No. _____

In the

Supreme Court of the United States

_____

George Henry Purdy, III,

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

Whether 18 U.S.C. §922(g)(1) comports with the Second Amendment?

Whether factual findings of a Presentence Report (PSR) that result in a higher sentence must be proven by the government in the face of objection, or whether the defendant must disprove them?

PARTIES TO THE PROCEEDING

Petitioner is George Henry Purdy, III, 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 George Henry Purdy, III, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at *United States v. Purdy*, Nos. 23-10501, 23-10502, 2024 WL 1905757 (5th Cir. May 1, 2024)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 1, 2024. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT GUIDELINE, RULE, STATUTES AND CONSTITUIONAL PROVISION

Section 922(g) of Title 18 reads in relevant part:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year …
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The Second Amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

USSG §6A1.3 provides:

Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

Federal Rule of Criminal Procedure 32 provides in relevant part:

Sentencing and Judgment

(c) Presentence Investigation.
(1) Required Investigation.
(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:
(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.
(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) Interviewing the Defendant. The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information.The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) Exclusions. The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure From Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of--or summarize in camera--any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) 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.

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner George Henry Purdy III pleaded guilty without a plea agreement to the indictment charging him with having a prior felony conviction, knowing that he had such a conviction, and possessing a firearm in and affecting commerce, in violation of 18 U.S.C. § 922(g)(1). The court accepted his plea.

The Presentence Report (PSR) calculated Mr. Purdy's base offense level as 20 pursuant to USSG § 2K2.1(a)(4)(A). In addition, the PSR applied a 4-level enhancement pursuant to USSG § 2K2.1(b)(6)(B), which applies if the defendant used or possessed the firearm "in connection with another felony offense." The PSR applied the enhancement based on the facts described in four paragraphs that summarized a Fort Worth Police Department (FWPD) report. The PSR's summary contained allegations from an unnamed person who claimed that she was involved in a domestic altercation with Mr. Purdy, and that during this altercation, he "pointed a pistol at" her face "and pulled the trigger" with no discharge. While the two were fighting over the gun, the PSR states that "[f]earing that Purdy would beat or choke her to death, the victim released the magazine from the pistol and gave the pistol to Purdy. She then concealed the magazine and pushed two rounds of ammunition from the magazine onto the bed." According to the PSR, "[a]s Purdy realized what the victim

had done, he raised the pistol to the victim's head and pulled the trigger, the pistol clicked, and Purdy stared at her when nothing happened."

Based on the allegations underlying the four-level adjustment, Tarrant County charged Mr. Purdy with Aggravated Assault with a Deadly Weapon. After his federal sentencing, Mr. Purdy would plead guilty in Tarrant County to felon in possession of a firearm; the Aggravated Assault charge was dismissed.

Prior to sentencing, Mr. Purdy objected to the court relying on "FWPD offense reports for conduct that Mr. Purdy has not pleaded guilty to and has not resulted in a conviction." He argued that the "summary of police reports does not bear sufficient indicia of reliability to overcome" his "due process rights." He reiterated this objection at sentencing, specifically with respect to the 4-level enhancement. The court overruled his objection. It adopted the PSR's calculation of his guidelines range as 70 to 87 months, and sentenced him to 87 months imprisonment to run consecutively to any sentence that may be imposed in his supervised release case, to be followed by three years of supervised release, forfeiture of the firearm and related items, and a $100 special assessment.

B. Appellate Proceedings

Petitioner appealed pressing, *inter alia*, a sentencing claim. Specifically, he renewed his objection to the district court's use of unreliable multiple hearsay – the PSR's summary of a police report summarizing the accusations of an unnamed complainant -- to increase his sentence. He conceded that Fifth Circuit law required a defendant to introduce rebuttal evidence against allegations in the PSR. But he

contended that this rule conflicted with Due Process, and the law of other circuits, and that it subjected the defendant to a risk of incarceration on the basis of unreliable information.

He also asserted a Second Amendment argument. He contended that he had a Second Amendment right to possess arms, and that a criminal conviction could not lie for the exercise of that right. He also contended that his guilty plea was invalid because the district court did not advise him of the constitutional limits on the government's power to prosecute him for possessing a firearm. He conceded that these claims were reviewable only for plain error.

