No. 24-5194

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

PETITIONER'S REPLY BRIEF

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Introduction

The Presentence Report (PSR) sought to enhance Petitioner George Henry Purdy III's sentence based on its summary of a police report containing allegations from an unnamed person. This person recounted a domestic altercation with Mr. Purdy, stating that during this altercation, he "pointed a pistol at" her face "and pulled the trigger" with no discharge. As explained below, a careful examination of the PSR's summary—amounting to triple hearsay—reveals that it is illogical, inconsistent, and flies in the face of common sense.

Despite the questionable reliability of the victim's account, Mr. Purdy faced a difficult, if not impossible task in contesting the sentencing enhancement. This is because the Fifth Circuit requires any defendant who wishes to challenge the PSR's factual recitation to "bear[] the burden of demonstrating that the PSR is inaccurate," which he must do by providing "rebuttal evidence." *United States v. Zuniga*, 720 F.3d 587, 591 (5th Cir. 2013) (quoting *United States v. Ollison*, 555 F.3d 152, 164 (5th Cir. 2009)). Rebuttal evidence "must consist of more than a defendant's objection; it requires a demonstration that the information is materially untrue, inaccurate or unreliable." *Id.* (quoting *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (internal quotation marks omitted)).

Testifying was not an option, because he had a pending case in Tarrant County for Aggravated Assault with a Deadly Weapon concerning the same allegations and risked waiving his Fifth Amendment privilege. ROA.23-10501.203. He could not even "den[y]" or "contest" the accuracy of the PSR's factual recitation, because he risked

an *even higher sentence* if the district judge believed that he had done so "falsely" or "frivolously." U.S. Sentencing Comm'n, Guidelines Manual § 3E1.1 cmt. n.1(A) (Nov. 2021) (providing that a defendant can lose a 3-level reduction for acceptance of responsibility under USSG § 3E1.1 if the judge finds that the defendant "falsely denies, or frivolously contests, relevant conduct that the court determines to be true."); U.S. Sentencing Comm'n, Guidelines Manual § 3C1.1 (providing a 2-level enhancement for obstructing or impeding the administration of justice).

Unless he could convince the witness—an angry ex-girlfriend—to recant and face potential criminal liability for lying to the police—Mr. Purdy could not meet his burden under the Fifth Circuit's rule to produce rebuttal evidence.

Nevertheless, Mr. Purdy objected to the court relying on paragraphs 9 through 12 of the PSR which summarize "FWPD offense reports for conduct that Mr. Purdy has not pleaded guilty to and has not resulted in a conviction." ROA.23-10501.214. He argued that the "summary of police reports does not bear sufficient indicia of reliability to overcome" his "due process rights." ROA.23-10501.214-15. He renewed this objection on appeal, and challenged the Fifth Circuit law requiring a defendant to introduce rebuttal evidence. After the court of appeals affirmed based on its own precedent, Mr. Purdy appealed to this Court to resolve the conflict between the circuits.

In its Brief in Opposition, the government concedes that a "narrow disagreement exists in the court of appeals on whether a bare objection to the factual accuracy of findings in a presentence report requires the government to introduce

evidence to support those findings[.]" Opp. 14. Further, it does not dispute that eleven of the twelve geographic circuits have taken sides in this split. Opp. 15–17. But inexplicably, it claims that "that conflict is not implicated in this case and does not warrant this Court's review." Opp. 14–15. It contends that Mr. Purdy "objected not to the reliability of the Probation Officer's report – i.e., that it had reliably recounted the police report or the victim's statements – but instead to the reliability of the underlying victim's statements themselves." Opp. 17–18 (emphasis in original) (footnote omitted). But the government cites no authority to support the distinction, because this is not a real difference. No circuit has hinted, much less held, that the burden of proof at sentencing depends on this distinction. To the contrary, at least five circuits hold that, when the defendant objects to the accuracy of factual allegations that a PSR repeats from another source, the government must produce evidence to prove those allegations—*regardless* of whether the PSR repeats them correctly. This case, in short, implicates an acknowledged and entrenched circuit split, and warrants review.

