No._____

IN THE
Supreme Court of the United States

BRANDON KENDALE DUDLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

W. MICHAEL DOWLING
Counsel of Record
THE DOWLING FIRM PLLC
P.O. BOX 27843
Raleigh, N.C. 27611
(919) 529-3351
mike@dowlingfirm.com

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Question Presented

Whether the use of the preponderance of the evidence standard at sentencing to substantially enhance a criminal defendant's advisory guideline range comports with the Constitution's guarantee of due process?

Parties to the Proceeding

The parties to the proceeding are those named in the caption above.

Table of Contents

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Relevant Statutory Provisions 1

Statement of the Case 2

Reasons for Granting the Writ 6

Conclusion 11

Appendix

Opinion of the United States Court of Appeals for the Fourth Circuit, filed 2/5/21 ..... A1

Table of Authorities

Cases

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 7

Rita v. United States, 551 U.S. 338 (2007) 9

Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209 (1967) 6

United States v. Anderson, 243 F.3d 478 (8th Cir. 2001) 7

United States v. Booker, 543 U.S. 220 (2005) 8

United States v. Brika, 487 F.3d 450 (6th Cir. 2007) 8

United States v. Grubbs, 585 F.3d 793 (4th Cir. 2009) 8

United States v. Hopper, 177 F.3d 824 (9th Cir. 1999) 7

United States v. Johnson, 342 F.3d 731 (7th Cir. 2003) 8

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990) 7, 8

United States v. Martinez, 525 F.3d 211 (2d Cir. 2008) 8

United States v. Reuter, 463 F.3d 792 (7th Cir. 2006) 9

United States v. Staten, 466 F.3d 708 (9th Cir. 2006) 8, 9

Statutes and Other Authorities

U.S. Const. amend. V 1

18 U.S.C. § 2 2

18 U.S.C. § 922(g)(1) 3

18 U.S.C. § 924(c)(1)(A) 3

18 U.S.C. § 3553(b) 7

21 U.S.C. § 841(a)(1) 2, 3

28 U.S.C. § 1254(1) 1

U.S.S.G. § 2D1.1(c)(5) 5

U.S. Sup. Ct. Rule 10 6

PETITION FOR WRIT OF CERTIORARI

Petitioner Brandon Kendale Dudley ("Mr. Dudley" or "Petitioner") respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below

The February 5, 2021 opinion of the United States Court of Appeals for the Fourth Circuit for which review is sought is not reported. The February 12, 2020 judgment of the district court for the Eastern District of North Carolina is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit for which review is sought was entered on February 5, 2021.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Statement of the Case

On August 7, 2019, the government filed a Superseding Indictment charging Mr. Dudley with four narcotics charges and two firearm-related charges. (C.A.J.A. 14-18)[1].

- Count One of the Superseding Indictment charged Mr. Dudley with conspiracy to distribute and possess with the intent to distribute fifty grams or more of methamphetamine, a quantity of marijuana, and a quantity of "Ecstasy." (C.A.J.A. 14).
- Count Two of the Superseding Indictment charged Mr. Dudley with possession with the intent to distribute five grams or more of methamphetamine, and aiding and abetting another, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 on or about February 20, 2018. (C.A.J.A. 15).
- Count Three of the Superseding Indictment charged Mr. Dudley with possession with the intent to distribute five grams or more of methamphetamine, and aiding and abetting another, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 on or about February 28, 2018. (*Id.*)
- Count Four of the Superseding Indictment charged Mr. Dudley with knowingly and intentionally possessing with the intent to distribute, and distributing, fifty grams or more of

[1] References to the Appellant's Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit are indicated by "C.A.J.A." plus the relevant volume and page numbers.

methamphetamine on March 15, 2018, in violation of 21 U.S.C. § 841(a)(1). (*Id.*)

- Count Five of the Superseding Indictment alleged that on December 4, 2018, Mr. Dudley knowingly possessed a firearm in furtherance of the drug trafficking crime charged in Count One, in violation of 18 U.S.C. § 924(c)(1)(A). (C.A.J.A. 16).
- Count Six of the Superseding Indictment alleged that on December 4, 2018, Mr. Dudley knowingly possessed a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding a year, in violation of 18 U.S.C. §§ 922(g)(1). (*Id.*).

