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

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In the

# Supreme Court of the United States

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**JEREMIAS ROBERTSON**, Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit

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## Petition for Writ of Certiorari

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STEPHEN P. MCCUE  
Federal Public Defender  
Margaret A. Katze\*  
Assistant Federal Public Defender  
111 Lomas Blvd., NW, Suite 501  
Albuquerque, New Mexico 87102  
Telephone: (505) 346-2489  
Facsimile: (505) 346-2494

Attorneys for the Petitioner  
\* Counsel of Record

## Questions Presented For Review

1. In *United States v. Mitchell*, 526 U.S. 314, 330 (1999), this Court held that a sentencing court may not draw adverse factual inferences from silence. Here, during sentencing deliberations, the court pointedly expressed surprise that it had not heard Robertson contradict, under oath, the testimony that he assaulted a police officer. A Tenth Circuit panel split on the comment's significance: a majority held it was ambiguous - the court never said it considered his silence unfavorably. The dissent argued that making - and twice repeating - the comment meant the court not only considered Robertson's silence but found it compelling.

When a court focuses on a defendant's silence during its sentencing deliberations, does it transgress the constitutional right against self-incrimination?

2. When a sentencing court's fact-finding establishes an uncharged offense that exponentially increases the calculated guideline sentencing range for the actual offense of conviction, should a clear and convincing, rather than a preponderance, standard apply to such a fact determination in deference to the constitutional rights to due process and a jury trial?

## **Related Proceedings**

United States Court of Appeals for the Tenth Circuit

*United States v. Jeremias Robertson*, Case No. 18-2165

Opinion Entered: January 6, 2020

Order Denying Petition for Panel Rehearing/Rehearing En Banc Entered:  
February 18, 2020

Mandate Entered: February 26, 2020

United States District Court for the District of New Mexico

*United States v. Jeremias Robertson*, Case No. 17-CR-2573-JAP

Judgment Entered: November 1, 2018

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In the

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# Supreme Court of the United States

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**JEREMIAS ROBERTSON**, Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

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## **Petition for Writ of Certiorari**

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Jeremias Robertson petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

## **Opinions Below**

The Tenth Circuit's decision in *United States v. Robertson*, Case No. 18-2165, affirming the district court's judgment and sentence, was published and is reported at 946 F.3d 1168 (10th Cir. 2020).<sup>1</sup> Robertson filed a petition for panel rehearing and rehearing en banc which the court denied.<sup>2</sup> The district

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<sup>1</sup> App. 1a-9a. "App." refers to the attached appendix. 'PSR' refers to the probation office's presentence report. The record on appeal contained four volumes. Robertson refers to the documents and pleadings in those volumes as Vol. \_\_ followed by the bates number on the bottom right of the page (e.g. Vol. I at 89). Robertson refers to the transcript from the sentencing hearing held on August 14, 2018, as 'S.Tr.' followed by the page number.

<sup>2</sup> App. 10a.

court did not issue a written order or memorandum opinion addressing the questions presented in this petition.

## **Jurisdiction**

On January 6, 2020, the Tenth Circuit affirmed the district court's judgment and sentence.<sup>3</sup> On February 18, 2020, the circuit court denied Robertson's petition for panel rehearing and rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Order from March 19, 2020, this petition is timely if filed on or before July 17, 2020.

## **Pertinent Constitutional Provisions**

The Fifth Amendment to the United States Constitution states:

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.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

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<sup>3</sup> App. 1a-9a.

law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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## Statement of the Case

### A. District Court Proceedings

Robertson pleaded guilty to an indictment which charged him with violating 18 U.S.C. § 922(g)(1) by unlawfully possessing a firearm and ammunition after he had been convicted of a felony.

**1. The probation office recommends an imprisonment range almost three times the range authorized for the offense to which Robertson pleaded guilty.**

In the presentence report (PSR) the probation office said the base offense level was 20. PSR ¶ 12 (citing United States Sentencing Guidelines (USSG) § 2K2.1(a)(4)(A)). It added 4 levels by applying USSG § 2K2.1(b)(6) because it believed Robertson assaulted a police officer while he possessed the firearm. PSR ¶ 13. It wrote, Robertson “pointed the firearm . . . toward the officer”, which under New Mexico law “constitutes [an] aggravated assault with [a] deadly weapon.” *Id.* The office also increased the offense level by 6, using USSG § 3A1.2(c)(1), the official victim enhancement. It noted that Robertson assaulted the officer in a “manner creating a substantial risk of serious bodily injury.” PSR ¶ 14. The adjusted offense level was 30.

That calculation had a disproportionate impact on the imprisonment range relative to the offense of conviction: for the offense to which Robertson pleaded guilty, felon in possession of a firearm, the court could impose a prison term between 46 to 57 months, but that range ballooned beyond the statutory maximum term to 120 to 150 months after adding the enhancements. PSR ¶ 62.

Because the parties were at odds over the enhancements recommended by the probation office, the district court held an evidentiary hearing. The officer who confronted and then shot Robertson testified for the government.

So did the officer who investigated the shooting. An eyewitness to the encounter testified on behalf of Robertson.

**2. The officer’s testimony that Robertson assaulted him was inherently inconsistent and uncorroborated.**

At approximately 5:30 on an August evening in 2017, Robertson was walking south on First Street in downtown Albuquerque. He was wearing a backpack and listening to music on his phone which he was holding in his left hand. S.Tr. 116. He did not have a gun in his hand. *Id.*

Robertson crossed First Street and then headed northeast through a dirt parking lot. S.Tr. 13, 116. An Albuquerque police officer who had been notified of a 911 call had stopped his patrol car at the north end of that street. S.Tr. 12. The caller reported that an African American male in the downtown area, near Second Street and Lomas Boulevard, had been pointing a gun at random citizens. *Id.* 11. When the officer saw Robertson crossing the street he “accelerated heavily towards” him. S.Tr. 13. As he sped off, the officer had his high powered rifle in hand. *Id.* 46.

The officer stopped in the middle of the street, leapt out of his car with his rifle “shouldered,” left his door open and told a man loading a vehicle onto the bed of a “large tow truck,” “watch my car.” S.Tr. 14-15. He did not follow Robertson into the parking lot but used the truck’s cover while he tracked him. *Id.* After he rounded the front of the truck, he still had the cover of a car in the lot. S.Tr. 17. When he saw Robertson, he crouched behind that car and shouted twice “in quick succession: ‘Show me your hands, show me your hands.’” S.Tr. 15. The officer gave this command although when he pulled up on Robertson, “he did see him have something dark in his right hand . . . there was a high likelihood it was a gun.” S.Tr. 16.

The officer said after directing Robertson to show him his hands and while pointing his rifle at him, Robertson turned slightly to the left and over his left shoulder pointed at the officer a “small caliber handgun” which he held in his right hand. S.Tr. 16. Robertson then walked away and the officer repeated “with great urgency, ‘show me your hands, show me your hands.’” *Id.* 17. Robertson again “looked over his left shoulder back at [the officer] looking into the sun with the handgun” pointed at the officer over his left shoulder. *Id.* 18-19. Notably, while he was shouting at Robertson, the officer heard Robertson pleading loudly, “don’t shoot me, I didn’t do anything wrong.” S.Tr. 49. The officer then “fired a single precise round” which hit Robertson between his armpit and left nipple. *Id.* Because of the “organic tissue damage . . . a 64-grain .223 round” will do, the officer’s shot “was effective.” S.Tr. 19-20. Robertson fell face down to the ground, “unresponsive.” *Id.* 21. A handgun was found two to three feet from where Robertson landed. *Id.* 57.

The officer’s body camera started recording during his drive down First Street. However, because he had it pointing towards the ground, it corroborated none of what he said Robertson did with the handgun. S.Tr. 147.

Before the officer saw Robertson cross the street, Johnny Pinson, a bystander, watched him walk past on the sidewalk. He saw Robertson cross the street and traverse the parking lot. Pinson noted that he did not see him carrying a gun in either hand. S.Tr. 116. He said Robertson appeared to be listening to music from the device he was holding in his hand. *Id.*

After Robertson crossed the street, Pinson saw the officer charge down the road and jump out of his car with “his big old rifle.” S.Tr. 117. He heard the officer “holler at that fellow in the parking lot, ‘show me your hands.’” *Id.*

Pinson heard Robertson say, “I haven’t done anything . . . I’m only 18, don’t shoot me.” S.Tr. 117-18. Then he heard, “bam.” *Id.* Pinson insisted he had a clear view of the confrontation. When the officer shouted “show me your hands,” Pinson saw Robertson with his hands open and up to his side, gesturing to emphasize his entreaty, “I haven’t done anything.” S.Tr. 117. He did not see a gun in his hands. *Id.* 118.

The officer’s proclivity for violent confrontation was detailed in his disciplinary history. He was removed from Special Weapons and Tactics (SWAT) because of a bean bag incident. S.Tr. 59. The officer fired three ‘bean bag’ shots to a man’s head. Unknown to the officer, the man was already dead, but if he had not been, those shots would have killed him. *Id.* 60. In addition to his removal, the officer was given a 32 hour suspension and a letter of reprimand. *Id.* 59.

In another confrontation, the officer grabbed a man’s arm and pointed his firearm at him. This man had simply reported domestic violence involving his neighbor. S.Tr. 60. For that improper use of force, the officer was given a verbal reprimand and then sued civilly. *Id.* 60-61. He also was disciplined for kicking, punching and then striking a man in the face with his rifle. S.Tr. 64.

