

No. _____

In the Supreme Court of the United States

October Term, 2019

JORGE EDUARDO NAVA, *PETITIONER*,

V.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Nava's federal Guideline sentencing range for his cocaine convictions was increased by 11 to 16 years' imprisonment based on the judge's finding by only a preponderance of the evidence that he was criminally liable for an uncharged and unadjudicated methamphetamine offense and that it was relevant conduct. Does the Fifth Amendment's Due Process Clause require a heightened standard of proof to dramatically increase a criminal defendant's prison sentence for the offense of conviction based on a judge's finding that he was criminally liable for an unrelated, uncharged, and unadjudicated offense?

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Petitioner, Jorge Eduardo Nava asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on September 28, 2020.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Nava*, 957 F.3d 581 (5th Cir. April 30, 2020), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on April 30, 2020. This petition is filed within 150 days after entry of judgment. *See* Sup. Ct. R. 13.1; Miscellaneous Order, 589 U.S. __ (Mar. 19, 2020). The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law.”

UNITED STATES SENTENCING GUIDELINES INVOLVED

Guideline § 1B1.3 and its commentary are reproduced as Appendix B.

STATEMENT

A jury found Jorge Eduardo Nava guilty of two counts of cocaine trafficking in Texas. At sentencing, the district court found by a preponderance of the evidence that an uncharged and unadjudicated methamphetamine offense in Mississippi was relevant conduct. The court's finding increased Nava's sentencing range by 11 to 16 years in prison. The court sentenced Nava under the increased range.

Nava, who owned a bar in Ciudad Juarez, Mexico, was stopped at the port of entry, on September 9, 2016, attempting to enter the United States. As a result, Nava offered to provide Drug Enforcement Agency (DEA) agents with information about cocaine trafficking from Mexico to El Paso, Texas. Nava told the agents that he had contacts with a Mexican drug-trafficking organization (DTO) and he coordinated kilograms of cocaine brought into the United States. Nava had extensive knowledge of the DTO's activities—where the cocaine originated from, how the cocaine was transferred from one location to another, and when the cocaine would be smuggled. Nava also told the agents that a man named Lara would be bringing cocaine from Juarez into El Paso.

Based on information from Nava about the cocaine transaction, DEA agents set up surveillance, on September 12, 2016, at a business in El Paso. They saw two vehicles arrive at the business, and

the occupants exchange a backpack. After the exchange, agents stopped the one vehicle and found four kilograms of cocaine in the backpack. Nava informed the agents that a second cocaine transaction was set for the next day. Based on that information, the agents stopped a car driven by Lara. The cocaine was found in a duffel bag in the car. Lara cooperated with the agents, admitting that he was involved with Nava in transporting cocaine to Denver. Lara also told the agents of other cocaine transactions he had done with Nava. While Lara was at the checkpoint, he kept receiving calls and messages on his cell phone from Nava. The DEA agents believed that Nava was continuing to traffic in cocaine against their orders.

Nava was arrested. The DEA searched his Facebook account and found photographs and videos of Nava with cocaine and money in his apartment. Nava was charged with two counts of cocaine trafficking. He went to trial, and the jury found him guilty of both counts.

In preparation for sentencing, a probation officer prepared a presentence report (PSR), grouping the two cocaine counts. U.S.S.G. §3D1.2(b), (d). The PSR recommended that Nava be held accountable for 17.24 kilograms of cocaine. That quantity of cocaine would result in a level 32 and, with Nava's criminal history

category of II, a guideline sentencing range of 135 to 168 months' imprisonment—11 to 14 years. U.S.S.G. §2D1.1(c)(4); U.S.S.G. Ch.5, Pt.A (sentencing table). But the PSR also recommended that Nava be held responsible for 29,291.60 grams of methamphetamine (ICE) as relevant conduct. U.S.S.G. §1B1.3.

The facts of the uncharged, unadjudicated methamphetamine offense were: On August 15, 2016, a police officer in Gulfport, Mississippi, pulled over an old pickup truck for a traffic violation. The truck was registered in Texas in Nava's name. Nava was not in the truck. When the officer asked the driver why it was not registered in his name, the driver replied that he did not have a valid driver's license. A search of the pickup truck revealed pure liquid methamphetamine concealed within the gas tank. The driver stated that he had picked up the drug-laden truck in Ciudad Juarez and was to transport it to Atlanta, Georgia. The driver said that he was transporting the load for a man called "Gaucho." When Nava was stopped at the port of entry, on September 9, 2016, he was questioned about the truck. Nava said that he had sold the truck about a month earlier to someone called "El Primo." After questioning Nava, the agents had determined that he was not involved in the methamphetamine offense.