The Trial

The trial began on August 12, 2019. (C.A.J.A. 7-8). Before jury selection, the Court granted the government's oral motion to dismiss Counts Five and Six. (C.A.J.A. 7). The jury returned a partial guilty verdict as to Count One (guilty as to conspiracy to distribute fifty grams or more of methamphetamine, but not guilty as to conspiracy to distribute marijuana and ecstasy), and guilty verdicts as to Counts Two through Four. (C.A.J.A. 297, 298, see also C.A.J.A. 293-294).

Sentencing and Appellate Proceedings

The Court imposed a sentence of 360 months imprisonment as to Counts One and Four, and 300 months imprisonment as to Counts Two and Three, with all sentences running concurrent to one another. (*Id.*)

The Court entered judgment on February 14, 2020 (C.A.J.A. 11), and Mr. Dudley timely filed a Notice of Appeal in the district court on February 18, 2020. (C.A.J.A. 360).

An appeal timely followed. (C.A.J.A. 360).

The Fourth Circuit court of Appeals affirmed the judgment and sentence of the district court by a per curiam opinion entered on February 5, 2021.

Statement of Relevant Facts

The charges in this case arose from a 2018 narcotics investigation by the Duplin County, North Carolina Sheriff's Office. (C.A.J.A. 35). A cooperating witness introduced an undercover detective to Dayona Dudley, who was Mr. Dudley's niece and an alleged methamphetamine trafficker. (C.A.J.A. 36-37). The undercover officer arranged to purchase crystal methamphetamine from Dayona Dudley on three separate occasions, which purchases gave rise to Counts One, Two, Three, and Four of the Superseding Indictment.

The jury convicted Mr. Dudley of Count One with respect to the distribution of methamphetamine, but acquitted Mr. Dudley as to Count One insofar as it dealt with marijuana and ecstasy distribution. (C.A.J.A. 297). The jury convicted Mr. Dudley further of Counts Two, Three, and Four. (C.A.J.A. 299-301).

The Probation Office prepared a presentence investigation report ("PSR"). (C.A.J.A. 362-386). Relying on the statements of three informants (C.A.J.A. 367-369), who collectively attributed 20,315.63 grams of ICE, 31,014.9 grams of cocaine base, and 15,522.125 grams of cocaine to Mr. Dudley over a period spanning back to

1999 (C.A.J.A. 377), the probation office determined that Mr. Dudley's base offense level was the maximum level possible: 38. *See* U.S.S.G. 2D1.1(c)(1).

By contrast, had Mr. Dudley be held accountable for the 60 grams of crystal methamphetamine that the jury attributed to him beyond a reasonable doubt, Mr. Dudley's base offense level under U.S.S.G. Section 2D1.1(c)(5) would have been a 24 (before any enhancements), corresponding to an advisory guideline range of 92-115 months. As a result of the historical drug weight statements, however, Mr. Dudley's advisory guideline range (before any enhancements) was 360 months to Life. After application of the enhancements, that range was Life.

The government requested a sentence of 460 months. (C.A.J.A. 348). Mr. Dudley's counsel did not ask for a specific term, but essentially asked for a sentence between 220 and 360 months. (C.A.J.A. 344-345).