The officer was also combative with his colleagues. He was suspended for 40 hours and sent to anger management counseling for assaulting a police lieutenant. S.Tr. 61-63. He was suspended for another 40 hours because he pointed his gun at a coworker’s chest and said, “Check it out, God’s gun.” S.Tr. 68.

Pertinent to his actions here, the officer was reprimanded for not using his “on-body recording device” when he shot at a car he was pursuing. *Id.* 67.

**3. The sentencing transcript proves the district court factored Robertson's silence into its sentencing deliberation.**

At the end of the hearing, the district court voiced its concern over the officer's turbulent background. Combined with doubts about the officer's testimony, the court said, it was "very disturbed about the sequence of events occurring so rapidly. I have some serious questions about him, frankly." ROA, Vol. IV at 154. However, it then added, "But I think his testimony is supported in this case. I'm a little surprised that I didn't hear from the main player who would tell us that, "No, I did not point a gun at Officer Arias.' I didn't hear that testimony." *Id.* at 154-55. When defense counsel countered that the parties were engaged in a "contested sentencing hearing because [Robertson] is saying, as we said throughout the objections in the sentencing memo, that he did not point the gun at –," the court interrupted and said, "he hadn't testified to that under oath." It then added, "I've heard other testimony under oath that is not countered by that." *Id.* at 155.

Examining the evidence from that perspective, the court then found:

1. When Robertson was walking down First Street, he did not have a gun in his right hand. S.Tr. 153. The surveillance video did not show a gun in his hand but it was clear he had a cellular telephone in his left hand. S.Tr. 158.
2. The 911 call that prompted the officer was not "made up." S.Tr. 154. The caller's observations seemed a "totally spontaneous" telling of what he saw "as he's walking along." *Id.*
3. The officer located Robertson "in the area of First and Lomas Boulevard." S.Tr. 151. He approached Robertson and saw him "to have a small pistol in his right hand. The officer ordered [Robertson] four

times to show his hands.” *Id.* He did not tell him to “drop the gun.” S.Tr. 138. Robertson pointed the handgun at the officer. S.Tr. 151. Robertson, “continued to move away from the officer, and he was again given verbal commands.” *Id.*

4. Robertson again “turned” and “pointed the firearm at the officer.” The officer “fired one round striking” Robertson. S.Tr. 151. A firearm was found where Robertson “fell to the ground a few feet above his head.” *Id.*

Based on its findings, the court ruled the probation office had correctly applied the enhancements for committing a felony assault against the officer, in a manner creating a substantial risk of serious bodily injury. S.Tr. 159, 164-65. Robertson had asked the court to examine the government’s evidence using the beyond a reasonable doubt or clear and convincing evidence standard. S.Tr. 160. It refused.

While the court believed the criminal history score was correctly calculated, it felt category V over-represented the seriousness of Robertson’s criminal history. It found the “more appropriate category” was “category IV.” S.Tr. 164. The court noted the imprisonment range in this category at level 27 was 100 to 120 months. *Id.* 165. The court intimated Robertson made a compelling argument for a 60 month term. S.Tr. 170. Ultimately, however, in keeping with its sentences for similarly situated defendants, the court varied down to only 84 months. S.Tr. 165, 170, 175; Vol. I at 186; Vol. III (Statement of Reasons).

## B. Tenth Circuit Proceedings

Robertson filed a timely notice of appeal. Doc. 46; Vol. I at 92. In a published opinion, the Tenth Circuit panel majority found the district court's statements were "ambiguous" and did not amount to "clear and obvious error." *United States v. Robertson*, 946 F.3d 1168, 1173 (10th Cir. 2020). Judge Briscoe disagreed. She found the district court "plainly erred by drawing an adverse inference from Mr. Robertson's silence at his sentencing hearing." *Id.* at 1175. In her opinion the court's remarks warranted reversing and remanding for resentencing. *Id.*

- 1. In her dissent, Judge Briscoe applied *Mitchell* to the facts and concluded the district court violated Robertson's Fifth Amendment rights by factoring his silence into its sentencing deliberations.**

As Judge Briscoe explained in her dissent, the record demonstrates that the district court committed plain error by holding Robertson's silence against him when deducing the facts which determined the severity of the imprisonment term. 946 F.3d at 1173-74. When, as here, an accused's silence is a factor which persuades the district court to rely on the testimony of other witnesses, the court commits error according to *Mitchell v. United States*, 526 U.S. 314, 319 (1999). *Id.* Contrary to the majority opinion, Judge Briscoe wrote, the district court's deliberate comments on Robertson's silence were not "ambiguous." 946 F.3d at 1173, 1174. She pointed out that the majority came to this conclusion by ignoring "critical portions of the sentencing transcript." 946 F.3d at 1174. The majority did not dispute that it had.

Judge Briscoe said the sentencing transcript showed the district court repeatedly referenced Robertson's failure to testify "under oath." 946 F.3d at 1174. Its reference to his silence was not coincidental. Judge Briscoe reasoned that if the court did not intend to consider Robertson's silence when deliberating on the evidence, its remarks would have been unnecessary. *Id.* Taken as a whole and in context, the court's comments show it questioning whether it had any choice but to apply the exacting sentencing enhancements given Robertson's silence. *Id.* Thus, Judge Briscoe concluded that the "district court's explicit consideration of Mr. Robertson's failure to testify *under oath* . . . makes clear that [his] silence factored into the district court's analysis of the 'other testimony' presented at the sentencing hearing." 946 F.3d at 1174. (emphasis in original).

However, Judge Briscoe joined the panel majority in rejecting Robertson's argument that when a guideline enhancement has a disproportionate impact on the recommended imprisonment range relative to the offense of conviction, the preponderance of the evidence standard will not adequately protect an accused's Fifth and Sixth Amendment rights. They all agreed that since this Court has "not adopted a heightened standard of proof . . . when a contested fact significantly changes the guidelines range of the sentence," here, the district court was correct to apply the preponderance of the evidence standard. 946 F.3d at 1171, 1173.

## **Reasons for Granting the Writ on the First Question Presented**

A sentencing court's task is to determine the circumstances of the offense and their impact on the severity of its sentence. Here, the court instead remarked again and again on Robertson's silence in court. In turn, according to the objective record, it drew an adverse inference from his silence. By doing so, the court imposed a burden on the right to remain silent. In other words, the exercise of a constitutional right impermissibly colored the court's findings and they must be set aside.

Robertson pleaded guilty to being a felon in possession of a firearm. He was sentenced as if he had used the firearm to assault a police officer. He was neither charged with nor convicted of committing an assault with a firearm. Yet, based on this alleged assault, the court applied sentencing guideline enhancements that resulted in a 10 level increase, almost tripling the prison term. The court's decision to enhance the sentence was made, at least in part, because it said it never heard from Robertson under oath.

The district court said despite reservations about the officer's troubled history and his haste in shooting Robertson, his testimony was "supported in this case." S.Tr. 154. It then said it was surprised it did not hear testimony from Robertson, "the main player who would tell us that, 'No, I did not point a gun at Officer Arias.'" *Id.* 154-55. When defense counsel reminded the court that his denial appeared throughout the objections in the sentencing memo, the court interrupted with the retort, "he hadn't testified to that under oath." It added, "I've heard other testimony under oath that is not countered by that." *Id.* 155.

The exchange is revealing. Not only is it the court who brings up Robertson's silence but it then *dwells* on it, repeatedly emphasizing the lack of defense testimony under oath. Courtroom silence and its meaning is not the question the court is obliged to examine. Rather, it is whether the government "carried its burden to prove its allegations while respecting the defendant's individual rights." *Mitchell*, 526 U.S. at 330. Robertson's silence was not only a wayward factor for the court, it was its focus. In effect, Robertson was punished for invoking his Fifth Amendment right against self-incrimination.

If the court did not intend to use Robertson's silence in its decision-making, why mention it at all? The panel majority does not say. The record indicates the court used his silence to "quantitatively weigh it against the government's 'untested' evidence . . ." *United States v. Mezas de Jesus*, 217 F.3d 638, 645 (9th Cir. 2000). The context in which the reference to Robertson's silence was repeated makes clear its significance to the court: a failure to testify established the officer's testimony as fact.

After *Mitchell*, a court need not expressly say it holds a defendant's silence against him. It is enough for a court to cite a failure to testify before allowing a problematic officer's testimony to enhance a sentence. If the sentencing court erred, as Robertson and the Tenth Circuit dissent believe, the panel majority's decision conflicts with this Court's decision in *Mitchell* and the Court must grant review. See Supreme Court Rule 10(c).

**A. In her dissent, Judge Briscoe pinpointed the district court remarks that prove Robertson's silence was a factor in his sentence; the majority concluded otherwise because "it omit[ted] critical portions of the sentencing transcript."**

The majority's conclusion cannot be reconciled with a full and objective reading of the sentencing transcript. Notably, the majority did not dispute critical portions were left out. Judge Briscoe, however, read all of the court's relevant remarks and described their import in the context in which they were made. Her methodical conclusion was that the district court plainly erred by drawing an adverse inference from Robertson's silence at his sentencing hearing. It is why this Court should use its discretion to grant certiorari, vacate the Tenth Circuit's judgment, and remand for reconsideration (GVR) in light of *Mitchell*.