The court of appeals affirmed. *See* [Appx. A]; *United States v. Purdy*, Nos. 23-10501, 23-10502, 2024 WL 1905757 (5th Cir. May 1, 2024)(unpublished). As to the sentencing claim, it thought the PSR's recitation sufficiently reliable, and said that "because [Petitioner] did not present rebuttal evidence or otherwise demonstrate that the allegations were unreliable, the district court was entitled to accept them" *Purdy*, 2024 WL 1905757, at *1. It observed that Fifth Circuit precedent forbade it to reconsider whether defendants have a burden of proof to rebut allegations in a PSR. *See id.* ("Purdy criticizes the reasoning employed in *Harris*[1] and *Parkerson*[2] with respect to burden-shifting and information based on police investigations. We reject

[1] *United States v. Harris*, 702 F.3d 226 (5th Cir. 2012).

[2] *United States v. Parkerson*, 984 F.3d 1124 (5th Cir. 2021).

his criticisms under the rule of orderliness.")(citing *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014)).

As to the Second Amendment claim, it applied plain error review and found that any error could not be deemed clear or obvious. *See id.* (citing *United States v. Jones*, 88 F.4th 571, 573–74 (5th Cir. 2023)).

REASONS FOR GRANTING THE PETITION

I. This Court should decide the constitutionality of 18 U.S.C. §922(g)(1) under the Second Amendment. It should hold the instant Petition pending resolution of any merits cases presenting that issue.

The Second Amendment guarantees "the right of the people to keep and bear arms." Yet 18 U.S.C. § 922(g)(1) denies that right, on pain of 15 years imprisonment, to anyone previously convicted of a crime punishable by a year or more. In spite of this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges to the statute for many years. *See United States v. Moore*, 666 F.3d 313, 316-317 (4th Cir. 2012) (collecting cases). This changed, however, following *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111 (2022). *Bruen* held that where the text of Second Amendment plainly covers regulated conduct, the government may defend that regulation only by showing that it comports with the nation's historical tradition of gun regulation. *See Bruen*, 142 S. Ct. at 2129-2130. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *See id*. at 2127-2128.

In *United States v. Rahimi*, 144 S.Ct. 1889 (June 21, 2024), this Court held that 18 U.S.C. §922(g)(8) comports with the Second Amendment. That statute makes it a crime to possess a firearm during the limited time that one:

> is subject to a court order that … restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and … includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or ….by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury…

18 U.S.C. §922(g)(8).

Upholding this statute, this Court emphasized its limited holding, which was "only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, 144 S.Ct. at 1903. That rationale plainly leaves ample space to challenge 18 U.S.C. §922(g)(1). Section (g)(1) imposes a permanent, not a temporary, firearm disability. And that disability can arise from all manner of criminal convictions that do not involve a judicial finding of future physical dangerousness.

Such a challenge could well be resolved against constitutionality of §922(g)(1). "Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were un-known before World War I." C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?,* 32 Harv. J. L. & Pub. Pol'y 695, 708 (2009); *see also* Adam Winkler, *Heller's Catch-22*,

56 UCLA L. Rev. 1551, 1563 (2009) ("The Founding generation had no laws . . . denying the right to people convicted of crimes.").; Carlton F.W. Larson, *Four Exceptions in Search of A Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 Hastings L. J. 1371, 1376 (2009)("…state laws prohibiting felons from possessing firearms or denying firearms licenses to felons date from the early part of the twentieth century.); *United States v. Bullock*, 679 F.Supp.3d 501, 505 (S.D. Miss. 2023)("The government's brief in this case does not identify a 'well-established and representative historical analogue' from either era supporting the categorical disarmament of tens of millions of Ameri-cans who seek to keep firearms in their home for self-defense."), appeal pending No. 23-60408 .