The Court credited the hearsay and unconfronted statements in the PSR that were used to dramatically enhance Mr. Dudley's sentence, and imposed a sentence of 360 months imprisonment as to Counts One and Four, and 300 months imprisonment as to Counts Two and Three, with all sentences running concurrent to one another. (*Id.*)

Reasons Why the Writ Should Issue

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER DUE PROCESS REQUIRES THAT A SENTENCE ENHANCEMENT WHICH IS GROSSLY DISPROPORTIONATE TO THE CHARGED OFFENSE MUST BE PROVED BY CLEAR AND CONVINCING EVIDENCE

This Court should grant certiorari in this case to resolve a conflict among the circuits as to whether due process requires that a sentence enhancement which is grossly disproportionate to the charged offense must be proved by clear and convincing offense. The court below entered a decision which is "in conflict with the decision of another United States court of appeals on the same important matter," U.S. Sup. Ct. Rule 10 (a). The court also "decided an important question of federal law that has not been, but should be, settled by this Court." U.S. Sup. Ct. Rule 10(c). For both reasons, this Court should grant certiorari.

To understand the setting of this controversy, it is necessary to review the history of what is commonly called the "tail wagging the dog" doctrine in the federal courts. In the seminal case of *Specht v. Patterson*, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212 - 1213 (1967) the defendant was sentenced under a procedure which allowed someone convicted of a sex offense to be sentenced for a term of imprisonment up to life upon the finding of a judge that he was a person who constituted a threat of bodily harm to the public, or that he was an habitual offender and mentally ill. The court found that this was a new finding of fact which required, consistent with due process, the presence of counsel, reasonable notice, and an opportunity to be heard. This Court did not consider whether due process required, in addition, a particular burden of proof.

This Court first considered the burden of proof issue in *McMillan v. Pennsylvania*, 477 U.S. 79, 87 (1986). In *McMillan*, the Court held that a statute which allowed facts supporting a mandatory minimum to be proved by a preponderance of the evidence did not violate due process. But the Court left open the possibility that a sentencing statute permitting a sentencing enhancement so substantial as "to be a tail which wags the dog of the substantive offense," might be subject to a different rule. *McMillan*, 477 U.S. at 88.

McMillan's suggestion of a higher standard of proof for "tail wagging the dog" facts was applied in *United States v. Kikumura*, 918 F.2d 1084, 1101 (3d Cir. 1990). In *Kikimura*, the defendant was convicted several explosives and passport offenses, for which the federal sentencing guidelines prescribed a sentencing range of between 27 and 33 months in prison. However, upon finding clear and convincing evidence that the defendant acted with the intent to cause multiple deaths and serious injuries, the trial judge sentenced Kikimura to sentence of 30 years' imprisonment, a 12-fold, 360-month increase. The court found that the clear and convincing standard was, under these circumstances, implicit in the statutory requirement that a sentencing court "find" certain considerations in order to justify a departure, 18 U.S.C. § 3553(b). The court "reserve[d] judgment on the question whether it is also implicit in the due process clause itself." 918 F.2d at 1102.

Following *Kikimura*, the Eighth and Ninth Circuits both adopted the "clear and convincing" standard for "tail-wagging the dog" facts, see *United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999); *United States v. Anderson*, 243 F.3d 478, 485 -

86 (8th Cir. 2001), and the Seventh Circuit expressed sympathy for that view. *United States v. Johnson*, 342 F.3d 731, 735 (7th Cir. 2003).

However, following this Court's decision in *United States v. Booker*, 543 U.S. 220, 268 (2005), making the federal guidelines discretionary, many courts began to reject the *Kikimura* doctrine as either unnecessary or unworkable. Most circuits have, post-*Booker*, rejected *Kikimura*. *See United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006), *United States v. Martinez*, 525 F.3d 211, 214-15 (2d Cir. 2008), *United States v. Grubbs*, 585 F.3d 793, 799-803 (4th Cir. 2009), *United States v. Brika*, 487 F.3d 450, 460-61 (6th Cir. 2007).

In the meantime, the Ninth Circuit continues to hold, post-*Booker*, that due process requires a clear and convincing standard where the guideline sentencing enhancement disproportionately increases the sentence for the charged offense. *United States v. Staten*, 466 F.3d 708, 717-20 (9th Cir. 2006).