In *Mitchell*, this Court held that a district court commits reversible error by drawing any "adverse inference from the defendant's silence" at sentencing when "determining facts about the crime which bear upon the severity of the sentence." 526 U.S. at 316-17. Judge Briscoe understood the plain language of this ruling. In *Lee v. Crouse*, she explained that after *Mitchell* it is improper for a court to use a defendant's silence to "infer commission of disputed criminal acts' for purposes of sentencing." 451 F.3d 598, 606 (10th Cir. 2006) (quoting *Mitchell*, 526 U.S. at 329). Here, she found the district court had done just that. Rather than examine the officer's testimony and decide whether it established the fact in question - did Robertson point a gun at the officer - the court examined Robertson's decision not to testify. 946 F.3d at 1174. The district court's single refrain during deliberations was that Robertson failed to testify under oath. *Id.* In that context, the court signaled its adverse opinion of Robertson's silence.

For its part, the majority briefly discussed two snippets from the district court’s deliberations. It said the district court mentioned it was “surprised” it had not heard from Robertson and then it said the officer’s testimony “was uncontradicted by direct testimony to the contrary.” 946 F.3d at 1173. Removed from context, the majority claimed the first snippet was “ambiguous” and thus, uncontroversial. It characterized the second as mere comment on the government’s proof. *Id.* (“merely an observation . . . [on] the only remaining testimony”). It found both statements ambiguous, failing “plain error” review.<sup>4</sup> The record sows doubt on its characterizations.

As Judge Briscoe noted, the majority expediently omitted the full exchange between Robertson’s counsel and the district court:

The Court: I have some serious questions about [Officer Arias], frankly. But I think his testimony is supported in this case. I’m a little surprised that I didn’t hear from the main player who would tell us that, “No, I did not point a gun at Officer Arias.” I didn’t hear that testimony.

Ms. Katze: Well, we’re here in a contested sentencing hearing because my client is saying, as we said throughout the objections in the sentencing memo, that he did not point the gun at - -

The Court: But *he* hadn’t testified to that *under oath* . . . And I’ve heard other testimony under oath that is not countered by that.

946 F.3d at 1174 (citing ROA, Vol. IV at 161-62) (emphasis in original).

The government always bears the burden of proof, even when a court is determining facts at sentencing. *Mitchell* barred a sentencing court from drawing adverse inferences from a defendant’s decision to remain silent. *Id.* (citing *Mitchell*, 526 U.S. at 327-30). Even when isolated, the panel majority

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<sup>4</sup> Unlike the majority, the government did not believe the court’s comments were ambiguous. By its remarks, the court was “acknowledging that a sworn denial by Robertson could have materially altered the balance of evidence.” GAB 23.

admitted the court’s “surprise” could mean it “was relying upon his failure to take the stand” when it found Robertson pointed a gun at the officer. 946 F.3d at 1173; S.Tr. 154. By reinserting the missing context, what the court meant becomes clear.

Judge Briscoe understood this. She found inferring guilt from Robertson not testifying violates this Court’s well-established rules:

The district court would not have repeatedly referenced the lack of testimony . . . if [] failure to testify was not a consideration in its analysis. When, as we see here, [] silence is a factor which persuades the sentencing court to rely on the testimony of other witnesses, the court commits error under *Mitchell* . . . [T]he district court’s focus in the above exchange was on the absence of one specific piece of evidence – the testimony of Mr. Robertson . . . [Its] own statements make clear that it considered Mr. Robertson’s silence in determining whether Mr. Robertson pointed a gun at Officer Arias.

946 F.3d at 1174.

In *Mitchell*, this Court found a remarkably similar comment regarding silence was improper. 526 U.S. at 319, 330. There, Mitchell disputed the drug quantity for which the co-defendants said she was responsible. During cross-examination, one co-defendant admitted to not seeing Mitchell regularly during the relevant time period. *Id.* at 318. Mitchell also relied on another defendant’s testimony that documents recorded the amount of drugs Mitchell sold. Despite Mitchell’s challenges to the co-defendants’ testimony, by “not testifying to the contrary” the sentencing court found them persuasive. *Id.* at 319. This Court held the court’s remark demonstrated it had used Mitchell’s silence to infer she committed the disputed acts. *Id.* at 329-30. It said it would not tolerate any negative inference from a failure to testify. *Id.* at 328. It emphasized a sentencing court may not infer anything from silence that affects factual conclusions on the circumstances of the offense. *Id.* at 329-30.

Contrary to what the panel majority suggests, *Mitchell* did not hold the sentencing court must expressly say it was basing the sentence on the defendant's silence. 946 F.3d at 1173. It is enough that a comment indicates not testifying played a role "in determining the facts of the offense at the sentencing hearing." *Mitchell*, 526 U.S. at 330. "I didn't hear that testimony" and "he hadn't testified to that under oath" both qualify. 946 F.3d at 1174. Just like in *Mitchell*, the court used silence to infer the commission of the disputed act - Robertson pointed a gun at the officer.<sup>5</sup> In other words, despite "serious questions" about the officer, absent a sworn rebuttal, his testimony proved aggravated assault. *Id.* This shifted the burden to Robertson to show sentencing enhancements should not apply. Thus, the sentencing court violated the right to remain silent and due process.

The district court's explicit consideration of Robertson's silence is clear from its own repeated comments on his failure to testify. It was error to do so. As this Court already has addressed the identical issue in *Mitchell*, the error is plain. Under the review appropriate for constitutional error, it is likely the court's explicit consideration affected its fact determination<sup>6</sup> and nearly tripled the potential sentencing range. When an error affects the calculation of a defendant's guideline range, the fourth prong is ordinarily

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<sup>5</sup> In *United States v. Gonzales*, 931 F.3d 1219, 1224 (10th Cir. 2019), the same district court again applied the sentencing guidelines official victim enhancement, § 3A1.2, because Gonzales "hadn't presented evidence" to counter its application. A circuit panel found the ruling unsound. It held an accused did not need to present any evidence.

<sup>6</sup> By its remarks, the court was "acknowledging that a sworn denial by Robertson could have materially altered the balance of evidence." GAB 23.

satisfied when the first three prongs are satisfied. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908-09 (2018). As Judge Briscoe wrote, all four elements for plain error are met. This Court should grant Robertson's petition for a writ of certiorari.

\* \* \* \* \*

## **Reasons for Granting the Writ on the Second Question Presented**

When a court finding exponentially increases a sentence for an uncharged offense, Fifth and Sixth Amendment rights to due process and to a jury trial, respectively, are best protected by using a ‘clear and convincing’ evidentiary standard. When, like here, a lesser evidentiary standard is used to find an uncharged crime and to nearly triple the recommended imprisonment range, a blatant sentencing miscarriage occurs.

Robertson’s case exemplifies why a sentencing factor that has a highly disproportionate effect on the prison term for the offense of conviction must be established by at least clear and convincing evidence. Robertson pleaded guilty to being a felon in possession of a firearm. He was never charged in any court with aggravated assault. Still, at the government’s urging, he was sentenced as if he had assaulted a police officer with a firearm based on a factor only found at sentencing. The imprisonment range for the offense to which he had pleaded guilty was 46 to 57 months. It grew to 120 to 150 months. In other words, the largest segment of the imprisonment range was imposed to punish an alleged crime that was not charged or proven by the government by clear and convincing evidence, let alone by a jury beyond a reasonable doubt.

The Tenth Circuit panel insisted this Court “has left the choice of standard to the discretion of the courts of appeals.” 946 F.3d at 1171-72 (quoting *United States v. Constantine*, 263 F.3d 1122, 1125 n.2 (10th Cir. 2001)). It held Robertson’s argument for a higher standard of proof is foreclosed by binding circuit precedent. *Id.* It did not address Robertson’s argument that a modestly higher standard of proof would not unduly burden the court or revoke its discretion. Nor did it discuss the Ninth Circuit test

that lets a sentencing court expeditiously decide when a heightened standard is warranted. Distilled to its essence, the test states if the government argues for guideline enhancements of four levels or more and the enhancements more than double the imprisonment range, it must prove the conduct supporting the enhancement by clear and convincing evidence. The panel curtly wrote the Ninth Circuit is the only circuit to adopt such a standard. 946 F.3d at 1171. But given the constitutional rights at risk, Robertson asks that the Court decide the Ninth Circuit's reasoned approach be used by all circuits.

While a preponderance of the evidence standard may be adequate for many sentencing determinations, it is not appropriate for facts that have an outsized effect on the length of imprisonment. Under this slight evidentiary standard, facts found by the sentencing court alone necessarily determine the prison term it gives. Likewise, the court can find facts that serve as legal predicates for enhancing the term. This practice allows a majority of the prison term to punish conduct for which there is neither an admission nor a jury's verdict. Constitutional prerequisites, which shape punishment's legal boundaries, are subverted.

The Founders made due process and a jury trial constitutional rights so a person's liberty was not decided too easily by a single individual. Yet, this is precisely what happens when a sentencing judge makes a weighty decision and does so by asking only which side produced the greater weight of evidence. *See* Black's Law Dictionary, 1201 (7th ed. 1999) (defining preponderance of the evidence); *Santosky v. Kramer*, 455 U.S. 745, 764 (1982) (preponderance considers quantity rather than quality of evidence). Even more grievous, then, when the decision permits doubling or tripling the

sentence imposed. More protection is needed when such distortions are possible. A heightened standard for fact-finding when sentences are disproportionately affected simply asks that a court be reasonably certain the government has established the elements of any uncharged offense. *See* Black's, 577 (defining clear and convincing evidence).