Had Mr. Purdy's case taken place in the Second, Eighth, Ninth, D.C. or Eleventh Circuit, the government would have been required to produce evidence to prove those allegations. But because he had the misfortune of being charged in the Fifth Circuit, the district court could consider triple hearsay as summarized in the PSR. It thus accepted an uncorroborated, unverified police report that in turn summarized a contradictory account from an unnamed witness. In sum, the Fifth Circuit's rule unjustly places the burden on a criminal defendant to disprove a

negative, presumes him guilty of a sentencing enhancement, and violates Mr. Purdy's Due Process rights. The Court should grant certiorari to resolve the circuit split.

I. This Court Should Resolve the Circuit Split to Protect the Due Process Rights of Defendants Such as Mr. Purdy, Who Risk Additional Incarceration for Attempting to Disprove "Facts" in the PSR.

A. Five Circuits Would Have Required The Government To Prove The Facts Disputed Below.

The government concedes the circuit split. Opp. 14–15. But it claims that split is not implicated here because Mr. Purdy "objected not to the reliability of the Probation Officer's report – i.e., that it had reliably recounted the police report or the victim's statements – but instead to the reliability of the underlying victim's statements themselves." Opp. 17–18 (emphasis in original) (footnote omitted). The government thus sees—and assumes that the split reflects—some distinction between (i) objecting to a PSR's accuracy in reciting allegations and (ii) objecting to the allegations themselves.

The government is alone in seeing this distinction. No circuit has suggested that this difference matters, and at least five circuits would have reached a contrary result.

Begin with the Ninth, Eleventh, and D.C. Circuits, which, as the government concedes, "have rejected reliance on disputed factual statements in a presentence report, at least in certain instances." Opp. 17 (citing *United States v. Flores*, 725 F.3d 1028, 1040–1041 (9th Cir. 2013); *United States v. Martinez*, 584 F.3d 1022, 1027 (11th Cir. 2009); *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005)).

As the government appears to acknowledge, the result would have been different in the Ninth Circuit. There, "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." *United States v. Ameline*, 409 F.3d 1073, 1085–86 (9th Cir. 2005) (cleaned up) (en banc). In *Ameline*, the defendant disputed the drug quantity in the PSR, which was "based solely on the investigative reports the officer had reviewed." *Id.* at 1075. No one disputed that the PSR accurately described the reports' contents; rather, the defendant simply questioned the drug quantity itself. The Ninth Circuit held that "by placing the burden on Ameline to disprove the factual statements made in the PSR, the district court improperly shifted the burden of proof to Ameline and relieved the government of its burden of proof to establish the base offense level." *Id.* at 1085. That is exactly what happened in Mr. Purdy's case, a result that the Fifth Circuit affirmed based on its precedent. That alone shows a circuit split.

The Eleventh Circuit likewise holds that "[w]hen a defendant challenges one of the factual bases of his sentence as set forth in the PSR, the Government has the burden of establishing the disputed fact[.]" *United States v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995) (citations omitted). It has applied that rule to hold that, after the defendant "disputes the factual accuracy of [the PSR's] description of the conduct underlying his false imprisonment conviction," the government bears "the burden of proving those facts." *United States v. Rosales-Bruno*, 676 F.3d 1017, 1023–24 (11th Cir. 2012). Once more, there was apparently no question that the PSR accurately described the document it used; what mattered was that the defendant disputed the

underlying facts. *Id.* at 1023; *see also Lawrence*, 47 F.3d at 1562, 1567 (requiring the government to offer "evidence supporting" the drug quantity the PSR calculated).

And, in the D.C. Circuit, "the Government carries the burden to prove the truth of [a] disputed assertion" in a PSR, which "is triggered whenever a defendant disputes the factual assertions in the report." *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005). *Price* addressed a prior conviction, which the PSR asserted based on "Court documents and criminal history information." *Id.* at 445. The defendant asserted that he was "not associated" with the case number the PSR recited, which sufficed to "dispute[] the factual accuracy of the PSR with regard to the 1999 conviction." *Id.* Again, what mattered was not the form or basis of the objection, but that the defendant "dispute[d] the existence" of the conviction. *Id.* The government's reliance on *Price* is thus puzzling; the point here is that Mr. Purdy, like Price, "disputes the factual assertions" in the PSR, which originated elsewhere. Opp. 19 (quoting *Price*, 409 F.3d at 444).