There are, in fact, strong reasons for holding that even advisory guidelines are not immune from due process concerns. Although post-*Booker* the guidelines are no longer mandatory in the sense that they must be followed by the district courts absent a statutorily supported downward departure, district courts are still required at least to consult the Guidelines, and to make any factual findings required in doing so. *See Booker*, 543 U.S. at 245-46 (noting that *Booker*'s remedy "requires a sentencing court to consider Guidelines ranges, but permits the court to tailor the sentence in light of other statutory concerns as well").

Moreover, the due process concern is triggered not by the "mandatory" or "advisory" status of any factual determination. Due process, and a heightened burden of proof, comes into play only "in limited circumstances," where "the facts found actually are determinative of the sentence given." *Staten*, 466 F.3d at 719.

Another way of putting the same point is to say that due process comes into play when facts found by a judge under a preponderance standard concerning a separate, uncharged crime result in a dramatic increase in the sentence actually imposed on the defendant for the crime of conviction, so as to suggest that the defendant is really being sentenced for the uncharged crime rather than the crime of conviction. Or, as Justice Stevens pointed out in his concurrence in *Rita v. United States*, 551 U.S. 338 (2007), an otherwise-permissible sentence may be unreasonable if it is imposed for an impermissible reason. *See* 127 S. Ct. at 2473 (Stevens, J., concurring) ("After all, a district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable.").

This case represents a particularly strong case for application of this due process doctrine. The jury found Mr. Dudley guilty beyond a reasonable doubt of either conspiring to distribute or possessing with the intent to distribute 60 grams or more of methamphetamine. (C.A.J.A. 297-301). That amount of drug weight corresponds to a Base Offense Level of 24 under the United States Sentencing Guidelines, and an advisory guideline range (before any enhancements) of 92-115 months.

However, after Mr. Dudley's conviction, the court relied on the hearsay statements of several informants who attributed 20 kg of methamphetamine, 41 kg of marijuana, 31 kg of cocaine base, and 15 kg of cocaine to Mr. Dudley. (C.A.J.A. 377). Only one of these informants testified at trial and was subject to cross-examination, and when he did testify, he admitted that he did not know Mr. Dudley "that well," and he conceded that he had never actually purchased narcotics directly from Mr. Dudley. Instead, he dealt directly with Mr. Dudley's brother. (C.A.J.A. 184). The other two informants whose statements so dramatically enhanced Mr. Dudley's advisory guideline range were never subject to cross-examination either at trial or the sentencing hearing.

Based on these untested and unreliable hearsay statements, Mr. Dudley's Base Offense Level under the Sentencing Guidelines increased from Level 24 to Level 38—a 14 level increase, corresponding to an advisory guideline range (before enhancements) of 360-Life. Thus, based on unreliable hearsay, Mr. Dudley's sentencing range was enhanced at least three-fold compared to what the jury found Mr. Dudley responsible for at trial. The difference between what Mr. Dudley received and what he could have received is indeed "dramatic," and triggers tail-wagging due process concerns.

This is a case where application of a clear and convincing standard most likely would have made a difference. Mr. Dudley was sentenced based upon hearsay that was vague and unconvincing. His sentence was grounded in unconfronted extrajudicial statements of 3 informants—and the only informant to testify at trial

admitted that he never actually received any narcotics or gave any money to Mr. Dudley. While the court below determined that drug weights had been proved by a preponderance of the evidence, it is far from certain that any reasonable jurist could have characterized that same evidence as "clear" or "convincing."

Therefore, this Court should grant the petition for writ of certiorari.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

/s/ W. Michael Dowling

W. MICHAEL DOWLING
Counsel of Record
THE DOWLING FIRM PLLC
P.O. BOX 27843
Raleigh, N.C. 27611
(919) 529-3351

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