Here, the invocation of a higher standard would have preserved meaningful due process and prevented a prison term grounded in contested fact. Rather than deliberating on which side produced the greater weight of evidence, which arguably invited the court to consider Robertson's silence, a higher standard would focus on whether the government carried its burden to prove the aggravated assault it alleged. As Justice Scalia once wrote in another case of perverse sentencing, only this Court's intervention can "put an end to the unbroken string of cases disregarding the [Fifth and] Sixth Amendment" protections everyone is entitled to at sentencing. *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting from denial of certiorari).

**A. Given the circuit split, the Court should find when sentencing enhancements have a disproportionate effect on the imprisonment range of the convicted offense, a higher proof standard best eliminates the subsequent threats to a defendant's rights and liberty during sentencing deliberations.**

The instant case is one of many that begs the Court to act. For the offense of conviction, felon in possession of a firearm, Robertson's total adjusted offense level was 17. When combined with criminal history category V, the advisory imprisonment range was 46 to 57 months. The government sought enhancements. The district court obliged. It made clear the reason for raising the base offense level from 20 to 30 was its finding Robertson committed an aggravated assault in a manner creating a substantial risk of

serious bodily injury. The finding had a disproportionate impact on the advisory imprisonment range. The range ballooned past the statutory maximum term to 120 to 150 months. PSR ¶ 62. The majority of the sentence was for punishment beyond that of the pleaded crime. Worse still, the court based its increase on testimony from an officer it had “serious questions about.” 946 F.3d at 1174. Relying exclusively on a preponderance of the evidence standard allows such egregious outcomes. *See, e.g., United States v. Gardenhire*, 784 F.3d 1277, 1280 (9th Cir. 2015) (district court’s theory on how conduct was reckless unproven by clear and convincing evidence in record).

**1. The effect of the risk of error and the interest at stake determine the level of proof required.**

The burden of proof “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Addington v. Texas*, 441 U.S. 418, 423 (1979). Its function in fact-finding is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” *Id.* (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)); *see also Washington v. Harper*, 494 U.S. 210, 229 (1990) (Due Process Clause satisfied when procedural protections determined by rights and interests at stake in the particular case). For example, a preponderance standard is appropriate when the interest is relatively unimportant, as in “civil cases involving a monetary dispute between private parties.” *Id.* In contrast, the beyond a reasonable doubt standard is necessary when an interest of “transcending value,” like a person’s liberty, is at stake. *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

Deciding which burden of proof to apply requires a thoughtful analysis of the impact of error and the interests affected by the fact-finding.

Regarding the impact of error, this Court's holdings are again instructive. A lesser standard is warranted in civil cases whose interest is money because it is "no more serious in general for there to be an erroneous verdict in the defendant's favor than . . . in the plaintiff's favor." *Winship*, 397 U.S. at 371 (Harlan, J., concurring); *see also Addington*, 441 U.S. at 423 (preponderance standard used when society has "a minimal concern with the outcome"). In criminal cases, however, where liberty is lost, "society imposes almost the entire risk of error upon itself . . ." *Addington*, 441 U.S. at 424. By applying the highest standard of proof, society strives "to exclude as nearly as possible the likelihood of an erroneous judgment." *Id.* at 423. In other words, taking meticulous care to avoid an erroneous finding acknowledges and protects the transcendent interest at stake.

Yet, when a sentencing court decides, like here, whether a defendant committed an uncharged crime, it is no longer necessary that it be "highly probable or reasonably certain" he did it to find against him. *United States v. Jordan*, 256 F.3d 922, 930 (9th Cir. 2001). *Addington* notwithstanding, now almost the entire risk of error is borne by the defendant. Moreover, adverse facts found using the lesser standard may significantly affect his liberty "in terms of absolute years behind bars." *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000). Bloated prison terms predicated on alleged acts proven only by a preponderance are a sentencing anomaly that offends due process. *See United States v. Tucker*, 404 U.S. 443, 447 (1972) (due process right not to be sentenced on materially incorrect information); *Townsend v. Burke*, 334 U.S.

736, 741 (1948) (due process violation for sentence to be based on materially untrue assumptions).

A higher evidentiary standard at sentencing lessens the risk of excessive sentences based on analyses of insufficient rigor. *See Woodby v. I.N.S.*, 385 U.S. 276, 285-86 (1966) (clear and convincing standard requires “Government to establish . . . by clear, unequivocal, and convincing evidence . . . its allegations . . . are true.”). In situations where the interest at issue is life, physical liberty, or one’s future, this Court has held the clear and convincing standard categorically lessens the risk of erroneous decisions. *See e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (First Amendment requires proof of actual malice by clear and convincing evidence to establish libel of public figure); *Santosky*, 455 U.S. at 769-70 (holding clear and convincing standard appropriate for termination of parental rights); *Addington*, 441 U.S. at 432-33 (holding clear and convincing standard constitutionally sufficient for civil commitments); *Woodby*, 385 U.S. at 285 (clear and convincing standard applies to deportation decisions); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (clear and convincing standard applies to denaturalization decisions); *see also* 26 U.S.C. § 7454(a) (burden on IRS to establish taxpayer’s civil fraud by clear and convincing evidence). Accordingly, both the interest involved in criminal sentencing and the importance of the ultimate decision demand the burden of proof allocate the risk of error to lessen the likelihood of unjust punishment. *See Winship*, 397 U.S. at 364 (heightened evidentiary standard “indispensable to command the respect and confidence of the community in applications of the criminal law.”).

**2. When a guideline enhancement has a disproportionate impact on the recommended prison range of the offense of conviction, a preponderance of the evidence standard does not adequately protect due process rights.**

When the government requests a sizeable enhancement to the recommended guideline imprisonment range for an uncharged offense, heightened evidentiary proof unquestionably safeguards due process rights better than a preponderance standard. While advisory, a court may not ignore the sentencing guidelines; it must use them as part of the “analytic framework” that determines the sentence. *Freeman v. United States*, 564 U.S. 522, 530 (2011). Likewise, a district court’s discretion will not be diminished or unduly burdened if, in limited instances, it must examine the evidence using a modestly higher standard of proof. It is a reasonable balance made between the amount of liberty lost and the minimal procedural process expected of the government and the court. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (due process depends, in part, on balancing interest affected against burden on government to use heightened procedural requirements). A clear and convincing standard ensures greater certainty in a court’s factual conclusions, which befits the loss of more liberty than authorized by either admissions or jury verdict.

When, as here, more than half of the calculated imprisonment range derives from the court finding an uncharged offense, a higher level of procedural protection is a commensurate expectation. Although this Court has not yet addressed the issue, the Ninth Circuit has developed a test for when a disputed guideline enhancement will raise the evidentiary bar. Its method “is consistent with the ‘flexible’ requirements of due process.” *Jordan*, 256 F.3d at 928; *see also Morrissey v. Brewer*, 408 U.S. 471, 481

(1972) (“Due process is flexible and calls for such procedural protections as the particular situation demands.”). The abridged Ninth Circuit factors are (1) the facts offered in support of the enhancement create new offenses requiring separate punishment; (2) the increase in sentence is based on the extent of a conspiracy; (3) an increase in the number of offense levels is more than or equal to four; and (4) the length of the enhanced sentence more than doubles the length of the sentence authorized. *United States v. Hymas*, 780 F.3d 1285, 1290 (9th Cir. 2015).<sup>7</sup>

Applying the Ninth Circuit test here illustrates its utility and simplicity. The court’s determination that Robertson assaulted the officer and caused a substantial risk of serious bodily injury created a separate crime. *See* PSR ¶¶ 13, 14 (alleging Robertson committed an aggravated assault against the officer under New Mexico law); Addendum to PSR, Vol. II at 31 (same). The increase was not based on the extent of a conspiracy. The combined increase of 10 levels is greater than 4. PSR ¶¶ 12-17. And the enhanced imprisonment range more than doubled the length of the sentence authorized by Robertson’s guilty plea. *See* PSR ¶ 62 (calculating enhanced range as 120 to 150 months). The test is accomplished with such ease because the factors

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<sup>7</sup> The Ninth Circuit’s test contains two other factors: (1) the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment and (2) the enhanced sentence negates the presumption of innocence or the prosecution’s burden of proof for the crime alleged in the indictment. Because the guidelines prohibit the imposition of a sentence outside the statutory maximum and no defendant would reach sentencing without the presumption of innocence being overcome either by plea or at trial, it is unclear how the two factors will ever be triggered. Evidently, the use of the clear and convincing standard has never turned on the application of these factors.

used are wholly objective. *See United States v. Staten*, 466 F.3d 708, 719-20 (9th Cir. 2006) (in “limited instances” where clear and convincing standard applies, it “turns on whether . . . the district court’s . . . factual finding was . . . determinative . . . of the sentence given.”). Here, each of the Ninth Circuit’s four objective factors would have directed the district court to use a higher standard of proof.<sup>8</sup>

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<sup>8</sup> *See, e.g., Mezas de Jesus*, 217 F.3d at 642-44 (due process required clear and convincing standard because 9 level increase for uncharged kidnaping caused less than two year prison term to increase to almost five); *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) (district court erred in not applying clear and convincing standard for enhancements that added 7 levels and caused imprisonment range to more than double); *United States v. Munoz*, 233 F.3d 1117, 1127 (9th Cir.2000) (9 level upward adjustment in sentence for uncharged conduct was sufficiently disproportionate to apply clear and convincing standard to factual findings); *Jordan*, 256 F.3d at 929 (district court plainly erred in not applying clear and convincing standard to 9 level enhancements that more than doubled the recommended imprisonment range); *United States v. Townley*, 929 F.2d 365, 369 (8th Cir. 1991) (clear and convincing evidence appropriate where prosecutor proved a single drug infraction involving 27 grams but urged trial court to sentence as multi-person cocaine conspiracy entailing nearly 6,000 grams, producing 18 level increase in base offense level and seven-fold increase in permissible sentencing range).

