

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

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**In the Supreme Court of the United States**

JACOB RAY OWENS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**Petition for Writ of Certiorari  
to the  
United States Court of Appeals for the Fifth Circuit**

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## **QUESTION PRESENTED FOR REVIEW**

At his sentencing, Owens was held responsible for methamphetamine (actual). The only evidence of the methamphetamine's purity was the purity of methamphetamine seized from Owens's co-conspirator's co-conspirator, well after Owens's arrest. Despite the lack of evidence, neither trial nor appellate counsel objected to the purity finding. Owens filed a motion to vacate his sentence based on his counsels' ineffectiveness.

The courts and parties below assumed that prior counsel was ineffective and that if Owens showed a reasonable probability of prevailing on a purity objection, his sentence would have been lower. Thus, the sole issue is:

Whether the purity of outside-the-conspiracy methamphetamine, linked to Owens's conspiracy solely by personnel, permitted an inference that Owens's methamphetamine was similarly pure.

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## **PETITION FOR WRIT OF CERTIORARI**

Jacob Ray Owens asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 1, 2024.

## **PARTIES TO THE PROCEEDING**

The caption of the case names all the parties to the proceedings in the court below.

## **OPINION BELOW**

The published opinion of the court of appeals, *United States v. Owens*, 94 F.4th 481 (5th Cir. 2024) is appended to this petition.

## **JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES**

The opinion and judgment of the court of appeals were entered on March 1, 2024. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISION INVOLVED**

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that “no person shall be ... deprived of ... liberty ... without due process of law.” U.S. Const. amend. V.

## STATEMENT OF THE CASE

Petitioner Jacob Ray Owens was held responsible for pure methamphetamine—increasing his recommended sentence by over 100 months—because the Fifth Circuit found methamphetamine seized from a co-conspirator’s co-conspirator, for which Owens was not held responsible, provided sufficiently reliable evidence of the purity of Owens’s methamphetamine. Thus, according to the Fifth Circuit, Owens’s trial counsel was not ineffective for failing to object to the purity determination because Owens did not show, on the papers, a reasonable probability of success.

Owens was arrested, during a traffic stop in Arizona, in possession of 10.6 ounces of methamphetamine. He was eventually brought to Midland, Texas, and charged in a two-person conspiracy with possession with intent to distribute methamphetamine. His co-conspirator, Brian Stowe, was not yet arrested. Twenty-three days later, while Owens was in custody, a co-conspirator of Stowe was arrested with 201.3 grams of actual methamphetamine. Owens was not held responsible for the methamphetamine seized from Stowe’s separate, subsequent conspiracy.

Instead, when Owens went to sentencing, the presentence investigation report held him responsible for 2.56 kilograms of actual methamphetamine, the 10.6 ounces he was seized with as well as five pounds Stowe said that Owens had helped import from Mexico prior to Owens's arrest. It is undisputed that neither the 10.6 ounces nor the 5 pounds were ever tested for purity. Instead, the report concluded that Owens was responsible for actual methamphetamine based on the purity of the methamphetamine seized from a separate conspiracy—linked only to Owens because Stowe had been a conspirator in both conspiracies.

Despite the lack of purity evidence, Owens's counsel did not object to the report's finding that he was responsible for actual methamphetamine.<sup>1</sup> Similarly, Owens's appellate counsel did not raise the lack of purity proof. Accordingly, Owens's filed a motion in the district court to vacate his sentence for ineffective assistance of counsel, pursuant to 28 U.S.C. § 2255. The district court denied

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<sup>1</sup> “‘Methamphetamine (actual)’ refer[s] to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing [methamphetamine] at 50% purity contains 5 grams of [methamphetamine] (actual).” U.S.S.G. § 2D1.1(c) n.(B).

the motion without a hearing, finding Owens had not shown a reasonable probability of success because the outside-the-conspiracy methamphetamine was probative of Owens's methamphetamine. A panel of the Fifth Circuit affirmed the district court on similar grounds. *Appendix* at 7-13. Judge Wiener dissented, finding an absence of evidence with sufficient indicia of reliability to show that the outside-the-conspiracy methamphetamine was probative of the purity of Owens's methamphetamine. *Appendix* at 14-17.

