

No. _____

In the
Supreme Court of the United States

Reynaldo Avila-Gonzalez,

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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QUESTION PRESENTED

Whether a federal court of appeals should vacate the sentence when the district adopts the invalid reasoning of a Presentence Report to resolve a factual or legal dispute, or whether this error may be excused if the court of appeals can identify from its own review of the record a valid hypothetical alternative basis for the district court's ruling?

PARTIES TO THE PROCEEDING

Petitioner is Reynaldo Avila-Gonzalez, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Reynaldo Avila-Gonzalez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgment and sentence is attached as Appendix B. The unpublished opinion of the Court of Appeals affirming the sentence is reprinted in Appendix A to this Petition.

JURISDICTION

The opinion below affirming the sentence was entered on December 13, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 32(i)(3) reads:

Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

STATEMENT OF THE CASE

A. Proceedings in District Court

Petitioner pleaded guilty without a plea agreement to one count of drug trafficking; specifically, he pleaded guilty to conspiring to traffic at least 500 grams of a mixture containing methamphetamine. (Record in the Court of Appeals, at 38-39). A Presentence Report (PSR) identified a Guideline range of 168-210 months imprisonment, owing to a final offense level of 35 and a criminal history category of I. (Record in the Court of Appeals, at 197, 200). The PSR did not apply USSG §§2D1.1(b)(18) or 5C1.2, Guideline “safety valve” provisions that free the court from the statutory minimum and reduce the offense level by two points when first offending drug defendants meet certain criteria. (Record in the Court of Appeals, at 192-193). The PSR provided only one reason for denying safety valve:

Per AUSA Shawn Smith, while the defendant did participate in a post-arrest interview; he had not provided all truthful information to the government as of the disclosure of this report. Thus, the reduction is not applied.

(Record in the Court of Appeals, at 192-193).

The defense filed an objection to the denial of the safety valve provisions, and another to the denial of a minor role reduction. (Record in the Court of Appeals, at 203). The PSR Addendum rejected both, with the following commentary as to safety valve, again citing nothing save the opinion of the prosecutor as to the defendant’s truthfulness:

As noted in that paragraph, per AUSA Shawn Smith, while the defendant did participate in a post-arrest interview; he had not provided

all truthful information to the government as of the disclosure of this report. Thus, the reduction is not applicable.

(Record in the Court of Appeals, at 210).

At sentencing, the district court first provided its tentative conclusion that the objections should be overruled “for the reasons set out in the PSR addendum.” (Record in the Court of Appeals, at 148). The PSR Addendum, again, referenced only the prosecutor’s opinion.

The prosecutor then called a Homeland Security agent that worked on the case. (Record in the Court of Appeals, at 151). The agent recounted the arrest and initial interview of the defendant, as well as the search of his home. (Record in the Court of Appeals, at 152-155). He then proceeded to describe the subsequent debriefing interview, which agents terminated on the belief that Appellant had not been forthcoming. (Record in the Court of Appeals, at 155-156).

The district court overruled the objection, adopting the factual findings of the PSR and Addendum, but making no other findings. (Record in the Court of Appeals, at 169). It then varied downward to a sentence of 135 months imprisonment, the bottom of the range that would have been applicable had all of the methamphetamine of high purity been treated as methamphetamine of lesser purity. (Record in the Court of Appeals, at 173-176). In doing so, it noted that the variance had been influenced by the defendant’s cooperation, but did not disclaim the impact of the Guidelines in its choice of sentence. (Record in the Court of Appeals, at 175).

B. Appellate Proceedings

On appeal, Petitioner argued that the district court had erred in adopting the PSR and Addendum to resolve the safety valve issue. *See* Initial Brief in *United States v. Avila-Gonzalez*, No. 23-10161, 2023 WL 5426739, at *6-7 (5th Cir. Filed August 14, 2023)(“Initial Brief”). Specifically, he noted that these documents relied exclusively on the unsworn statements of the prosecutor, which the Fifth Circuit has held to be an insufficiently reliable basis for sentencing. *See* Initial Brief, at *6 (*citing United States v. Patterson*, 962 F.2d 409, 415 (5th Cir. 1992)). Alternatively, he challenged the adequacy of the agent’s testimony to support the district court’s finding that the defendant had not been forthcoming in the interview. *See id.* at *6-7.

The court of appeals affirmed. *See* [Appx. A]; *United States v. Avila-Gonzalez*, No. 23-10161, 2023 WL 8622285 (5th Cir. Dec. 13, 2023)(unpublished). It did not pass on the adequacy of the PSR’s reasoning. *See Avila-Gonzalez*, 2023 WL 8622285, at *1. Instead, it cited portions of the agent’s testimony that *could have* justified a negative finding as to the defendant’s candor. *See id.* It also held that the defendant had not adequately asserted his own truthfulness. *See id.*, at *2. As such, the court of appeals ignored the finding actually made by the district court – which simply adopted the PSR – and substituted its own factual findings, supported by record evidence the district court did not cite.

