

No. 19-

IN THE

SUPREME COURT OF THE UNITED STATES

CORY DALE FIELDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is alleged prior uncharged conduct that had been no-billed by a Grand Jury sufficiently reliable for a federal district court to consider at sentencing?

PARTIES

Petitioner: Cory Dale Fields

Respondent: United States of America

RELATED PROCEEDINGS

There are no related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cory Dale Fields respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States of America v. Cory Dale Fields*, 932 F.3d 316 (5th Cir. 2019). See Appendix A.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition has been filed within 90 days of the opinion below, excluding the final Sunday, and is therefore timely. *See* Sup. Ct. R. 13.1; Sup. Ct. R. 30.1.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides that:

[n]o person shall be . . . deprived of life, liberty, or property without due process of law.

Section 3661 of Title 18, United States Code provides that:

[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense for which a court of the United States may receive and for the purpose of imposing an appropriate sentence.

STATEMENT OF THE CASE

Introduction

A district court must find any sentencing fact by a preponderance of the evidence. In this case, the district court increased Petitioner's sentence based on conduct which had long ago been no-billed by a Texas Grand Jury. A Grand Jury need only find probable cause to return an indictment, a standard lower than the preponderance-of-the-evidence standard required for judicial findings at sentencing. Nevertheless, the district court, sitting many years later and relying solely on one-paragraph summaries in a presentence report, concluded by a preponderance of the evidence that Petitioner had in fact engaged in the conduct described.

This petition respectfully requests the Court to review whether a district court can rely on prior no-billed conduct when making its sentencing determinations.

Procedural Overview

In July 2018, Petitioner was sentenced to 60 months imprisonment in federal court for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (ROA. 28-29,45-48, 108.) His Guidelines range was 37-6 months. (ROA. 93, 154.) But the district court upwardly varied from the Guidelines by 14 months based in part on the presentence report's brief descriptions of two old prior arrests from 2001 and 2005. (ROA. 133-134.)

Among the limited information the district court had about these arrests, it learned that a Texas Grand Jury had no-billed each of these charges. (ROA. 133-134.)

At sentencing, Counsel argued that the court should not rely on the conduct described in the PSR because such information was insufficiently reliable in light of the Grand Jury no-bills. (ROA. 97-98.) The court acknowledged the no-bills; but it concluded nevertheless by a preponderance of the evidence that Petitioner had engaged in the conduct described in the paragraphs of the presentence report. (ROA. 105-106.)

Appeal

Petitioner appealed. On appeal, Petitioner challenged the district court's reliance on conduct which had been no-billed by a Texas Grand Jury. In a published opinion, the Fifth Circuit concluded that a "no-bill cannot transform a factual recitation with sufficient indicia of reliability into one that lacks such indicia." *Fields*, 932 F.3d at 323.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. Published precedent in the Fifth Circuit authorizes a district judge to upwardly vary from the Guidelines based on prior uncharged conduct which had been no-billed by a Grand Jury.

While there is no limit to the *kinds* of information which a court may consider at sentencing, 18 U.S.C. § 3661, such information must still be sufficiently reliable to comport with due process. Due process requires that sentencing facts must be established by at least a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 156 (1997) (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986); *Nichols v. United States*, 511 U.S. 738, 747-748 (1994)).

But in the case below, the district court increased Petitioner's sentence based on two old arrests for which Petitioner had been no-billed by a Texas Grand Jury. As a consequence, the court found by a preponderance of the evidence Petitioner had engaged in conduct for which a Grand Jury found the evidence lacking under even the lower standard of probable cause. *See Harris County Dist. Atty's Office v. R. R.*, 928 S.W. 2d 26, 264 (Tex. App.—Houston [1st Dist.] 1996 (grand jury refusal to indict strongly suggest probable cause was missing); *United States v. Gipson*, No. 17-10753, 745 Fed. Appx. 364, 369 (5th Cir. 2018) (Higginson, J., dissenting) (concluding it stands to reason from no-bill that Grand Jury lacked a reasonable basis to believe the defendant committed offense recounted in PSR).

