism to ensure that a "court not sentence [a person] in reliance on misinformation." *Delacruz*, 862 F.3d at 175.

This Court and others have recognized the necessity of such protections. That is because "the public legitimacy of our justice system. relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction.'" *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (quoting Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 215–216 (2012)). Allowing people to have their sentenced premised on baseless assumptions about who they are—with allowing no opportunity for error correction—undermines any such legitimacy. That makes the question presented here one of vital importance.

III. Mr. Mac Cleary's case presents the right vehicle to examine the scope of *Townsend*.

Mr. Mac Cleary's case presents the right vehicle to resolve this circuit split for two reasons. First, the issue is squarely presented. The district court cited a baseless assumption in the breath before it imposed a sentence two years longer than the government's recommendation. And, as the Ninth Circuit recognized, the district court left the bench without giving Mr. Mac Cleary's lawyer "a full opportunity to assert her objections." Pet. App. 2a n.2. Mr. Mac Cleary then relied extensively on *Townsend* in his appeal to the Ninth Circuit.

Second, the question presented will determine this case's outcome. If the Court holds that *Townsend* prevents the Court from premising a sentence on a (1)

false assumption or (2) a disputed assumption without a chance to object, Mr. Mac Cleary should get a remand. And if the Court holds that it does not offend due process to premise a sentence on a baseless assumption without giving the defendant a chance to object, Mr. Mac Cleary's sentence must be affirmed. That makes this case an excellent vehicle to resolve lower courts' disagreement.

IV. The Ninth Circuit's abrogation of *Townsend* is wrong, and the Court can provide a clear, workable standard.

The divergent approaches of the courts of appeals warrant review no matter which standard prevails. But granting the petition is particularly vital here because the Ninth Circuit's permissive and muddled approach to sentences based on demonstrably unreliable assumptions is wrong. To see why, one need look no further than this case.

Here, the Ninth Circuit declined to follow *Townsend*'s clear holding, as recognized by the Second Circuit and others. The Second Circuit recognizes that due process requires that a person not "be sentenced on the basis of 'materially untrue' assumptions or 'misinformation,' and that he have an opportunity to respond to material allegations that he disputes, in order that the court not sentence him in reliance on misinformation." *Delacruz*, 862 F.3d at 175. And, as discussed above, *Townsend*'s core holding is that a person cannot be sentenced based on information "extensively and materially false, which the prisoner had no opportunity to correct." *Townsend*, 334 U.S. at 741.

But, here, the panel very much did not take that approach. Indeed, the Ninth Circuit acknowledged that Mr. Mac Cleary did not get a chance to object after the

court said he was receiving adequate medical care and imposed sentence. Pet. App. 2a n.2. That alone warrants a remand.[4] *See Delacruz*, 862 F.3d at 175; *Satterfield*, 743 F.2d at 840; *Collins*, 493 F.2d at 345.

The Ninth Circuit also did not actually assess if the district court's assumption is false. Rather, it sua sponte combed the record and came up with an argument raised by neither party. It reasoned that an October 2020 medical records cited by Mr. Mac Cleary did not conclusively prove that he was receiving inadequate medical care a year later. But no one ever argued that theory because it makes no sense. That is because Mr. Mac Cleary argued that later medical records showed that he continued to receive inadequate care. That the Ninth Circuit never addressed that argument compounded the district court's due process violation.

The Ninth Circuit's approach also contravenes the basic elements of due process. As discussed above, "the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 168 (Frankfurter, J., concurring). That principle was not honored here.

As circuits that faithfully apply *Townsend* recognize, requiring sentences to be premised on accurate information "help[s] avoid the irrationality and unfairness inherent in a system in which a criminal penalty is designed for an individual whose characteristics differ from those of the person on whom punishment actually is imposed." *Moore*, 571 F.2d at 184. Or to put a finer point on it, there would be

[4] To the extent that the Ninth Circuit its own precedents in this case, that matters not in assessing if the Ninth Circuit erred here and if a protracted circuit split exists.

"something radically wrong with a system of justice that can produce such a result." *Weston*, 448 F.2d at 631.

There is a better way. Decades of percolation among the courts of appeals show that there is a clear and workable standard that complies with constitutional commands. A sentencing court cannot premise a sentence on a sua sponte assumption unless (1) the defendant is given a full chance to challenge that assumption, and (2) that assumption is supported by at least a preponderance of the evidence. *See, e.g.*, *Delacruz*, 862 F.3d at 175; *United States v. Juwa*, 508 F.3d 694, 701 (2d Cir. 2007). Because that standard was not met here, the Court should grant the petition.

CONCLUSION

For the foregoing reasons, Mr. Mac Cleary respectfully asks that the Court grant the petition for certiorari.

Respectfully submitted,

Date: September 26, 2023

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