Nevertheless, the PSR included the methamphetamine as relevant conduct. The methamphetamine amount alone would result in a level 38 and a guideline sentencing range of 262 to 327 months' imprisonment—22 to 27 years. U.S.S.G. §2D1.1(c)(1); U.S.S.G. Ch.5, Pt.A (sentencing table).

The PSR stated that the methamphetamine offense was relevant conduct to the cocaine offenses because of Nava's extensive involvement with the cocaine DTO. Nava knew of methods used by the DTO to smuggle cocaine loaded vehicles from Juarez into El Paso. Nava recruited Lara and others to store and transport cocaine from Juarez to El Paso, Denver, Chicago, and Little Rock. Nava was storing cocaine in his apartment and transporting large amounts of U.S. currency from these destination cities to Mexico. And the pickup truck was registered in Nava's name. Therefore, the PSR stated, Nava is held accountable for the methamphetamine.

Nava objected to the methamphetamine being included as relevant conduct. Nava argued that the evidence was insufficient to show that he was responsible for the methamphetamine offense and that the offense was not similar to the cocaine offenses of conviction. Nava also argued that due process requires a higher

standard of proof when the relevant conduct adjustment drastically increases a defendant’s sentence based on an unadjudicated offense.

The district court overruled Nava’s objections. Applying the preponderance of the evidence standard, the court found that the methamphetamine was relevant conduct. Including the methamphetamine from the Mississippi incident resulted in Nava’s prison sentence being increased by 11 to 16 years.

Nava appealed. The United States Court of Appeals for the Fifth Circuit framed the issue as, “Nava contends that the district court erred in holding him accountable for an uncharged methamphetamine seizure, both because the seizure did not qualify as relevant conduct under the Sentencing Guidelines and because the district court applied an inappropriate standard of proof in making its relevant-conduct determination.” *United States v. Nava*, 957 F.3d 581, 583 (5th Cir. 2020).

The court of appeals agreed with Nava that the methamphetamine seizure did not qualify as part of a common scheme or plan with the cocaine-trafficking offenses. *Id.* at 586. The court found, however, that “it was not clear error to attribute the meth to Nava as part of the ‘same course of conduct’ with his charged offenses.” *Id.*

The court of appeals opined, however, that “the district court could reasonably have come out the other way.” *Id.* at 587.

As Nava points out, a short timeline does not automatically qualify an offense as relevant conduct. In addition, the similarities between the cocaine and meth offenses, while notable, are not overwhelming. Most obviously, they involved different controlled substances, a fact that “suggests distinct crimes.”

Id. Ultimately, the court of appeals decided, “Still, the district court’s decision is ‘plausible in light of the record as a whole.’” *Id.*

The court of appeals also rejected Nava’s argument that “the district court violated the Fifth Amendment by applying a preponderance of the evidence standard in its determination that Nava was responsible for the methamphetamine offense[.]” *Id.* at 588. The court held that this argument was foreclosed by Fifth Circuit and Supreme Court precedent. *Id.* (citing *United States v. Watts*, 519 U.S. 148, 156 (1997)).

REASONS FOR GRANTING THE WRIT

Nava's guideline sentence was increased by 11 to 16 years as the result of a judicial finding, by a preponderance of the evidence, that he had committed an uncharged, unadjudicated offense and that it was relevant conduct. The judge's factual finding on this uncharged, unadjudicated crime dramatically increased the prison sentence for the offenses for which Nava was convicted. This result violated Nava's Fifth Amendment right to due process by allowing the judicial fact finding to be the "tail which wags the dog of the substantive offense." *Blakely v. Washington*, 542 U.S. 296, 307–08 (2004); *see also McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986). Such a dramatic increase in the amount of time a criminal defendant must spend in prison due to a judge determining, by a preponderance of the evidence, that the defendant committed an uncharged, unadjudicated offense implicates important interests: the liberty of the defendant, society's confidence and faith in criminal trials, and the reliability of the sentence. These interests are all protected by the Due Process Clause.

This Court has held that the Sixth Amendment right to a jury trial prohibits judicial fact-finding by a preponderance of the evidence when imposing a sentence beyond the statutory maximum. *Apprendi v. New Jersey*, 530 U.S. 466, 491 (2000). This Court has held that the Sixth Amendment prohibits judicial fact-finding by a

preponderance of the evidence to increase the mandatory minimum sentence. *Alleyne v. United States*, 570 U.S. 99, 104–06 (2013). This Court has held that, under the mandatory Federal Sentencing Guidelines, judicial fact-finding violated the defendant’s Sixth Amendment right to have his guilt or innocence determined by a jury of his peers. *United States v. Booker*, 543 U.S. 220, 234–35 (2005).