REASONS FOR GRANTING THE PETITION

The opinion of the court below conflicts with that of other federal courts of appeal on an important matter of federal law.

“As amended by the Sentencing Reform Act, Federal Rule of Criminal Procedure 32 provides for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence.” *Burns v. United States*, 501 U.S. 129, 134 (1991). A critical component of this regime is Federal Rule of Criminal Procedure 32, which requires that the sentencing court “for any disputed portion of the presentence report or other controverted matter [] rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.” Fed. R. Crim. P. 32(i)(3)(B). As the Commission has long recognized, “[a]lthough lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care.” USSG §6A1.3, comment.

Notwithstanding these formal requirements, the courts of appeals permit certain concessions to the press of the docket. Sentencing courts may in appropriate cases adopt the PSR rather than fully enunciate their own findings. *See United States v. Skrodzki*, 9 F.3d 198, 202 n. 7 (1st Cir.1993); *United States v. Bolden*, 325 F.3d 471, 497 (4th Cir.2003); *United States v. Mora*, 994 F.2d 1129, 1141 (5th Cir.1993); *United States v. Williams*, 41 F.3d 496, 498 (9th Cir.1994). And in some cases, courts of appeals will accept implicit rather than explicit findings of fact. *See United States v. Saxena*, 229 F.3d 1, 11 (1st Cir.2000); *United States v. Johnson*, 14 F.4th 342, 349

(5th Cir. 2021). The present case examines the proper limits of informality insofar as it implicates the parties' rights to a clear and accurate resolution of factual questions.

In this case, the district court resolved a disputed factual matter *solely* by adopting the PSR (and Addendum). (Record in the Court of Appeals, at 148, 169). The PSR, however, cited only the prosecutor's unsworn statement in support of its conclusion, a source the Fifth Circuit has found unreliable as a matter of law. (Record in the Court of Appeals, at 192-193, 210); *see also United States v. Patterson*, 962 F.2d 409, 415 (5th Cir.1992) ("unsworn assertions of the government's attorney do not provide, by themselves, a sufficiently reliable basis on which to sentence the defendant."); *accord United States v. Jones*, 475 F.3d 701, 705 (5th Cir. 2007); *United States v. Alfaro*, 919 F.2d 962, 966 & n.18 (5th Cir.1990); *United States v. Miller*, 66 F.3d 322 (5th Cir. 1995)(unpublished).

The Fifth Circuit, however, excused this reliance on a legally deficient source. *See* [Appx. A]; *United States v. Avila-Gonzalez*, No. 23-10161, 2023 WL 8622285, at *1 (5th Cir. Dec. 13, 2023)(unpublished). In doing so, it recounted evidence adduced in the district court that met constitutional standards of reliability, notwithstanding the fact that the district court *did not cite that evidence* in its finding. *See Avila-Gonzalez*, 2023 WL 8622285, at *1. As such, the court below declined to offer relief, notwithstanding the district court's adoption of a PSR that relied on a legally insufficient source, in effect substituting its own factual findings for those of the district court.

This resolution of the case conflicts with the law of other circuits. In those jurisdictions, the focus of appellate review is the factual finding actually made by the district court. If the district court adopts a PSR that relies on inadequate factual development or invalid legal theories, the district court's factual finding is held inadequate.

In *United States v. Flores-Alvarado*, 779 F.3d 250, 256 (4th Cir. 2015), *as amended* (Mar. 11, 2015), the PSR attributed multiple drug quantities to the defendant that had been seized in his absence. *See Flores-Alvarado*, 779 F.3d at 256-257. The defendant challenged the adequacy of the evidence in support of those attributions, and the Fourth Circuit reversed. *See id.* The court of appeals began by “recogniz[ing] that the district court adopted the PSR, which can be a satisfactory means of resolving factual disputes.” *Id.* at 256 (citing *Bolden*, 325 F.3d at 497, and *United States v. Walker*, 29 F.3d 908, 911 (4th Cir. 1194). However, it continued, holding that “[a]dopting the PSR does not satisfy the requirements of Rule 32(i)(3)(B), however, if the factual recitations in the PSR do not support the PSR's recommendation.” *Id.*

Applying this holding, the Fourth Circuit reviewed the factual recitations in the PSR and found that they did not justify the challenged drug attributions. *See id.* at 256-257. Specifically, the PSR relied on drug seizures from traffickers with whom the defendant had transacted – but it did not identify good reason to think the defendant had been involved in those transactions specifically. *See id.* Accordingly, the court of appeals granted relief because “the factual recitations of the PSR are

insufficient to attribute the [relevant] Seizures to Flores–Alvarado.” *Id.* at 256. In doing so, it extended settled Fourth Circuit law, which requires resentencing if the district court adopts a PSR containing insufficient factual support for its conclusion. *See id.* (citing *Bolden*, 325 F.3d at 498, *United States v. Chandia*, 514 F.3d 365, 376 (4th Cir.2008), and *United States v. Robinson*, 744 F.3d 293, 300 n. 5 (4th Cir. 2014)(*dicta*)).