Contrary to the government's suggestion, the Eighth Circuit would have reached a different result here. There, if a defendant "objects to any of the factual allegations" in a PSR "on an issue on which the government has the burden of proof, . . . the government must present evidence at the sentencing hearing to prove the existence of the disputed facts." *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004). *Poor Bear* thus vacated a sentence that relied on "objected-to paragraphs" in a PSR "gleaned . . . from FBI investigation reports." *Id.* at 1040. No one disputed that the PSR accurately described what the FBI reports said; rather, the defendant

"objected to the probation officer's recommendation" of the higher guidelines calculation, "as well as to the paragraphs detailing the factual allegations that would support the provision's application." *See id.*

The government correctly observes that the Sentencing Guidelines "do not mandate a full evidentiary hearing when a defendant disputes a [presentence report]'s factual representation[.]" Opp. 17 (quoting *United States v. Stapleton*, 268 F.3d 597, 598 (8th Cir. 2001)). And yet, the Eighth Circuit has made clear that in that Circuit "some investigation and verification of the disputed statements in the PSR is required." *Stapleton*, 268 F.3d at 598. For this reason, it found error in *Stapleton* when the district court relied on unsubstantiated statements in a PSR, rather than requiring the government to produce evidence in response to the facts contested by the defendant. *Id.* at 598–99.[1] The same is true here.

Finally, the Second Circuit has long held that the government must prove disputed facts at sentencing. *See United States v. Lee*, 818 F.2d 1052, 1056 (2d Cir. 1987). Thus a "sentencing court" cannot simply "rely on information" in a PSR to

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[1] The government cites two other Eighth Circuit cases in support of its position, but neither are applicable. First, it cites *United States v. Dokes*, for the proposition that a defendant must "object to fact statements in the presentence report 'with specificity and clarity.'" Opp. 17 (quoting *Dokes*, 872 F.3d 886, 889 (8th Cir. 2017)). Mr. Purdy's objection is clear. At no point has the government ever complained that the substance of Mr. Purdy's objection lacks specificity or clarity.

Equally misplaced is the government's reliance on *United States v. Bledsoe*, 445 F.3d 1069, 1073 (8th Cir. 2006) (recognizing that the court could rely on "factual allegations" in presentence report where the defendant "objected not to the facts themselves, but only to the report's recommendation based on those facts."). *See* Opp. 18. Mr. Purdy objected both to the PSR's recommended enhancement and to the facts recited in the PSR to support that enhancement, contending that it lacked sufficient indicia of reliability.

which the defendant objects, *United States v. Helmsley*, 941 F.2d 71, 98 (2d Cir. 1991). That court has applied this rule to set aside a sentence based on a PSR that "simply recited" allegations "in contemporary newspaper accounts and . . . prison records." *United States v. Riddle*, 601 F. App'x 36, 38 (2d Cir. 2015). *Riddle* did not involve some sort of scrivener's error in transcribing these sources. Instead, the court had before it a PSR recounting stories and records on the one hand, and the defendant's objection on the other. *See id.* at 37–38 (Riddle's counsel objected, explaining that Riddle had never been convicted of the disputed conduct). The same is true here: The government offered a certain narrative in the PSR, while Mr. Purdy argued that the account lacked "sufficient indicia of reliability." In the Second Circuit, such a conflict creates "a disputed factual question" on which the district court "could not rely" without proof from the government. *Id.* In the Fifth Circuit, the sentencing court can simply brush that dispute aside. That is a split. *See also Lee*, 818 F.2d 1052, 1056 (2d Cir. 1987) (explaining that the government bears the burden of persuasion at sentencing because, *inter alia*, "the defendant should not have to face the inherent difficulty of proving a negative—that is, that he did not commit the disputed acts.").

In short, none of the circuits that reject the Fifth Circuit's rule limit the government's burden to proof that the PSR correctly recited the underlying account. And rightly so: The ultimate question here is whether the PSR's allegations are true. It does not matter whether the allegations are false because the PSR mischaracterized them, or because they were never true to begin with. Rather, what matters in all these circuits is whether the defendant disputes a fact asserted in the

PSR. If so, "the district court is obligated to resolve the factual dispute, and the government bears the burden of proof[.]" *Ameline*, 409 F.3d at 1085 (citation omitted).