## REASONS FOR GRANTING CERT

This appeal arises from the denial of Owens's motion, pursuant to 28 U.S.C. § 2255, to vacate his sentence because his counsel was ineffective. Courts evaluate ineffective-assistance-of-counsel claims under the two-pronged test defined in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail, Owens needed to show (1) his counsels' performance was deficient and (2) the deficient performance prejudiced him. *See id.* To establish deficient performance, Owens had to show his counsels' performance fell below "an objective standard of reasonableness." *Id.* at 688. Then, to establish prejudice, Owens had to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The parties and courts below assumed deficient performance. *Appendix* at 6. The dispute centered on whether there was evidence in Owens's presentence report to prove by a preponderance of the evidence that he was responsible for methamphetamine (actual). If Owens showed an absence of such evidence, there was a reasonable probability that he would have received a lower sentence had his trial or appellate counsel challenged the methamphetamine (actual) finding. *Appendix* at 7-8, 17.

**I. The Circuits are split over whether the purity of outside-the-conspiracy methamphetamine with tenuous links to the defendant is sufficient to infer the purity of the methamphetamine involved in a defendant's offense.**

This Court has held that courts may consider facts proven by a preponderance of the evidence at the sentencing phase, consistent with due process. *United States v. Watts*, 519 U.S. 148, 156 (1997) (citing *McMillan v. Pennsylvania*, 447 U.S. 79, 91-92 (1986); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994). The U.S. Sentencing Guidelines permit courts to consider information supported by “sufficient indicia of reliability to support its probable accuracy” and to find sentencing factors that affect the application of the Guidelines by “a preponderance of the evidence standard.” U.S.S.G. § 6A1.3(a) and Commentary.

In a methamphetamine case, purity matters. Guideline offense levels increase dramatically depending on whether the offense involved “methamphetamine” or “methamphetamine (actual).” See U.S.S.G. § 2D1.1(c). “Methamphetamine (actual)’ refer[s] to the weight of the controlled substance itself, contained in the mixture or substance . . . U.S.S.G. § 2D1.1(c) n.(B).

As a relevant example, 2.56 kilograms yields an offense level of 36 if the substance is “methamphetamine (actual)” but an offense

level of 32 if the substance is “methamphetamine.” *Compare* § 2D1.1(c)(2) *with* § 2D1.1(c)(4). Equivalent to “methamphetamine (actual),” in its treatment by the Guidelines, is “Ice,” which is “d-methamphetamine hydrochloride of at least 80% purity.” § 2D1.1(c) n.(C). Thus, the higher offense level can be achieved by the government showing either (a) that the substance contained the requisite level of pure methamphetamine or (b) that the entire substance was a certain weight and at least 80% pure. *See* § 2D1.1(c)(2) (assigning a Level 36 to an offense involving “at least 1.5kg but less than 4.5kg of Methamphetamine (actual) or ... of ‘Ice’”).<sup>2</sup> The purity determination, thus, both matters and requires a high level of precision chemical measuring.

With this case, four circuits—the Fourth, Fifth, Seventh, and Eighth—have written on the level of proof necessary to show that methamphetamine is actual instead of a mixture. The courts

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<sup>2</sup> In the case of a conflict in results between measuring the “Ice,” which looks at the substance as a whole, or “Methamphetamine (actual),” which looks at the amount of methamphetamine in the substance, the Guideline instructs courts to use “whichever is greater.” U.S.S.G. § 2D1.1(c) n.(B)

agree that the amount and type of drugs are factual findings that must be supported by a preponderance of the evidence.<sup>3</sup>

In applying the preponderance standard, the Fifth Circuit has designed rules making it the outlier—permitting a purity inference from a sample of outside-the-conspiracy methamphetamine because Owens’s co-conspirator was held responsible for that methamphetamine. The Seventh Circuit explicitly rejected an identical attempt to infer the purity of methamphetamine. *Carnell*, 972 F.3d at 943. Carnell was not held responsible for methamphetamine seized from a close associate of his. *Id.* Though there was a close connection between Carnell and the associate, the purity of the outside-the-conspiracy-methamphetamine was not probative of Carnell’s because “the fact that some [methamphetamine] in a separate conspiracy was ‘pure’ [was] not sufficient to” determine the purity of Carnell’s methamphetamine. *Id.*