As the government noted in a recent Supplemental Brief urging this Court to grant certiorari regarding §922(g)(1), many district courts have invalidated the statute even as to defendants with extremely serious felony records. *See* Supplemental Brief for the Federal Parties in Nos. 23-374, *Garland v. Range*; 23-683, *Vincent v. Garland*; 23-6170, *Jackson v. United States*; 23-6602, *Cunningham v. United States*, and 23-6842, *Doss v. United States*, at p.4, n.1 (June 24, 2024)(collecting 12 such cases)(hereafter "Supplemental Federal Parties), *available at* https://www.supremecourt.gov/DocketPDF/23/23-374/315629/20240624205559866_23-374%20Supp%20Brief.pdf, *last visited July 25, 2024.*

As noted, the government has now asked this Court to grant certiorari in a wide range of cases presenting the constitutionality of §922(g)(1). All of those

Petitions were granted, and the cases remanded in light of *Rahimi*, *supra*. *See Garland v. Range*, No. 23-374, 2024 WL 3259661 (July 2, 2024); *Vincent v. Garland*, No. 23-6170, 2024 WL 3259668 (July 2, 2024); *Jackson v. United States*, No. 23-6170, 2024 WL 3259675 (July 2, 2024); *Cunningham v. United States*, No. 23-6602, 2024 WL 3259687 (July 2, 2024); *Doss v. United States*, No. 23-6842, 2024 WL 3259684 (July 2, 2024). Notably, this Court remanded both those cases that resulted in a finding of 922(g)(1)'s unconstitutionality (like *Range*), and those that found it constitutional, (the remainder). This demonstrates that *Rahimi* does not clearly resolve the constitutional status of the statute – were that so, it would be unnecessary to remand those cases in which the arms-bearer lost in the court of appeals. This Court should grant certiorari to decide this momentous issue, and, if it does so in another case, should hold the instant Petition pending the outcome. *See Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting)("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.").

This is so notwithstanding the failure of preservation in the district court, which may ultimately occasion review for plain error. *See United States v. Olano*, 507 U.S. 725, 732 (1993). For one, an error may become "plain" any time while the case remains on direct appeal. *See Henderson v. United States*, 568 U.S. 266 (2013). Further, procedural obstacles to reversal – such as the consequences of non-preservation – should be decided in the first instance by the court of appeals. *See*

Henry v. Rock Hill, 376 U.S. 776, 777 (1964)(per curiam)(GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres- Valencia v. United States*, 464 U.S. 44 (1983)(per curiam)(GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the court of appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the court of appeals).

II. The circuits are divided as to who bears the burden of production regarding factual claims made in a presentence report after a specific objection by the defendant. The position of the court below generates a high probability of unjust incarceration.

A. The courts are divided

A federal district court must impose a sentence no greater than necessary to achieve the goals in18 U.S.C. §3553(a)(2), after considering the other factors enumerated §3553(a), including the defendant's Guideline range. *See* 18 U.S.C. §3553(a)(2); *United States v. Booker*, 543 U.S. 220, 245-246 (2005). The selection of an appropriate federal sentence depends on accurate factual findings. Only by accurately determining the facts can a district court determine the need for

deterrence, incapacitation and just punishment, identify important factors regarding the offense and offender, and correctly calculate the defendant's Guideline range.

At least three authorities combine to safeguard the accuracy of fact-finding at federal sentencing. Most fundamentally, the Due Process Clause demands that evidence used at sentencing be reasonably reliable. *See United States v. Tucker*, 404 U.S. 443, 447 (1972). The Federal Guidelines likewise require that information used at sentencing exhibit "sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3(a). And Federal Rule of Criminal Procedure 32 offers a collection of procedural guarantees that together "provide[] for the focused, adversarial development" of the factual and legal record. *Burns v. United States*, 501 U.S. 129, 134 (1991). These include: a presentence report that calculates the defendant's Guideline range, identifies potential bases for departure from the Guidelines, describes the defendant's criminal record, and assesses victim impact, (Fed. R. Crim. P. 32(d)); the timely disclosure of the presentence report, (Fed. R. Crim. P. 32(e)); an opportunity to object to the presentence report, (Fed. R. Crim. P. 32(f)); an opportunity to comment on the presentence report orally at sentencing, (Fed. R. Crim. P. 32(i)(1)), and a ruling on "any disputed portion of the presentence report or other controverted matter" if it will affect the sentence, (Fed. Crim. P. 32(i)(3)).