After all, a PSR almost always consists of secondhand information gathered from various sources. In some cases, the defendant will contend that the probation office made an error in reciting that information.[2] But in most, he will object to information in the report by challenging the veracity of the underlying assertions. Such objections—to the quantity or type of drugs or a co-conspirator's plan—are common. It makes no sense to shift the burden to the defendant in one of these situations but not the other. Either way, a critical fact is disputed. And because the PSR "is not evidence," *Poor Bear*, 359 F.3d at 1041 (citation omitted), when its allegations are disputed, there must be some sort of proof. That is all that Mr. Purdy asks. Had he made his objection in the Second, Eighth, Ninth, Eleventh, or D.C. Circuits, he would have gotten relief.

B. The Fifth Circuit's Rule Requiring a Defendant to Prove His Innocence With Respect to a Sentencing Enhancement Violates Due Process.

This case demonstrates the unfairness of the Fifth Circuit's rule requiring a defendant to disprove the PSR. The effect of the rule is to presume that he is guilty with respect to the conduct alleged in the report. It says that Mr. Purdy committed

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[2] The distinction between a mis-recitation and false underlying information is not always clear. Sometimes, a PSR may correctly recite the underlying document but fail to include other information that places it in a different light or undermines the declarant's credibility.

an incredibly serious crime. He now has to prove that he did not. In other words, Mr. Purdy has to prove a negative.

Courts around the country recognized the dangers of a rule requiring the defendant to produce rebuttal evidence, *i.e.* to "prove his innocence" with respect to a sentencing enhancement predicated on hearsay. In *United States v. Weston*, the Ninth Circuit held that defendants should not be required to disprove allegations in the PSR based on police reports conveying information from an informant. 448 F.2d 626, 634 (9th Cir. 1971) *cert. denied.* 404 U.S. 1061 (1971). The court recognized that "[i]n addition to the difficulty of 'proving a negative,' we think it a great miscarriage of justice to expect Weston or her attorney to assume the burden and the expense of proving to the court that she is not the large scale dealer that the anonymous informant says that she is." *Id.* The Ninth Circuit recently acknowledged that, "if the sentencing process effectively puts the burden of proof on the defendant to refute a damaging hearsay allegation, particularly when the factual basis for believing such a charge is practically nonexistent, that process is legally flawed." *United States v. Franklin*, 18 F.4th 1105, 1118–19 (9th Cir. 2021) (citation omitted). In other words, "[t]he government could effectively assert anything in the PSR and require the defendant to refute it. Such a system is repugnant to due process." *Id.* at 1119 (citation omitted).

The Eleventh Circuit also recognizes the dangers of requiring a defendant to prove a negative. As noted above, it has adopted a rule that, "once a defendant objects to a fact contained in the PSI, the government bears the burden of proving that

disputed fact by a preponderance of the evidence." *Martinez*, 584 F.3d at 1027 (citations omitted). Prior to *Shepard v. United States*, 544 U.S. 13, 21 (2005), "there was some 'slight' burden for a defendant to substantiate his objection to the PSR." *United States v. Rosales-Bruno*, 676 F.3d at 1023 (recognizing that *Shepard* "significantly impacted how we analyze objections to the PSR."). The court emphasized the minimal nature of the pre-*Shepard* the burden, since even then, the defendant would "not . . . be required to prove the negative proposition that he was not violent. . ." *Id.* (cleaned up). *See also United States v. Restrepo*, 832 F.2d 146, 149 (11th Cir. 1987) (in describing the pre-*Shepard* burden, noting that "[d]efendants are not to be required to prove negative propositions; and, thus, this burden ought to be slight.").

And, the Second Circuit provided three reasons to assign the burden of persuasion at sentencing to the government: (1) "there is a presumption that the defendant who denies committing these acts is innocent;" (2) "the government has greater resources to marshall proof in support of these allegations;" and (3) "the defendant should not have to face the inherent difficulty of proving a negative—that is, that he did not commit the disputed acts." *Lee*, 818 F.2d at 1056 (citation omitted).