In the opinion below, the Fifth Circuit drew a distinction between the charges no-billed and the underlying conduct described. *Fields*, 932 F.3d at 324 The court

emphasized that the district court had made a finding that Petitioner had engaged in the conduct described in the PSR in connection with the arrests, but had not found that that he had committed any particular offense that had been no-billed *Id.* In *Gipson*, Judge Higginson observed in a prior case raising a similar issue “that is a distinction without a difference.” *Gipson*, 746 Fed. Appx. at 369 (Higginson, J., dissenting). Petitioner submits Judge Higginson has the better view.

Nor does it matter that the precise reason for the no-bill remains unknown. The panel reasoned that the no-bill did nothing to undermine the reliability of the remaining information in the PSR because the Grand Jury’s reasons for the no-bill are unknown. *See Fields*, 932 F.3d at 323-324. But the very fact of the no-bill should provide reason enough to doubt the reliability of the one-paragraph summaries lifted from a police report. “Shrouding the PSR’s preponderance assertion with more mystery hardly bolsters its credibility.” *Id.* (Higginson, J., dissenting). The fact that the government purportedly can’t explain how or why no-bills were returned does nothing to alleviate or reverse doubts about the reliability of the evidence.

The Fifth Circuit’s reasoning further conflicts with the Court’s decision in *Watts*, even though the panel below discusses *Watts* at some length in its opinion. *See Fields*, 932 F.3d at 320-321. In *Watts*, the Court concluded that a district court could consider conduct at sentencing for which a jury had acquitted the defendant at trial. *United States v. Watts*, 519 U.S. 148, 149 (1997). Of critical importance however, the Court acknowledged that an acquittal carries evidentiary significance, even if the particular

reason for the acquittal is unknown. Quoting from a prior decision it noted that an “acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.” *Id.* at 155 (citing *United States of America v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) (emphasis added). In upholding the judicial factfinding, the Court emphasized that the government need only prove sentencing facts by a preponderance of the evidence instead of beyond a reasonable doubt. *Watts*, 519 U.S. at 156.

But the reasoning of *Watts* should compel precisely the opposite result here, where the situation is reversed. Here the district court made factual findings under a higher standard of proof than the standard applied by the Grand Jury when it no-billed the alleged conduct. The unknown reasons for the no-bill should not matter, just as they did not matter in *Watts*. Jury deliberations at trial and Grand Jury deliberations are both conducted in secret. But the reasoning of *Watts* should compel the inference that the government failed to establish probable cause, even if the Grand Jury’s particular reason is unknown. If an acquittal “proves the existence of reasonable doubt” at a trial, then a no-bill should similarly carry evidentiary weight as “proof” that the known evidence failed to establish probable cause. *Watts*, *Harris County DA’s Office v. R.R.*, 928 S.W. 2d at 264. In fact, it should establish that the known evidence failed to establish probable cause for not only the arrested offense, but *any* offense whatsoever. *See Tex. Code Crim. art. 20.09* (requiring Grand Jury to “inquire into all offenses” of which it had knowledge).

In *Watts*, the district judge had at least heard the very same evidence as the jury. By contrast, it is completely implausible that the district court had more information than the Grand Jury did 10-15 years earlier, a Grand Jury charged with “inquiring into all offenses” of which it had knowledge. Tex. Code. Crim. Proc. art. 20.09. The very existence of the no-bills themselves should have rendered the cursory paragraphs in the PSR as unreliable. It should have in no way figured into a 14-month variance from the applicable Sentencing Guidelines range.

Binding precedent in the Fifth Circuit now authorizes district courts to ignore no-bills and make judicial fact findings under a higher evidentiary standard as if the no-bills never occurred. The mere existence of the no-bill should have sounded a loud alarm to the district court that the limited information before it was unreliable. In the Fifth Circuit, courts may lengthen a defendant’s sentence based on evidence which prior decisionmakers closer to the action found failed to meet even a lower standard of proof. Due process demands more in order to lengthen a person’s sentence, and this Court should grant certiorari.

CONCLUSION

Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

DATE: October 28, 2019

Respectfully Submitted,

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