Several circuits, including the court below, have interpreted these authorities to impose on the defendant a burden of production. *See United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005); *United States v. O'Garro*, 280 F. App'x 220, 225 (3d Cir. 2008); *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002); *United States v.*

Valencia, 44 F.3d 269, 274 (5th Cir. 1995); *United States v. Lang*, 333 F.3d 678, 681-682 (6th Cir. 2003); *United States v. Mustread*, 42 F.3d 1097, 1102 (7th Cir. 1994); *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006). In these circuits, a district court may adopt the factual findings of a presentence report "without further inquiry" absent competent rebuttal evidence offered by the defendant. *United States v. Valdez*, 453 F.3d 252, 230 (5th Cir. 2006); *see also Prochner*, 417 F.3d at 66; *Lang*, 333 F.3d at 681-682; *Mustread*, 42 F.3d at 1102; *Rodriguez-Delma*, 456 F.3d at 1253.

Defendants in these jurisdictions cannot compel the government to introduce evidence in support of the presentence report's findings merely by objecting to them – defendants must instead introduce evidence of their own. *See United States v. Ramirez*, 367 F.3d 274, 277 (5th Cir. 2004)(holding that "[t]he defendant bears the burden of demonstrating that the information relied upon by the district court in sentencing is materially untrue")(citing *United States v. Davis*, 76 F.3d 82, 84 (5th Cir. 1996)); *Prochner*, 417 F.3d at 66 (holding that "[e]ven where a defendant objects to facts in a PSR, the district court is entitled to rely on the objected-to facts if the defendant's objections 'are merely rhetorical and unsupported by countervailing proof'")(quoting *United States v. Cyr*, 337 F.3d 96, 100 (1st Cir. 2003)(further quotations omitted), and citing *United States v. Grant*, 114 F.3d 323, 328 (1st Cir. 1997)); *Lang*, 333 F.3d at 681-682 ("agree(ing) with the reasoning of the Seventh Circuit that [a] defendant cannot show that a PSR is inaccurate by simply denying the PSR's truth," and further holding that, "[i]nstead, beyond such a bare denial, he

must produce some evidence that calls the reliability or correctness of the alleged facts into question")(citing *Mustread*, 42 F.3d at 1102, and *United States v. Wiant*, 314 F.3d 826, 832 (6th Cir. 2003)); *Mustread*, 42 F.3d at 1102 (citing *United States v. Coonce*, 961 F.2d 1268, 1280-81 (7th Cir. 1992), and *United States v. Isirov*, 986 F.2d 183, 186 (7th Cir. 1993)); *Rodriguez-Delma*, 456 F.3d at 1253 (holding that the "defendant's rebuttal evidence must demonstrate that information in PSR is materially untrue, inaccurate or unreliable").

But the D.C., Second, Eighth, Ninth, and Eleventh Circuits have all rejected this reasoning. In each of these cases, an objection to facts stated in a PSR shifts the burden of production to the government to produce additional supporting evidence. *See United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005)("the Government may not simply rely on assertions in a presentence report if those assertions are contested by the defendant."); *United States v. Helmsley,* 941 F.2d 71, 98 (2d Cir. 1991) ("If an inaccuracy is alleged [in the PSR], the court must make a finding as to the controverted matter or refrain from taking that matter into account in sentencing. If no such objection is made, however, the sentencing court may rely on information contained in the report."); *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004) ("If the defendant objects to any of the factual allegations . . . on which the government has the burden of proof, such as the base offense level. . . the government must present evidence at the sentencing hearing to prove the existence of the disputed facts."); *United States v. Ameline*, 409 F.3d 1073, 1085-86 (9th Cir. 2005) (*en banc*)("However, when a defendant raises objections to the PSR, the district court is

obligated to resolve the factual dispute, and the government bears the burden of proof . . . . The court may not simply rely on the factual statements in the PSR. "); *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009)("It is now abundantly clear that once a defendant objects to a fact contained in the [PSR], the government bears the burden of proving the disputed fact by a preponderance of the evidence."). An examination of each these circuits reveals that the division of authority is sharp, consistent, and significant to the outcome of cases.