**3. When only a judge’s fact-finding makes a sentence substantively reasonable, the Fifth and Sixth Amendments dictate the degree of proof required for the fact to constitutionally affect the prison term.**

This Court’s rulings have implicitly endorsed the Ninth Circuit’s approach. Citing the Fifth and Sixth Amendments, the Court has sought to restrict the use of facts at sentencing that are not confessed or proven beyond a reasonable doubt. *See, e.g., Blakely v. Washington*, 542 U.S. 296, 304-06 (2004) (punishment that “jury’s verdict alone does not allow” is unconstitutional when sentencing authority derived “wholly from the jury’s verdict”); *Cunningham v. California*, 549 U.S. 270, 281 (2007) (“any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge.”). In *Rita v. United States*, 551 U.S. 338, 347 (2007), the Court examined whether the Sixth Amendment lets appellate courts presume a sentence that “reflects a proper application of the Sentencing Guidelines” is reasonable. The Court found “[a] *nonbinding* appellate presumption” is consistent with the Sixth Amendment. *Id.* at 353 (emphasis added). However, Justices Scalia and Thomas wrote separately to stress that, under the guidelines, “sentences whose legality is premised on a judge’s finding some fact (or combination of facts)” violate the Sixth Amendment. *Id.* at 371 (Scalia, J., concurring in part and concurring in judgment).

To show how a Sixth Amendment violation unfolds, Justice Scalia presented a hypothetical where “the district court imposes a sentence *within* an advisory Guidelines range that has been substantially enhanced by certain judge-found facts.” *Id.* (emphasis in original). The guideline range for a robbery conviction in criminal history category I is 33 to 41 months. If the district court found a firearm was discharged, serious bodily injury was

inflicted, and more than \$5 million was stolen, the range skyrockets to 235 to 293 months. *Id.* at 371-72. Justice Scalia warned, “judge-found facts” are “not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence.” *Id.* at 372. In the absence of judicial fact-finding, the “293-month sentence . . . would surely be reversed as unreasonably excessive.” *Id.*

The facts and wildly disparate imprisonment ranges here fit Justice Scalia’s hypothetical and animate his concerns that soft proof undermines the Fifth and Sixth Amendments. The district court relied on an alleged aggravated assault proven only by a preponderance of the evidence. Finding Robertson pointed a gun undoubtedly was an essential predicate for the prison term imposed. But for this fact, the point at which the court began its guideline calculations was otherwise unsupportable. This is the exact scenario of which Justice Scalia warned. *See Cunningham*, 549 U.S. at 290 (“Sixth Amendment requirement is not satisfied” when judge must find additional fact to impose longer term); *Jones*, 574 U.S. 948 (Scalia, J., dissenting from denial of certiorari) (petitioners presented “strong case, that, but for the judge’s finding of fact, their sentences would have been substantively unreasonable and therefore illegal” in violation of Fifth and Sixth Amendment rights).

Here, Robertson surrendered years of his life under a standard that does not reflect “the weight and gravity” of the loss. *Addington*, 441 U.S. at 427.<sup>9</sup>

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<sup>9</sup> Not all Tenth Circuit panels agree a preponderance standard protects constitutional rights at sentencing regardless of the circumstances. In *United States v. Ray*, 704 F.3d 1307, 1314 (10th Cir. 2013) and *United States v. Olsen*, 519 F.3d 1096, 1105 (10th Cir. 2008), the panels said when a sentencing factor has a

“A standard of proof that by its very terms demands consideration of the quantity rather than the quality of the evidence may misdirect the factfinder in the marginal case.” *Santosky*, 455 U.S. at 764. Thus, Justice Scalia consistently urged a straightforward application of constitutional protections when the reasonableness of a sentence depends on facts found by a sentencing court using a diminished evidentiary standard.

For example, in *Marlowe v. United States*, 555 U.S. 963 (2008), a Sixth Circuit panel upheld a sentence that relied solely on facts found by the sentencing court; specifically, Marlowe possessed the “malice aforethought” required for second-degree murder. Justice Scalia, dissenting from the denial of certiorari, decried an outcome that “falls short of what we have held the right to trial by jury demands: ‘Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the Defendant or proved to a jury beyond a reasonable doubt.’” 555 U.S. at 963 (quoting *United States v. Booker*, 543 U.S. 220, 244 (2005)).<sup>10</sup>

In *Jones*, Justices Ginsburg and Thomas joined him to make the same point. There, a jury convicted the petitioners of distributing “very small amounts of crack cocaine” but acquitted them of a distribution conspiracy. 547 U.S. at 948. Relying on its own findings, the district court sentenced

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disproportionate effect on the sentence, the Due Process Clause may require government proof by clear and convincing evidence.

<sup>10</sup> Cf. *Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring) (“the door . . . remains open for a defendant to demonstrate that his sentence . . . would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.”).

them as if they had engaged in the conspiracy and imposed prison terms “many times longer than those the Guidelines would otherwise have recommended.” *Id.*<sup>11</sup> Justice Scalia again criticized the district court’s enhanced sentence because it plainly violated the petitioners’ Fifth and Sixth Amendment rights. Any fact “necessary to prevent a sentence from being substantively unreasonable – thereby exposing the defendant to a longer sentence . . . must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.” *Id.* (emphasis in original).

This Court has yet to address the arguments of Justice Scalia and countless petitioners. As it stands then, the “factual certainty” required to take away years, if not decades, of liberty is “no greater than that necessary to award money damages in an ordinary civil action.” *Santosky*, 455 U.S. at 747. It cannot be right that the “drastic deprivations that [] follow” can be based “upon no higher degree of proof than applies in a negligence case.” *Woodby*, 385 U.S. at 487. As a matter of perception and for all practical purposes, the constitutional rights to due process and trial by jury become nullities if a person can be imprisoned for an uncharged crime that he did not admit and that the sentencing court does not even need to be reasonably

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<sup>11</sup> Petitioners’ recommended imprisonment ranges went from 27 to 71 months to 262 to 405 months. *Id.* (citing *United States v. Jones*, 744 F.3d 1362, 1366, 1369 (D.C. Cir. 2014)).

certain occurred.<sup>12</sup> It cannot be right that only the Ninth Circuit has recognized this tragedy.

To consider a heightened standard, *Addington* is helpful. In the trial court there, Addington argued the state had to prove beyond a reasonable doubt that he was mentally ill and required hospitalization before involuntarily committing him to a state institution. The court disagreed and told the jury the evidentiary standard was “clear, unequivocal and convincing evidence.” 441 U.S. at 421. The court of appeals agreed with Addington but the state supreme court said a preponderance of the evidence standard “satisfied due process.” *Id.* at 422.

This Court found the preponderance standard was not robust enough to protect Addington’s due process rights. “The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.” 441 U.S. at 427. The Court held that due process required the state “to justify confinement by proof more substantial than a mere preponderance of the evidence.” *Id.* Its reasoning still applies.

When the government must prove an uncharged crime that dramatically enhances the imprisonment range by only a preponderance of evidence, the risk of an erroneous decision is not fairly distributed between the two parties. *See Santosky*, 455 U.S. at 758 (risk of error from using preponderance

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<sup>12</sup> This Court has called it an “absurd result” when a person can be sentenced “for committing murder, even if the jury convicted him only of illegally possessing the firearm used to commit it – or making an illegal lane change while fleeing the death scene.” *Blakely*, 542 U.S. at 306. Yet, the Tenth Circuit sanctioned such a result here.

standard is “substantial.”). To the government an error may mean defending the decision on appeal. To the defendant it may mean years more in prison. “A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity.” *Santosky*, 455 U.S. at 766; *see also id.* at 764 (“the social cost of even an occasional error is sizable.”).

Like other “inroads upon the sacred bulwark of the nation,” using an uncharged offense that is constitutionally unproven to support the larger part of an imprisonment range is “fundamentally opposite to the spirit of our constitution.” *Booker*, 543 U.S. at 244 (quoting W. Blackstone, *Commentaries on the Laws of England* 343-44 (1769)). If the Court cannot agree with Justice Scalia’s belief that only the standard required of a jury can protect constitutional rights, then expecting proof by clear and convincing evidence “strikes a fair balance” between rights and the government’s burden. *Santosky*, 455 U.S. at 769. It is the ideal alternative. It is a “burden approximating” beyond a reasonable doubt. *Addington*, 441 U.S. at 432. And it “is one way to impress the factfinder with the importance of the decision and . . . reduce the chances that inappropriate [prison terms] will be ordered.” *Id.* at 427.

Indeed, this Court has already discussed the standard before. “[W]hen the individual interests at stake . . . are both ‘particularly important’ and ‘more substantial than mere loss of money’ . . . . [T]he Court has deemed this level of certainty necessary to preserve fundamental fairness in . . . proceedings that threaten . . . ‘a significant deprivation of liberty’ or ‘stigma.’” *Santosky*, 455 U.S. at 756 (quoting *Addington*, 441 U.S. at 424, 425, 426). In this light, it is not overreaching to infer the clear and convincing standard should apply

in circumstances like those delineated in the Ninth Circuit test. Robertson respectfully asks the Court to apply the test in all circuits.