The *Apprendi* Court noted that, “due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence.’” 530 U.S. at 484 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998)). Since *Apprendi*, and its progeny, however, this Court has not addressed to what degree due process protects the defendant against judicially found facts that greatly increase his sentence. In *United States v. Watts*, 519 U.S. 148, 156 (1997), this Court had held that acquitted conduct need only be found by a preponderance of the evidence at sentencing. But it also acknowledged, though did not resolve, “a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based” on a heightened standard of proof. *Id.* at 156–57.

The divergence among the circuit courts still exists after the *Apprendi* revolution. While only one court routinely applies a heightened standard of proof for relevant conduct at sentencing, *see United States v. Hymas*, 780 F.3d 1285, 1289 (9th Cir. 2015), other courts leave open the possibility of a heightened standard without clarifying when it will apply, *see United States v. Olsen*, 519 F.3d 1096, 1105 (10th Cir. 2008), and some judges have argued against their circuit's refusal to apply a heightened standard, *see United States v. Grier*, 475 F.3d 556 (3rd Cir. 2007) (en banc) (Ambro, J., concurring; Sloviter, J., dissenting).

Due process should not allow a criminal defendant to be charged and adjudicated for one crime but then punished, and more harshly, because of a judicial finding by a preponderance of the evidence that he had committed another uncharged and unadjudicated crime and that it was relevant conduct. *Blakely*, 542 U.S. 306 (sentencing a man for murder though convicted only of illegally possessing the firearm used to commit it).

Given the important interests at stake and the long-standing confusion over the issue, this Court should grant certiorari.

A. A defendant's liberty interest is implicated at sentencing and requires application of a heightened standard of proof.

The Fifth Amendment guarantees that no person may be deprived of liberty without due process of law. U.S. Const. amend. V. That constitutional protection exists because “[t]he accused during a criminal prosecution has at stake [an] interest of immense importance ... because of the possibility that he may lose his liberty upon conviction[.]” *In re Winship*, 397 U.S. 358, 363 (1970). Thus, part of the process to which a criminal defendant is due is a system containing procedural safeguards to ensure that he will not be erroneously deprived of liberty. *Apprendi*, 530 U.S. at 484 (citing *Winship*).

To protect against erroneous decisions in determining guilt, courts employ a “beyond a reasonable doubt” standard. *Id.* (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975)). But criminal law “is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability” assigned to a defendant. *Mullaney*, 421 U.S. at 697–98. “[I]t can hardly be said that the potential doubling of one’s sentence ... has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached,” the difference is “unquestionably of constitutional significance.” *Apprendi*, 530 U.S. at 495.

Nava's liberty interest was at stake when the district court took up the question of whether he was guilty of the uncharged, unadjudicated methamphetamine offense. The court's finding, by a preponderance of the evidence, that Nava was criminally liable for the methamphetamine offense and that it was relevant conduct increased his prison sentence for his cocaine convictions by 11 to 16 years. In Nava's case, the judicial finding by a preponderance of the evidence of the uncharged, unadjudicated offense was the "tail" that "wag[ged] the dog of the substantive offenses." *Blakely*, 542 U.S. at 307–08.

Due process requires that the burden of proof applicable to any judicial factual determination reflect the importance of the interests placed at stake by the underlying decision. *Washington v. Harper*, 494 U.S. 210, 229 (1990). In a sentencing proceeding, the individual interests at issue, as well as the importance of the ultimate decisions to be made, require that the court's fact-finding, by a preponderance of the evidence, not greatly increase the defendant's sentence far above that supported by the offense of conviction.

B. The allocation of risk regarding erroneous determinations warrants applying a heightened standard of proof.

The burden of proof "standard 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). Indeed, “[t]he function of a standard of proof ... 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 *Winship*, 397 U.S. at 370 (Harlan, J., concurring)).

In a civil case, where money—as opposed to a person’s freedom—is at issue, the preponderance-of-evidence standard is appropriate. *Winship*, 397 U.S. at 371 (Harlan, J., concurring); *see also Addington*, 441 U.S. at 423 (preponderance standard is warranted because society has “a minimal concern with the outcome” of private civil suits). In a criminal case, however, “society imposes almost the entire risk of error upon itself” by employing the reasonable doubt requirement “to exclude as nearly as possible the likelihood of an erroneous judgment.” *Addington*, 441 U.S. at 423. The reasonable doubt standard therefore “plays a vital role in the American scheme of criminal procedure” and is “indispensable to command the respect and confidence of the community in applications of the criminal law.” *Winship*, 397 U.S. at 363–64.