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<sup>3</sup> Appendix at 7-8; *United States v. Walker*, 688 F.3d 416, 420 (8th Cir. 2012) (“drug quantity and identity determinates are factual findings, which we review for clear error applying the preponderance-of-the-evidence standard”); *United States v. Carnell*, 972 F.3d 932, 938 (7th Cir. 2020) (“a sentencing court must only find that a preponderance of reliable evidence supports the drug quantity finding”); *United States v. Cockrell*, 217 F.3d 841 (4th Cir. June 28, 2000) (unpublished) (same).

In *Carnell*, the Seventh Circuit rejected not only the attempt to infer the purity from outside-the-conspiracy methamphetamine but also an attempt to infer the purity from the statements by users that the methamphetamine was “ice” or of “good purity.” *Id.* at 941-42. In doing so, it recognized that it was splitting with the Eight Circuit’s decision in *Walker*. *Carnell*, 972 at 941 (citing *Walker*, 688 F.3d at 423-25). The Seventh Circuit reasoned that the level of precision required by the Guidelines could not be met by relying on “the experience of users, dealers[, or] law enforcement officers, without more.” *Id.*

In *Walker*, by contrast, the Eighth Circuit found the purity evidence sufficient because co-conspirators described the methamphetamine as “ice” and a user testified that “the ‘ice’ he obtained [from the conspiracy] resulted in a ‘cleaner high’ that would allow the user to ‘stay up longer without feeling side effects.’” 688 F.3d at 424. Those observations were corroborated by law enforcement testimony about the characteristics of methamphetamine. *Id.* at 424-25; *see also Cockerill*, 214 F.3d at 841 (finding sufficient, on plain error review, testimony of co-conspirator that methamphetamine was “of very good quality” to show that it had a purity of at least 80%).

Thus, the circuits to consider this question vary substantially about the actual proof needed to show the purity of the seized methamphetamine by a preponderance of the evidence. From highest to lowest:

- The Seventh Circuit prefers a lab report to show the exacting evidence required by the Guideline but was open to “the possibility” of other evidence of purity, like testimony “connecting the visual description of the methamphetamine to its purity.” *Carnell*, 927 F.3d at 943-44.
- The Eighth and Fourth Circuits have relied on statements of co-conspirators or users that the methamphetamine was “ice” or “of very good quality” to find that it had at least an 80% purity. *Walker*, 688 F.3d at 423-25; *Cockerill*, 214 F.3d at 841.
- The Fifth Circuit is the lone circuit to infer purity from outside-the-conspiracy methamphetamine without any other evidence about the purity of the methamphetamine involved in the defendant’s offense. *Appendix* at 7-13.

The evidence in the presentence report did not suggest that the involvement of Stowe in both conspiracies justified an inference of

similar purity. The majority opinion relied on portions of the report that referred to Stowe as having a “contact” in Tijuana, Mexico, from which he obtained methamphetamine. *Appendix* at 9-10. But, as the opinion noted, the report also explicitly said that the contact was not the same individual used by Owens. *Appendix* at 9. And, as the dissent noted, the report made “inconsistent use of the singular ‘contact’ versus the plural ‘contacts,’ even in the same sentence.” *Appendix* at 15-16 (Wiener, J., dissenting). Thus, this was not a case where additional evidence showed that the outside-the-conspiracy methamphetamine was probative of the quality of Owens’s methamphetamine because they both came from a single source.

This Court should review the Fifth Circuit’s holding to resolve this circuit split and bring the Fifth Circuit’s holding in line with the other circuits to have considered this issue.

## **CONCLUSION**

For these reasons, Petitioner asks that this Court grant a writ of certiorari and review the judgment of the court of appeals.

s/ Shane O’Neal  
*Counsel of Record for Petitioner*  
Dated: May 29, 2024