Here, not only would Mr. Purdy be required to prove a negative, but he would have to negate information from a hostile witness. Even if Mr. Purdy could locate the complainant, compelling such an adverse witness to recant her prior statement to law enforcement in the face of a self-incrimination claim would be close to impossible. By comparison, the burden on the government to call the complainant as a witness to

substantiate the PSR's allegations would be much more manageable – the witness had, after all, indicated a willingness to work with law enforcement.

On top of these practical difficulties, Mr. Purdy faced adverse consequences in both the federal and state court if he were to testify or otherwise tell his side of the story. He would have jettisoned his right to silence in the state case, and risked facing a higher offense level in federal court if the judge did not believe him. The government bears no legal consequence at all if it is disbelieved.

In sum, the Fifth Circuit's rule requires a criminal defendant to prove his innocence with respect to a sentencing enhancement. As other courts have recognized, such a rule is "legally flawed," "a great miscarriage of justice," and "repugnant to due process." *Franklin*, 18 F.4th at 1118–19; *Weston*, 448 F.2d at 634. This Court should grant review to correct this injustice.

C. The Split Warrants Review, and This Case is a Good Vehicle.

The government offers a long string cite of prior petitions that raised "substantially the same issue." Opp. 15, n. 3. But that only highlights the recurring nature of this question, which has arisen over many years from a variety of circuits. Indeed, it shows the split has become entrenched and is not capable of resolution. And as the government itself has argued, many of those cases were bad vehicles, and thus the split was "not implicated" there. *E.g.*, Brief in Opposition 14–15, 19, *Parkerson v. United States*, 142 S. Ct. 753 (2022) (No. 20-8345); Brief in Opposition 9–10, *Tshiansi v. United States*, 139 S. Ct. 2748 (2019) (No. 18-8524); Brief in Opposition 10–11, *Gipson v. United States*, 139 S. Ct. 2636 (2019) (No. 18-7139).

The government makes a similar argument here, asserting that this case is a poor vehicle because other parts of the PSR "corroborated the victim's statements in important respects." Opp. 18. It also argued that the district court overruled the objection "as untimely, as well as meritless" and that this "alternative basis for affirmance provides sufficient reason to deny review here." Opp. 19 (citation omitted). Both reasons are groundless.

1. The victim's account is illogical and uncorroborated.

The government argues that "it is far from clear that any circuit would preclude a sentencing court from considering the accurately reported and corroborated statements of the victim[.]" Opp. 18. As an initial matter, the Second, Eighth, Ninth, Eleventh, and D.C. Circuits likely would not even consider the victim's statements on this record, because they were conveyed to the court through a disputed PSR.

Nor is there any corroboration for the victim's narrative supporting the enhancement. The government notes that Mr. Purdy did not object to the PSR's finding "that '[t]he victim's version of events appeared to be corroborated, in part, by' evidence found at the crime scene, neighbors' statements, and marks observed on the victim's body." Opp. 13 (citing PSR ¶ 13). But as Mr. Purdy has already pointed out—if true, these "facts" would support her claim that a domestic disturbance occurred,

and that a firearm was present in the home.[3] They *do not* corroborate her allegation that Mr. Purdy assaulted her with a firearm.

Most importantly, if the complainant's account is "accurately reported[,]" Opp. 18, it is illogical, inconsistent, and flies in the face of common sense. *Id.* at 3–6. This may be because the complainant's account was false or incomplete, or it might be that somewhere in the chain of hearsay, critical details left the story. The record does not reveal which is more likely, well-illustrating the unworkability of the government's proposed distinction between unreliable recitations and unreliable underlying information. In any case, there are at least three reasons to doubt the information as it comes to the district court.

First, it is highly unlikely that a Stallard Arms (HiPoint) Model JS, 9-millimeter pistol could have been concealed in a woman's back pants pocket, as the victim claimed. PSR ¶¶ 11, 13. Based on a publicly available source, the pistol is 7.75 inches in length, and the barrel is 4.5 inches.[4]

Second, even assuming that the victim was extremely knowledgeable about firearms and had impressive hand-eye coordination, it would have been an incredible feat for her to "release[] the magazine from the pistol[,]" while Mr. Purdy was "on top of her[,] . . . chok[ing] the victim using his forearm against her throat," all as the pistol

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[3] *See* Reply Brief of Defendant-Appellant at 5–6, *United States* v. *Purdy*, Nos. 23-10502, 23-10501, 2024 WL 1905757 (5th Cir. May 1, 2024) (unpublished).