The D.C. Circuit has held "the Government may not simply rely on assertions in a presentence report if those assertions are contested by the defendant." *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005). Rather, the Government must "demonstrate [information in a PSR] is based on a sufficiently reliable source to establish [its] accuracy . . . ." *Id.* (citing *United States v. Richardson*, 161 F.3d 728, 737-38 (D.C. Cir. 1998)). Further, the government's burden is triggered "whenever a defendant disputes the factual assertions in the report," and the defendant "need not produce *any evidence*, *for the Government carries the burden* to prove the truth of the disputed assertion." *Id.* (citing *United States v. Pinnick*, 47 F.3d 434, 437 (D.C. Cir. 1995))(emphasis added).

Similarly, the Second Circuit has repeatedly emphasized that the burden of proof shifts to the government when the defense objects to the PSR's factual assertions. *See Helmsley*, 941 F.2d at 90; *Streich*, 987 F.2d 104, 107 (2d Cir. 1993)("The government's burden is to establish material and disputed facts [in the PSR] by the preponderance of the evidence."); *United States v. Brown*, 52 F.3d 415,

419 (2d Cir. 1995)("The defendant offered no evidence to controvert the government's proffers which is not to say or even intended to suggest the burden of proof *ever shifted from the government*.")(emphasis added).

The Eighth Circuit permits the district court to adopt any portion of the PSR that is not attacked by specific objection. *See United States v. Tabor*, 439 F.3d 826, 830 (8th Cir. 2006); *United States v. Moser*, 168 F.3d 1130, 1132 (8th Cir. 1999); *United States v. Coleman*, 132 F.3d 440, 441 (8th Cir. 1998). It distinguishes between objections to "the facts themselves," on the one hand, and to "recommendation[s] based on those facts," on the other. *United States v. Bledsoe*, 445 F.3d 1069, 1072-1073 (8th Cir. 2006). The latter type of objection triggers no burden of proof on the part of the government. *See United States v. Mannings*, 850 F.3d 404, 409-410 (8th Cir. 2017); *United States v. Humphrey*, 753 F.3d 813, 818 (8th Cir. 2014); *Bledsoe*, 445 F.3d at 1072-1073; *Moser*, 168 F.3d at 1132. But the former type of objection triggers an obligation on the part of the government to present evidence in support of the PSR. *See United States v. Sorrells*, 432 F.3d 836, 838-839 (8th Cir. 2005)("Given the Government's failure to present substantiating evidence, the district court erred in using the PSR's allegations of the uncharged conduct to increase Sorrells's base offense level."); *Poor Bear*, 359 F.3d at 1041; *United States v. Greene*, 41 F.3d 383, 386 (8th Cir. 1994)("If the sentencing court chooses to make a finding with respect to the disputed facts, it must do so on the basis of evidence, and not the presentence report."). This is because in the Eighth Circuit, "[t]he presentence report is not evidence…" *United States v. Reid*, 827 F.3d 797, 801 (8th Cir. 2016).

These principles remain the law in the Eighth Circuit. In 2017, that jurisdiction applied the distinction between objections to the facts, and to the inferences drawn therefrom, recognizing the government's burden of proof in the former case. *See Mannings*, 850 F.3d at 409-410. Further, these are not mere abstract principles, but frequently determine the outcome of appeal. The Eighth Circuit has repeatedly vacated the sentence due to the government's failure to support a PSR's factual finding in the face of appropriate objection. *See Sorrells*, 432 F.3d at 838-839, and cases cited therein.