### **Conclusion**

For the reasons given in his petition, Robertson respectfully requests this Court grant his petition for writ of certiorari.

Respectfully submitted,  
Stephen P. McCue  
Federal Public Defender

DATED: July 16, 2020

By: *s/Margaret A. Katze*  
Margaret A. Katze\*  
Federal Public Defender

Attorneys for the Petitioner  
\* Counsel of Record

## **Appendix**

Tenth Circuit's Published Decision in Current Appeal (January 6, 2020) . . .	1a
Tenth Circuit's Order Denying Petition for Panel Rehearing/Rehearing En Banc (February 18, 2020) . . . . .	10a

946 F.3d 1168

United States Court of Appeals, Tenth Circuit.

UNITED STATES of  
America, Plaintiff - Appellee,  
v.  
Jeremias ROBERTSON,  
Defendant - Appellant.

No. 18-2165

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FILED January 6, 2020

West Headnotes (11)

[1] **Criminal Law**  
    key Review De Novo

**Criminal Law**    key Sentencing

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 In general

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and  
Findings

110k1158.34 Sentencing

The Court of Appeals reviews a district  
court's factual findings at sentencing for  
clear error and its legal conclusions de  
novo.

[2] **Criminal Law**  
    key Sentencing

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and  
Findings

110k1158.34 Sentencing

Factual findings at sentencing are clearly  
erroneous if they are without factual  
support in the record or if the appellate  
court is left with a definite and firm  
conviction that a mistake has been made.

[3] **Criminal Law**  
    key Judgment, sentence, and punishment

110 Criminal Law

110XXIV Review

110XXIV(M) Presumptions

110k1144 Facts or Proceedings Not  
Shown by Record110k1144.17 Judgment, sentence, and  
punishmentThe Court of Appeals views the evidence  
in the light most favorable to the

government, in an appellate challenge to a sentencing decision.

**[4] Criminal Law**

🔑 Sentencing

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158.34 Sentencing

Sentencing court's factual determination that defendant convicted of being a felon in possession of a firearm pointed a gun at law enforcement officer, which resulted in an increase of 10 levels in the base offense sentencing level, and which more than doubled the initial Sentencing Guidelines range, was subject to review on appeal for preponderance of the evidence, rather than for clear and convincing evidence.

FLAG U.S.S.G. § 1B1.1 et seq.

**[5] Sentencing and Punishment**

🔑 Degree of Proof

350H Sentencing and Punishment

350HII Sentencing Proceedings in General

350HII(F) Evidence

350Hk322 Degree of Proof

350Hk322.3 In general

Generally, factual findings at the sentencing stage must be supported by a preponderance of the evidence.

**[6] Sentencing and Punishment**

🔑 Amount and degree of loss or injury

350H Sentencing and Punishment

350HIV Sentencing Guidelines

350HIV(H) Proceedings

350HIV(H)2 Evidence

350Hk974 Sufficiency

350Hk978 Amount and degree of loss or injury

Evidence was sufficient to prove that defendant convicted of being a felon in possession of a firearm assaulted a

law enforcement officer in a manner creating a substantial risk of bodily injury, as required to support six-level sentencing increase; officer testified that defendant pointed a handgun at him and simultaneously pleaded not to be shot.

FLAG U.S.S.G. § 3A1.2(c)(1).

**[7] Criminal Law**

🔑 Sentencing

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158.34 Sentencing

Because the district court is in the best position to observe witnesses, the Court of Appeals is loath to second-guess a district court's determination of a witness's credibility at sentencing.

**[8] Criminal Law**

🔑 Sentencing proceedings in general

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1042.3 Sentencing and Punishment

110k1042.3(2) Sentencing proceedings in general

Any error in District Court's expression of surprise about defendant's failure to testify that he did not point a gun at law enforcement officer did not amount to clear and obvious error, as required for reversal of sentence, which was based, in part, on finding that defendant pointed gun at officer, under plain error standard, where Court did not indicate that it was basing defendant's sentence

on defendant's silence. FLAG U.S.S.G. §§ 2K2.1(b)(6), FLAG 3A1.2(c)(1).

**[9] Criminal Law****↳ Necessity of Objections in General**

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and  
Reservation in Lower Court of Grounds of  
Review

110XXIV(E)1 In General

110k1030 Necessity of Objections in  
General

110k1030(1) In general

When a defendant raises an issue for the  
first time on appeal, the appellate court  
reviews the issue for plain error.**\*1169 Appeal from the United States District  
Court for the District of New Mexico (D.C. No.  
1:17-CR-02573-JAP-1)****Attorneys and Law Firms**Margaret A. Katze, Assistant Federal Public Defender,  
Albuquerque, New Mexico, for Defendant - Appellant.Howard R. Thomas, Assistant United States Attorney  
(and John C. Anderson, United States Attorney, with  
him on the brief), Albuquerque, New Mexico, for  
Plaintiff - Appellee.Before BRISCOE, KELLY, and BACHARACH,  
Circuit Judges.**Opinion**

KELLY, Circuit Judge.

\*\*1 Defendant-Appellant Jeremias Robertson pled guilty to possession of a firearm and ammunition by a felon, 18 U.S.C. § 922(g)(1), and was sentenced to a term of 84 months' imprisonment followed by three years' supervised release.<sup>1</sup> On appeal he challenges the district court's findings that he pointed a gun at an officer, thereby resulting in a four-level enhancement for use or possession of a firearm in connection with another felony offense (aggravated assault with a deadly weapon), and a six-level enhancement for assaulting the officer in a manner creating a substantial risk of bodily injury. U.S.S.G. §§ 2K2.1(b)(6) &

U.S.S.G. § 3A1.2(c)(1). He argues that (1) the district court should have required proof by clear and convincing evidence, (2) under any standard of proof, the evidence did not support the district court's findings, and (3) the district court erroneously drew a negative inference from his silence at the sentencing hearing. See Aplt. Br. at 1–3. We exercise \*1170 jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and affirm.

**Background**The district court held an evidentiary hearing. In  
August 2017, Albuquerque Police Department officer**[10] Criminal Law****↳ Necessity of Objections in General**

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and  
Reservation in Lower Court of Grounds of  
Review

110XXIV(E)1 In General

110k1030 Necessity of Objections in  
General

110k1030(1) In general

The plain error standard of review requires (1) an error, (2) that is plain, (3) which affects the defendant's substantial rights, and (4) which seriously affects the fairness, integrity, or public reputation of judicial proceedings.

**[11] Criminal Law****↳ Necessity of Objections in General**

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and  
Reservation in Lower Court of Grounds of  
Review

110XXIV(E)1 In General

110k1030 Necessity of Objections in  
General

110k1030(1) In general

The plain error standard of review is a  
high standard for the appellant to meet.

Steven Arias responded to a 911 call reporting a man walking through the downtown part of the city “pulling out a gun” and “pointing it at people.” Aplee. Br. at 1 (citing V R. Ex. W). Mr. Robertson, who matched the description given by the 911 caller, was walking in the area when the officer arrived. *Id.* at 2. Mr. Robertson crossed First Street and headed northeast through a dirt parking lot. Aplt. Br. at 5. Officer Arias stopped his police vehicle at the north end of First Street. *Id.* Spotting Mr. Robertson, Officer Arias accelerated toward him. *Id.* Mr. Robertson quickened his pace, crossed to the sidewalk on the east side of First Street, and passed out of Officer Arias’s line of sight behind a tow truck. IV R. 21–22. Officer Arias stopped his vehicle next to the tow truck and exited. *Id.* The officer testified that based on the description on the 911 call and Mr. Robertson’s proximity to the area, he believed there was a high likelihood that an object in Mr. Robertson’s right hand was a gun. *Id.* at 23.

Officer Arias rounded the tow truck and spotted Mr. Robertson, who continued to move through the parking lot while partially obscured by cars. *Id.* 23:24–24:1. Officer Arias crouched behind a car for cover and twice shouted “show me your hands.” *Id.* at 24:22; *see* Aplt. Br. at 6. According to Officer Arias, Mr. Robertson then “kind of turned to the west looking over his left shoulder with a small caliber handgun in his right hand, and he pointed it at [Officer Arias].” IV R. 23:1–11; Aplt. Br. at 3. Officer Arias then took cover behind a sedan. IV R. 23:20–24:3.

\*\*2 When Officer Arias looked back, Mr. Robertson was again “moving at a brisk pace” toward the northeast. Aplt. Br. at 4. Officer Arias testified that he repeated his commands and Mr. Robertson responded by saying something to the effect of “I didn’t do anything wrong,” and “don’t shoot me.” *Id.* 56:1–13. Officer Arias testified that Mr. Robertson then again pointed a gun at him over his shoulder, and the officer identified it as a gun “because of the barrel.” *Id.* at 25:9–13. Fearing that Mr. Robertson might shoot, Officer Arias fired a single round from his service rifle toward Mr. Robertson’s chest. *Id.* at 14–17. The bullet entered Mr. Robertson’s chest under his left armpit and incapacitated him. *Id.* at 20–24. A handgun was later recovered near where Mr. Robertson fell to the ground. Aplt. Br. at 7.