In federal criminal sentencing, because factual findings by a preponderance of the evidence can significantly affect a defendant’s prison sentence “in terms of absolute years behind bars,”

Apprendi, 530 U.S. at 495, due process requires application of a heightened burden of proof. And the problematic risk of error is exacerbated because of aspects to current federal criminal sentencing procedure.

fact findings are the product of a process in which the government's burden of proof is only a preponderance of the evidence, defendants have limited rights to the discovery of evidence germane to sentencing factors, much of the true fact-finding is done (at least preliminarily) by probation officers without the benefit of formal evidentiary presentation, and the sentencing hearing itself is not subject to the rules of evidence.

Frank O. Bowman, III, *Completing the Sentencing Revolution: Reconsidering Sentencing Procedures in the Guidelines Era*, 12 Fed. Sent. Rptr (Vera) 187 (2000). A defendant can see his sentence balloon based on “facts extracted after trial from a report complied by a probation officer who the judge thinks more likely got it right than got it wrong.” *Blakely*, 542 U.S. at 312.

Because of the danger associated with this procedure, some states require that before “evidence of an extraneous crime or bad act” may be used at sentencing, it must be “shown beyond a reasonable doubt to have been committed by the defendant.” Tex. Code Crim. Proc. Ann., art. 37.07, § 3(a)(1) (West 2019). Having a federal system in which a defendant convicted of one offense is excessively punished based on another uncharged, unadjudicated

offense that a judge finds it “more likely than not” he committed, undermines the community’s trust in the criminal justice system.

Thus, both the interest at stake and the importance of the underlying decision require that the burden of proof allocate the risk of an error in such a way that it is less likely that a defendant will be punished incorrectly.

C. The advisory nature of the guidelines does not diminish the threat posed to the interests protected by the Due Process Clause.

In *Booker*, the Supreme Court held 18 U.S.C. § 3553(b), a key provision of the Sentencing Reform Act, unconstitutional under the Sixth Amendment’s jury clause. Severing that subsection, rather than striking down the entire Act, left § 3553(a) in place as the operative statutory guide to federal sentencing. As a result, the Guidelines remained in effect, but in an advisory capacity only.

But *Booker* did not return federal sentencing procedure to the pre-Guidelines era in which the trial court had virtually unfettered discretion to sentence a defendant within the statutory range. Rather, the Guidelines continue to play a dominant role in sentencing decisions. *See Peugh v. United States*, 569 U.S. 530, 549 (2013). Indeed, in post-*Booker* sentencing, district courts must start with a Guidelines calculation. *Id.* Statistics collected by the United States Sentencing Commission show that district courts continue

to impose either within-Guidelines sentences or sentences that depart from the Guidelines based on a motion by the Government. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016).

Even under the advisory guidelines, there is a danger that a sentencing factor could be applied beyond “[say, due process] *limitsBooker*, 543 U.S. at 330 (Rehnquist, C.J., dissenting), based on the court making an erroneous critical factual determination that dramatically increases a sentence based upon a mere preponderance of the evidence. *Booker* did not analyze or remediate these due process violations.

Due process demands a more exacting standard. “If the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof.” *United States v. Pimental*, 367 F. Supp. 2d 143, 154 (D. Mass. 2005).

In sum, “[w]hen a judge’s finding based on a mere preponderance of the evidence” that a criminal defendant committed an uncharged, unadjudicated offense that results in a dramatic increase in the prison sentence, “it is appropriately characterized as ‘a tail which wags the dog of the substantive offense.’” *Apprendi*, 530 U.S. at 495 (quoting *McMillan*, 477 U.S. at 88). The threat posed by fact-finding at sentencing to the interests long protected by the

reasonable doubt standard remains very real. A defendant is entitled to have a heightened standard of proof applied when a district court makes factual findings under relevant conduct that dramatically increase his sentencing range.

D. This Court should grant certiorari.

Under a higher standard of proof, the district court could not have found that Nava committed the unrelated, uncharged, unadjudicated methamphetamine offense. As the Fifth Circuit noted, when reviewing for clear error the preponderance of the evidence finding, “the district court could reasonably have come out the other way.” *Nava*, 957 F.3d at 587.

In *Almendarez-Torres*, because the petitioner made “no separate, subsidiary, standard of proof claims with respect to his sentencing,” this Court expressed “no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence.” 523 U.S. at 247–48 (citing *Watts*, 519 U.S. at 156). Here, Nava raised the issue before the district court, before the Fifth Circuit, who addressed it in a published opinion, and now before this Court. This Court should grant certiorari to address this important issue and to resolve the divergence among the federal courts of appeals.

CONCLUSION

FOR THESE REASONS, Nava asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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