[4] "Hi-Point Model JS-9," The Handgun Information Resource (last accessed Jan. 18, 2024), available at https://www.genitron.com/Handgun/Hi-Point/Pistol/JS-9/9-mm/Variant-1.

was behind her back in her "back pocket[,]" and she was screaming "Don't kill me[.]" PSR ¶ 11–13. It is also unclear why, and how, she "pushed two rounds of ammunition from the magazine onto the bed" after she had removed the magazine from the pistol. PSR ¶ 12.

Third, although the victim claimed that she used Mr. Purdy's "moment of confusion to flee the apartment[,]" her other statements contradict the notion that Mr. Purdy was confused. PSR ¶ 12. According to the victim, "[a]s Purdy realized what [she] had done, he raised the pistol to the victim's head and pulled the trigger[.]" PSR ¶ 12. Thus, according to her, Mr. Purdy was *aware* that she had removed the magazine from the pistol before he pulled the trigger. If this was true, he was not confused when he pulled the trigger and nothing happened. Thus, is the PSR likely does not accurately depict the alleged altercation nor how she escaped.

Below, the government also pointed to "the fact that the magazine and ammunition were found separately from the pistol" and the discovery of a "spent shell casing" as further corroboration of the victim's account.[5] This also defies reason. If the scuffle occurred as the victim described—on a "bed," presumably in a bedroom—it is unclear why police found the magazine in the "living room area," nor why the pistol was "hidden in the kitchen stove." PSR ¶ 10, 12, 13. Either the victim decided to omit some key details, or the incident did not occur in the way that she described. And, if someone decided to hide the pistol in the kitchen stove, he or she may have

[5] *See* Brief of United States-Appellee at 4, *United States* v. *Purdy*, Nos. 23-10502, 23-10501, 2024 WL 1905757 (5th Cir. May 1, 2024) (unpublished).

removed the magazine for practical reasons, such as to prevent the bullets from exploding if heated. The discovery of a spent shell casing does not corroborate her claim that Mr. Purdy pointed a gun to her head.

In sum, the record contains no evidence corroborating the victim's accusation that Mr. Purdy assaulted her with a firearm. Her account is internally inconsistent and illogical. It underscores the problem with the Fifth Circuit's rule. To the extent that the court of appeals set the bar for reliability so low that it can be met by such a nonsensical statement by an unnamed witness, that rule needs to be revisited.

2. The objection was preserved.

The government seeks to avoid review, claiming that "a decision in petitioner's favor would have no practical effect on his sentence." Opp. 19. To its credit, it does not argue that a four-level difference in Mr. Purdy's offense level would have made no difference in the sentence. Rather, it claims—for the first time—that when he raised his "oral objection to the four-point enhancement . . . the district court overruled that objection as untimely, as well as meritless." Opp. 19. It notes that because Mr. Purdy "did not challenge that separate ruling on timeliness" before the Fifth Circuit, nor before this Court, "[t]hat alternative basis for affirmance provides sufficient reason to deny review here." Opp. 19. The government is wrong.

To begin, Mr. Purdy preserved his objection. To do so, a "party must raise a claim of error with the district court in such a manner so that the district court may correct itself and thus, obviate the need for [appellate] review." *United States v. Krout*, 66 F.3d 1420, 1434 (5th Cir. 1995) (cleaned up). "The purpose of requiring

defendants to make timely objections to the PSR and actual sentence is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States v. Ocana*, 204 F.3d 585, 589 (5th Cir. 2000) (quoting *United States v. Ruiz*, 43 F.3d 986, 988 (5th Cir. 1995) (internal quotation marks omitted)). Mr. Purdy's objection to the 4-level enhancement fulfills this purpose. More than four months before sentencing, Mr. Purdy filed written objections to the court relying on paragraphs 9-12 of the PSR, which summarize "FWPD offense reports for conduct that Mr. Purdy has not pleaded guilty to and has not resulted in a conviction." ROA.23-10501.214. He argued that the "summary of police reports does not bear sufficient indicia of reliability to overcome" his "due process rights." ROA.23-10501.214-15. Both the government and the Probation Office received copies of Mr. Purdy's objection, and responded in writing over three months prior to sentencing. ROA.23-10501.217-19, ROA.23-10501.241-42. Mr. Purdy reiterated this objection at sentencing, specifically with respect to the 4-level enhancement in PSR paragraph 23. ROA.23-10501.161. His attorney informed the court that she had "already discussed it with the government. I'm not springing this on them." ROA.23-10501.161. She indicated that she had nothing to add to her argument beyond the written objections. ROA.23-10501.161. The district court overruled the objection on substantive *and* timeliness grounds. ROA.23-10501.161. It is clear that the "district court was clearly notified of the grounds upon which" Mr. Purdy's "objections were being made." *Ocana*, 204 F.3d at 589 (citing *Krout*, 66 F.3d