The district court also heard testimony from Johnny Pinson, a bystander. Mr. Pinson testified that he saw Mr. Robertson cross First Street before Officer Arias arrived. IV R. 123:20–24. According to Mr. Pinson, Mr. Robertson appeared to be listening to music at the time and did not have a gun in his hand. *Id.* at 123:2–10. Mr. Pinson also testified that he did not see a gun in Mr. Robertson’s hands when he turned in response to Officer Arias’s commands. *Id.* at 123:13–15. However, he later testified that “wouldn’t have seen” whether Mr. Robertson had a gun in his right hand. *Id.* at 135:8–9.

Mr. Robertson also presented evidence of Officer Arias’s troubled disciplinary record and his “proclivity for violent confrontation.” Aplt. Br. at 8. Officer Arias was removed from a Special Weapons and Tactics (SWAT) team because he fired three “bean bag” shots at a man’s head. *Id.* He was also given a 32-hour suspension and a letter of reprimand for that incident. *Id.* Officer Arias received a verbal reprimand for improper use of force after he pointed \*1171 his firearm at a man who had reported domestic violence involving his neighbor. *Id.* at 8–9. He was suspended for 40 hours and sent to anger management counseling for assaulting a police lieutenant. *Id.* at 9.

The court acknowledged that it “had serious questions” about Officer Arias because of his disciplinary history. IV R. 161:23. Nevertheless, it found his testimony “supported in this case.” *Id.* at 161:24. The court also stated the following: “I’m a little surprised that I didn’t hear from the main player who would tell us that ‘no, I did not point a gun at Officer Arias.’ I didn’t hear that testimony.” *Id.* at 161:25–162:2.

Counsel stated Mr. Robertson’s position that he never pointed a gun at Officer Arias. *Id.* at 162:3–10. The district court then said: “But he ha[s]n’t testified to that under oath ... And I’ve heard other testimony under oath that is not countered by that.” *Id.* The district court explained that Mr. Pinson, while an “honest person,” had given testimony that did “not fit what was shown on the video” evidence. *Id.* at 163. The district court ultimately found that “testimony under oath, uncontradicted by direct testimony to the contrary,” supported a finding that Mr. Robertson had twice pointed the gun at Officer Arias. *Id.* at 166.

## Discussion

[1] [2] [3] This court reviews a district court's factual findings at sentencing for clear error and its legal conclusions *de novo*. United States v. Lozano, 921 F.3d 942, 946 (10th Cir. 2019). Factual findings are clearly erroneous if they are without factual support in the record or if the court is left with a definite and firm conviction that a mistake has been made. *Id.* We view the evidence in the light most favorable to the government. *Id.*

[4] Mr. Robertson urges a higher standard of proof. The district court found—over Mr. Robertson's objection—that he pointed a gun at a law enforcement officer. This resulted in an increase of 10 levels, which more than doubled the initial guidelines range from 46–57 months to 120 months (the statutory maximum). Aplt. Br. at 24. Because this disputed fact had a disproportionate effect on his sentence, Mr. Robertson contends that due process requires the government to prove it by clear and convincing evidence rather than by a preponderance of the evidence. *Id.* at 22 (citing  United States v. Ray, 704 F.3d 1307, 1314 (10th Cir. 2013)).

\*\*3 [5] Generally, factual findings at the sentencing stage must be supported by a preponderance of the evidence.  United States v. Olsen, 519 F.3d 1096, 1104 (10th Cir. 2008). The Supreme Court has not yet held that due process requires a heightened standard when a contested fact significantly changes the guidelines range of the sentence. Five circuits have rejected that argument. See United States v. Villareal-Amarillas, 562 F.3d 892, 894–98 (8th Cir. 2009);  United States v. Grubbs, 585 F.3d 793, 800–03 (4th Cir. 2009);  United States v. Fisher, 502 F.3d 293, 295–308 (3d Cir. 2007);  United States v. Brika, 487 F.3d 450, 461–62 (6th Cir. 2007); United States v. Reuter, 463 F.3d 792, 792–93 (7th Cir. 2006). Mr. Robertson points to a test adopted by the Ninth Circuit to determine whether a fact must be proven by a heightened standard at sentencing. Aplt. Br. at 22; see  United States v. Hymas, 780 F.3d 1285, 1290 (9th Cir. 2015). The Ninth Circuit is the only circuit to adopt such a standard.

The Supreme Court has not adopted a heightened standard of proof at sentencing for contested facts, thus

we hold that the correct standard of proof in this case was a preponderance of the evidence. This issue has been foreclosed in this Circuit. See \*1172 United States v. Constantine, 263 F.3d 1122, 1125 n.2 (10th Cir. 2001) (“The Supreme Court has left the choice of standard to the discretion of the courts of appeals ... and within the Tenth Circuit[,] the arguments for higher standards are ‘foreclosed by binding precedent.’” (quoting United States v. Valdez, 225 F.3d 1137, 1143 n.2 (10th Cir. 2000)));  United States v. Washington, 11 F.3d 1510, 1516 (10th Cir. 1993) (“We have clear holdings that the preponderance standard applies to fact finding in the sentencing process. ... At least as concerns making guideline calculations the issue of a higher than a preponderance standard is foreclosed in this circuit.”).<sup>2</sup>

[6] Mr. Robertson next contends that the district court's factual finding that he assaulted Officer Arias in a manner creating a substantial risk of bodily injury was improper “[u]nder any standard of proof.” Aplt. Br. at 26. We review a district court's factual findings for clear error; because we decline to adopt a heightened standard for the fact at issue in this case, we look for clear error in the findings that the judge made by a preponderance of the evidence. See Lozano, 921 F.3d at 946.

[7] Mr. Robertson argues essentially that the district court erred when it credited Officer Arias's testimony that Mr. Robertson simultaneously pointed a handgun at him and pleaded not to be shot. See Aplt. Br. at 26–31. The district court heard and considered a variety of claims about that moment and assessed the credibility of the officer under direct and cross-examination. Because the district court is in the best position to observe witnesses, “[t]his court is loath to second-guess a district court's determination of a witness's credibility.”  United States v. Asch, 207 F.3d 1238, 1243 (10th Cir. 2000). The fact that the district court “had serious questions” about Officer Arias's background but nonetheless decided that “his testimony is supported in this case” shows that it engaged in exactly the kind of on-the-ground balancing and demeanor judgments for which district courts administering hearings are particularly well-suited. See IV R. 161:23–24. The district court's findings by

a preponderance thus have support in the record and were not in clear error.

\*\*4 [8] Mr. Robertson's final argument is that the district court drew a negative inference from his decision not to testify at the sentencing hearing. Aplt. Br. at 31. Mr. Robertson argues that  Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) establishes that it is reversible error for a sentencing judge to "draw[ ] an adverse inference from the accused's silence at sentencing." Aplt. Br. at 32. At sentencing, the court made the following remark:

THE COURT: I have some serious questions about [Officer Arias], frankly. But I think his testimony is supported in this case. I'm a little surprised that I didn't hear from the main player who would tell us that, "No, I did not point a gun at Officer Arias." I didn't hear that testimony.

IV R. 161:23–162:2. Mr. Robertson argues that this comment shows a violation of his Fifth Amendment right to remain silent and to due process. Aplt. Br. at 31.

[9] [10] [11] Mr. Robertson contends that he sufficiently objected at sentencing by reminding the court that Mr. Robertson did not have to testify to challenge the application of enhancements because other testimony contradicted Officer Arias's version of events, and that any further objection \*1173 would have been futile. Aplt. Reply Br. at 22; see IV R. 162:11–14. We disagree that counsel's objection was sufficient. Because Mr. Robertson raises this specific issue for the first time on appeal, we review the district court's statement for plain error. See  United States v. Garcia-Caraveo, 586 F.3d 1230, 1232 (10th Cir. 2009). Plain error is (1) error, (2) that is plain, (3) which affects Mr. Robertson's substantial rights, and (4) which seriously affects the "fairness, integrity, or public reputation of judicial proceedings."  Id. (quoting   United States v. Romero, 491 F.3d 1173, 1178 (10th Cir. 2007)). The error must be "clear or obvious." United States v. Pablo, 696 F.3d 1280, 1290 (10th Cir. 2012). It is a high standard for the appellant.  Garcia-Caraveo, 586 F.3d at 1232.

The district court's comments in this case are ambiguous. Had the district court said it was basing the sentence on Mr. Robertson's silence, the district court would have committed error. The district court expressed "surprise" that it had not heard from Mr. Robertson, which could mean that the court was relying upon his failure to take the stand. But the statement also could be taken at face value. The court's statement that Officer Arias's testimony "was uncontradicted by direct testimony to the contrary" was merely an observation that after discounting Johnny Pinson's testimony, see IV R. 135:4–16, 157:18–158:6, the only remaining testimony on the issue was that Mr. Robertson pointed the gun at Officer Arias. Given the ambiguity in the court's statements, if there was error, it was not "clear or obvious" and would not satisfy the second element of the plain error test. See United States v. Fonseca, 744 F.3d 674, 684 (10th Cir. 2014) (concluding that ambiguity in the district court's ruling was not "plainly or obviously improper"); see also United States v. Draffin, 286 F.3d 606, 610 (D.C. Cir. 2002).

AFFIRMED.

BRISCOE, Circuit Judge, concurring and dissenting. I agree with the majority's conclusion that the district court was correct in applying a preponderance of the evidence standard of proof, although I would also address and reject Mr. Robertson's additional contention that the district court erred in its application of the preponderance standard. See Aplt. Br. at 15–21. The record provides no indication that the district court applied an "ample evidence" standard, id. at 16, or that it merely examined the quantum of the evidence presented, id. at 17. I agree that the district court did not clearly err in its factual findings.