This is the opposite of the approach taken below. In the instant case, the court of appeals excused the district court’s adoption of a PSR that relied on facts that were unreliable as a matter of law. By contrast, the rule enunciated by the Fourth Circuit, and consistently applied, requires relief when the district court adopts a PSR that identifies insufficient or invalid grounds for its conclusion.

And even clearer conflict with the opinion below is seen in the law of the First Circuit. In *United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996), a tax evasion case, the First Circuit recognized the same limitations to the district court’s ability to adopt the PSR discussed above. The district court adopted a PSR with a sizeable enhancement for the amount of tax loss, and the First Circuit vacated the sentence. *See Olbres*, 99 F.3d at 31-32. The First Circuit recognized that district courts may generally adopt a PSR to resolve factual and legal disputes, but it granted relief because the PSR had not found that the defendants wilfully evaded all of the taxes counted against them in the enhancement. *See id.* Like the Fourth Circuit cases discussed above, *Olbres* held that “because the PSR did not resolve all of the disputed factual issues, simple reliance on it is not enough.” *Id.* at 31.

But the First Circuit went further in *United States v. Correy*, 570 F.3d 373 (1st Cir. 2009), illustrating the direct conflict between that circuit’s approach and that of the opinion below. In *Correy*, the defendant (Pizarro) received a firearm enhancement in a drug case. *See Correy*, 570 F.3d at 400–01. The district court relied on a jury verdict that did not specifically establish the enhancement and a PSR that had not been correctly prepared, and that simply repeated allegations from the indictment. *See id.* at 382-387, 400–01. The First Circuit vacated the sentence due to the erroneous bases for the firearm enhancement. *See id.* at 400-401.

Critically for our purposes, the First Circuit offered relief even though it believed the trial record as a whole might have supported application of the firearm enhancement. *See id.* at 400 (“Considering the use of weapons by co-conspirators and Pizarro's role with respect to a large quantity of drugs, our case law permits the inference that the conspiracy's use of weapons would be foreseeable to Pizarro.”). Unlike the opinion below, the First Circuit will not undertake its own review of the record in support of an alternative basis for the judgment:

[e]ven stripped of reliance on challenged testimony, the sentencing court might have fairly drawn this inference. But the record gives no indication that the sentencing court actually drew such an inference. Rather, the record gives every indication that the sentencing court relied on the jury's verdict and even highly disputed acquitted conduct, without making any independent credibility determination.

Id.

The conflict between the First Circuit and the Fifth Circuit is thus cleanly drawn. In the Fifth Circuit, what matters is whether the record could support the

outcome. In the First Circuit, what matters is the validity of the factual findings actually made by the district court.

This Court should address that conflict. The district court's duty to resolve factual and legal disputes is an explicit requirement of Rule 32, and a centerpiece of the Sentencing Reform Act, which contemplates a rigorous and transparent methodology for determining federal sentences. *See* Fed. R. Crim. P. 32(i); S. Rep. 98-225, at *39 (1983) ("The Committee set several goals that it believes any sentencing reform legislation should meet...[I]t should assure that the offender, the federal personnel charged with implementing the sentence and the general public are certain about the sentence and the reasons for it."). The approach of the court below significantly undermines this duty, permitting appellate courts to rescue district courts from deficient fact-findings, so long as some plausible basis exists in the record for a valid hypothetical finding. This undermines the parties' right to have fact-finding conducted by the court with the most institutional competence in fact-finding. *See Buford v. United States*, 532 U.S. 59 (2001).

The approach of the court below may also expose defendants to a risk of incarceration on the basis of erroneous sentencing determinations, a form of wrongful imprisonment. When an appellate court substitutes its own fact-findings for the district court's invalid rationale, it risks affirming the sentence on the basis of sources that the district court chose not to credit. In many cases, the district court will have had good reason to forego reliance on the sources credited by the court of appeals. In

other words, the approach of the opinion below makes it more likely that defendants will serve longer sentences on the basis of factual findings that are simply not correct.

As discussed above, the present case clearly presents the issue. The district court adopted a PSR that relied on sources the court below has found legally invalid. In the First Circuit, and likely in the Fourth, he would have received relief.

CONCLUSION

Petitioner respectfully requests that this Court grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 12th day of March, 2024.

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