at 1434) (footnote omitted)). If the district court believed the information insufficiently reliable for the variance, it would necessarily be insufficiently reliable for the enhancement. The oral objection simply pointed out another necessary implication of the prior assertion. The objection was preserved. That should end the matter.

But even if the government were correct that Mr. Purdy missed his opportunity to challenge the "timeliness" ruling, that is not a reason to deny review. It would simply affect the standard of review. *See Ocana*, 204 F.3d at 588 ("Failure to object to either the PSR or the district court's sentence results in review for plain error.").[6]

Nevertheless, the government suggests that this Court should deny review based on a footnote in a lone out-of-circuit case noting that "(a finding of untimeliness under Federal Rule of Criminal Procedure 32(f)(1) is sufficient reason to deny a sentencing objection and that a defendant must successfully challenge such a finding on appeal to obtain review of the merits)". *See* Opp. 19–20 (citing *United States v. Wells*, 38 F. 4th 1246, 1262 n. 12 (10th Cir. 2022)).

But that is not what the court of appeals chose to do. Mr. Purdy stated that the Fifth Circuit should review his Due Process and procedural reasonableness claims

[6] *United States v. Olano*, 507 U.S. 725, 732 (1993) (to prevail on a claim of unpreserved error, appellant must demonstrate: 1) error, 2) that is clear or obvious, 3) that affects substantial rights, and 4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings, meriting discretionary relief).

under a *de novo* standard.[7] In its response, the government voiced no objection and did not otherwise address the standard of review in the court of appeals.[8] The Fifth Circuit acknowledged that Mr. Purdy had preserved his claim, noting that whether the sufficient indicia of reliability standard "is met in a given instance is a factual finding reviewed for clear error." *United States* v. *Purdy*, Nos. 23-10502, 23-10501, 2024 WL 1905757 at *1 (5th Cir. May 1, 2024) (unpublished) (quoting *United States v. Ortega-Calderon*, 814 F.3d 757, 760 (5th Cir. 2016)).

This Court should reject the government's last ditch attempt to evade review. The Fifth Circuit addressed Mr. Purdy's objection on the merits, making no comments about untimeliness or even plain error review. It denied his arguments "under the rule of orderliness[,]" citing its own precedent. *Id.* at *1 (citing *United States v. Harris,* 702 F.3d 226, 230 (5th Cir. 2012); *United States v. Parkerson*, 984, F.3d 1124, 1129 (5th Cir. 2021)). That precedent, which faults Mr. Purdy for failing to "present rebuttal evidence or otherwise demonstrate that the allegations were unreliable" *id.* at *1, is unjust, unworkable, and unconstitutional—especially with respect to someone like Mr. Purdy, who faced a pending state case concerning the same conduct. This Court should grant review.

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[7] *See* Brief of Defendant-Appellant at 11–12, *United States* v. *Purdy*, Nos. 23-10502, 23-10501, 2024 WL 1905757 (5th Cir. May 1, 2024) (unpublished).

[8] *See* Brief of United States-Appellee at 1–2, *United States* v. *Purdy*, Nos. 23-10502, 23-10501, 2024 WL 1905757 (5th Cir. May 1, 2024) (unpublished).

II. This Court Should Hold the Petition Until it Decides the Constitutionality of Section 922(g)(1) under the Second Amendment.

For the reasons previously stated, this Court should grant certiorari to decide the constitutionality of 18 U.S.C. § 922(g)(1). If it does so in another case, it 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.") (emphasis in original)).

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 4th day of December, 2024.

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