\*\*5 I disagree, however, with the majority's conclusion that the district court did not plainly err by drawing an adverse inference from Mr. Robertson's silence. By holding Mr. Robertson's silence against him in determining facts bearing upon the severity of his sentence, the district court committed plain error and imposed an impermissible burden on the exercise of his constitutional right against self-incrimination. I would, therefore, reverse and remand for resentencing.

As regards the first prong of plain error, Mr. Robertson has shown that the district court erred at sentencing by drawing an adverse inference from his silence when determining whether Mr. Robertson pointed a gun at Officer Arias. The Supreme Court held in *Mitchell* that a district court commits reversible error by drawing any “*adverse inference* from the defendant’s silence” at sentencing “in determining facts about the crime which bear upon the severity of the sentence.” *Mitchell* 526 U.S. at 316–17, 330, 119 S.Ct. 1307 (emphasis added) (concluding that the district court imposed \*1174 an impermissible burden on the exercise of the constitutional right against compelled self-incrimination “[b]y holding [the defendant’s] silence against her in determining the facts of the offense at the sentencing hearing”). The majority contends that the district court’s statements regarding Mr. Robertson’s silence at sentencing are ambiguous, but it omits critical portions of the sentencing transcript. The full exchange between Mr. Robertson’s counsel and the court was as follows:

THE COURT: I have some serious questions about [Officer Arias], frankly. But I think his testimony is supported in this case. I’m a little surprised that I didn’t hear from the main player who would tell us that, “No, I did not point a gun at Officer Arias.” I didn’t hear that testimony.

MS. KATZE: Well, we’re here in a contested sentencing hearing because my client is saying, as we said throughout the objections in the sentencing memo, that he did not point the gun at - -

THE COURT: But *he hadn’t* testified to that *under oath* ... And I’ve heard other testimony under oath that is not countered by that.

ROA, Vol. IV, at 161–62 (emphasis added).

The district court’s explicit consideration of Mr. Robertson’s failure to testify *under oath*, as evidenced by this exchange with defense counsel, makes clear that Mr. Robertson’s silence factored into the district court’s analysis of the “other testimony” presented at the sentencing hearing. The district court would not have repeatedly referenced the lack of testimony from Mr. Robertson in analyzing Officer Arias’s testimony if Mr. Robertson’s failure to testify was

not a consideration in its analysis. When, as we see here, the defendant’s silence is a factor which persuades the sentencing court to rely on the testimony of other witnesses, the court commits error under *Mitchell*. See *Mitchell*, 526 U.S. at 319, 119 S.Ct. 1307 (finding reversible error where “[o]ne of the things” persuading the [district] court to rely on the testimony of the codefendants [at sentencing] was [the defendant’s] ‘not testifying to the contrary’ ”). While the district court at other times discussed a lack of “direct testimony” contradicting Officer Arias’s account *generally*, see ROA, Vol. IV, at 166, the district court’s focus in the above exchange was on the absence of one specific piece of evidence—the testimony of Mr. Robertson. See *id.* at 162 (“But *he hadn’t* testified to that *under oath*.”) (emphasis added).<sup>1</sup> The district court’s own statements make clear that it considered Mr. Robertson’s silence in determining whether Mr. Robertson pointed a gun at Officer Arias.

\*\*6 Having concluded that the district court committed error, I next consider whether the error is plain—that is, whether it is “clear under current law.”

*United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). “An error is clear where ‘the Supreme Court or this court [ ] [has] addressed the issue’ or where ‘the district court’s interpretation was

clearly erroneous.’ ” *United States v. Cordery*, 656

F.3d 1103, 1106 (10th Cir. 2011) (quoting *United States v. Ruiz-Gea*, 340 F.3d 1181, 1187 (10th Cir.

2003)). That is the case here. *Mitchell* made clear that a district court “may not draw [an] adverse inference” from a defendant’s silence “in determining \*1175 facts about the crime which bear upon the

severity of the sentence.” *Mitchell* 526 U.S. at 316–317, 119 S.Ct. 1307. Unlike the majority, I do not view the district court’s statements regarding Mr. Robertson’s silence to be ambiguous. As such, Mr. Robertson has satisfied the second prong of plain error, and the government has not argued otherwise.<sup>2</sup>

Mr. Robertson has also satisfied the third prong of plain error—that is, whether the error affects his “substantial rights.” *United States v. Hasan*, 526 F.3d 653, 664 (10th Cir. 2008). In this analysis, “we ask only whether there is ‘a reasonable probability that, but for the error

claimed, the result of the proceeding would have been different.’” *Id.* (quoting *United States v. Andrews*, 447 F.3d 806, 811 (10th Cir. 2006)). To satisfy this burden, Mr. Robertson “must show a reasonable probability sufficient to undermine confidence in the outcome at [his] sentencing.”  *United States v. Yurek*, 925 F.3d 423, 446 (10th Cir. 2019). “Confidence in the outcome can be undermined even if [Mr. Robertson’s] showing would not satisfy the preponderance-of-the-evidence standard.”  *Id.* And “[i]n light of the constitutional nature of the error,” we must conduct this analysis less rigidly than we would otherwise.  *United States v. Dazey*, 403 F.3d 1147, 1177 (10th Cir. 2005) (applying a less rigid approach to the third prong).

In this case, the district court’s own statements indicate that it relied on Mr. Robertson’s silence in crediting the testimony of Officer Arias. *See*  *United States v. Trujillo-Terrazas*, 405 F.3d 814, 820 (10th Cir. 2005) (considering a district court’s comments at sentencing when determining whether the plain error prejudiced the defendant). Taking the requisite less rigid approach appropriate to constitutional error, a reasonable probability exists that the district court’s factual finding would have been different had it not relied on Mr. Robertson’s silence.<sup>3</sup> And if the district court had discredited Officer Arias, its starting point of 120 months would have been reduced by more than

one-half (46 to 57 months), or even more if the 37 to 46 month range applied. “When the court’s starting point is skewed a ‘reasonable probability’ exists that its final sentence is skewed too.”  *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014); *see*  *Yurek*, 925 F.3d at 447 (finding the third prong met where there was a reasonable probability that the district court would have granted a mitigating-role adjustment under the correct test, which would have lowered the guideline range). Mr. Robertson has satisfied the third prong of plain error.

To satisfy the fourth prong, Mr. Robertson must show that the district court’s error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1144 (10th Cir. 2017) (en banc). Where, as here, “an error affects the calculation of a defendant’s guideline range, the fourth prong is ordinarily satisfied when the first three prongs are satisfied.”  *Yurek*, 925 F.3d at 447. I conclude that the district court plainly erred by drawing an adverse inference from Mr. Robertson’s silence at his sentencing hearing. I would reverse and remand for resentencing.

## All Citations

946 F.3d 1168, 2020 WL 54652

## Footnotes

- 1 The district court based the sentence upon an offense level of 27. In addition to the enhancements, the district court applied a three-level reduction for acceptance of responsibility and reduced his criminal history category to category IV. The guideline range for a person in category IV, level 27 who was convicted of this crime is 100–120 months’ imprisonment (the upper bound of the range is capped at 120 months, the statutory maximum for the crime).
- 2 We note that in  *Ray*, we stated that we have “left open the possibility” that an exceptional case might exist where a heightened standard is proper.  704 F.3d at 1314. However, our caselaw predating  *Ray* is clear that the issue was already settled and one panel cannot overrule another. *See* *United States v. Holcomb*, 853 F.3d 1098, 1100 (10th Cir. 2017).
- 1 I emphasize that Mr. Robertson did not need to present any evidence whatsoever because “the burden of proof fell on the government to trigger the enhancement.” *United States v. Gonzales*, 931 F.3d 1219, 1224 (10th Cir. 2019); *see*  *Mitchell*, 526 U.S. at 330, 119 S.Ct. 1307 (“[t]he Government retains the burden of proving facts relevant to the crime at the sentencing phase and *cannot enlist the defendant in this process* at the expense of the self-incrimination privilege”) (emphasis added).
- 2 The government only addresses the first prong of plain error. *See* Aple. Br. at 23–24.

3 "Of course, our standard is couched in terms of probability, and we cannot say with certainty what the district court will find on remand." *Hasan*, 526 F.3d at 665.

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FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

February 18, 2020

Christopher M. Wolpert  
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEREMIAS ROBERTSON,

Defendant - Appellant.

No. 18-2165  
(D.C. No. 1:17-CR-02573-JAP-1)

ORDER

Before **BRISCOE, KELLY, and BACHARACH**, Circuit Judges.

This matter is before the court appellant's Petition for Panel Rehearing/Rehearing En Banc. Upon consideration, the request for panel rehearing is denied by a majority of the original panel members. Judge Briscoe would grant panel rehearing

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the en banc request is likewise denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

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

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In the

# **Supreme Court of the United States**

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**JEREMIAS ROBERTSON**, Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

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On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

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## **Certificate of Service**

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I, Margaret A. Katze, hereby certify that on July 16, 2020, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

Stephen P. McCue  
Federal Public Defender

DATED: July 16, 2020

By:

*s/ Margaret A. Katze*  
Margaret A. Katze\*  
Federal Public Defender  
111 Lomas Blvd., Suite 501  
Albuquerque, New Mexico 87102  
Telephone: (505) 346-2489  
Facsimile: (505) 346-2494

Attorneys for the Petitioner  
\* Counsel of Record