The Ninth Circuit has similarly held, *en banc*, that a court "may not simply rely on the factual statements in the PSR," in the face of objection. *See Ameline*, 409 F.3d at 1085-86. As one would expect of a statement of law found in an *en banc* opinion, this principle remains the law of the Circuit. *See United States v. Khan*, 701 Fed. Appx. 592, 595 (9th Cir. 2017)(unpublished)("A district court may not simply rely on the factual statements in a PSR when a defendant objects to those facts."). And as in the Eighth Circuit, the principle is not merely abstract, but has instead given rise to reversals when the government failed to offer evidence in favor of the PSR. *See United States v. Showalter*, 569 F.3d 1150, 1158-1160 (9th Cir. 2006); *Khan*, 701 Fed. Appx. at 595.

Likewise, the Eleventh Circuit has found it well settled that "once a defendant objects to a fact contained in the [PSR], the government bears the burden of proving the disputed fact by a preponderance of the evidence." *Martinez*, 584 F.3d at 1026 (citing *United States v. Rodriguez*, 398 F.3d 1291, 1296 (11th Cir. 2005), *United States*

v. Liss, 265 F.3d 1220, 1230 (11th Cir. 2001), *United States v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995), and *United States v. Bernardine*, 73 F.3d 1078, 1080 (11th Cir. 1996)); *see also United States v. Rosales–Bruno,* 676 F.3d 1017, 1023 (11th Cir.2012)(defendant's objections to statements in his PSI placed "on the government the burden of proving [the disputed] facts."); *Liss*, 265 F.3d at 1230 ("When a defendant challenges one of the bases of his sentence as set forth in the PS[I], the government has the burden of establishing the disputed fact by a preponderance of the evidence."). That burden shifting regime was again recognized in 2015 in *United States v. Arroyo-Jaimes*, 608 F. App'x 843 (11th Cir. 2015)(unpublished), which held that an objection to facts in the PSR sufficed "to place the burden on the government to produce evidence in support of that fact." *Arroyo-Jaimes*, 608 F. App'x at 846. Finally, as in the Eighth and Ninth Circuits, the Eleventh Circuits has vacated solely for want of "*undisputed* evidence in the PSI." *Martinez*, 584 F.3d at 1028 (emphasis added).

As can be seen, there is a stark contrast between the courts of appeals regarding the function of the PSR. It is current, balanced, and widespread, and it is frequently material to the outcome.

B. The conflict merits review.

This Court should resolve the conflict between the circuits as to the burden of production following an objection to the PSR. The issue is hardly isolated, but rather recurring. Indeed, it is fundamental to federal sentencing. Virtually every federal

criminal case has a potential sentencing dispute, and it matters a great deal who is required to muster evidence, as this very case demonstrates.

Here, a person was subjected to a higher sentence on the basis of criminal allegations that would ultimately be rejected by a state prosecutor. The district court nonetheless found the allegations true. It simply read information in a PSR and concluded that the information was true, notwithstanding the absence of any other judicial testing. Because the burden lay on the defense to rebut the PSR with independent evidence, the district court's finding was sustainable on appeal.

The rule applied below carries the potential for serious error. Placing a burden of proof on the defense creates a risk of wrongfully extending term of imprisonment on the basis of an inaccurate factual finding. And the wrongful extension of a term of imprisonment is an "equitable consideration[] of great weight." *United States v. Johnson*, 529 U.S. 53, 60 (2000).

C. The present case is an ideal vehicle to address the conflict.

The Court should take this case to resolve the division in the courts of appeals. The court below passed explicitly on the question presented, assigning a burden of production to the defendant to rebut the PSR. *See Purdy*, 2024 WL 1905757, at *1 ("In turn, because he did not present rebuttal evidence or otherwise demonstrate that the allegations were unreliable, the district court was entitled to accept them.") Had the burden of production been assigned to the government to prove independently that Petitioner committed the acts in question, the outcome likely would have been different. The record contained no evidence on this point other than the PSR itself,

reciting the same the same information that a prosecutor later declined to pursue. The PSR made a specific finding that the defendant committed the acts alleged, and the district court agreed in spite of objection.

The court below never suggested that the finding might be harmless. Nor would such a suggestion be plausible. The district court used the information to support a sizable increase in the defendant's Guideline range, and then sentenced at the high of the resulting range. There is every reason to think it affected the outcome.

CONCLUSION

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

Respectfully submitted this 26th day of July, 2024.

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