

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2022 Term

MALIK ROSS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Submitted By:

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QUESTION PRESENTED

This case presents a recurring problem arising when a federal court relies on contested facts it did not find beyond a reasonable doubt at sentencing to impose a sentence many years longer than the U.S. Sentencing Guidelines recommend for the charged conduct admitted by an accused's guilty plea—facts, without which the Court of Appeals would reverse the sentence as substantively unreasonable. Judge Erickson's concurring opinion states the scenario succinctly:

Malik Ross stands convicted of embezzling bank funds, not manslaughter or murder. Yet he received a 120-month sentence—more than eight times the high end of the applicable guidelines range—because a judge determined he recklessly fired a gun resulting in the tragic death of a child. Missouri prosecutors expressly declined to charge Ross for the killing. And he disputed his culpability at sentencing, arguing that he fired the shots in self-defense after two individuals confronted him and shot first. Rather than a jury deciding Ross's guilt beyond a reasonable doubt, however, the sentencing judge found him responsible for homicide under a [preponderance of the evidence,] more-likely-than-not standard.

In light of the foregoing, the question presented here is as follows:

Does a judge deny a defendant's Fifth Amendment rights by increasing a prison sentence based on disputed facts the Court did not find beyond a reasonable doubt, but for which the sentence would be stricken as substantively unreasonable on appeal?

Parties to the Proceedings

Petitioner Malik Ross was represented in the lower court proceedings by his appointed counsel, Federal Public Defenders Lee T. Lawless and Nanci H. McCarthy and Assistant Federal Public Defender Beverly A. Beimdiek and Kayla Williams, 1010 Market, Suite 200, Saint Louis, Missouri 63101. The United States was represented by United States Attorney Saylor Fleming and Assistant United States Attorney Allison Behrens, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri 63102.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is published at 29 F.4th 1003. The opinion appears in the Appendix (“Appx.”, at 1).

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on April 4, 2022. Appx. 1-9. Mr. Ross filed a timely motion for rehearing, which was denied June 3, 2022. Appx. 10. Justice Kavanaugh, Circuit Justice for the Eighth Circuit United States Court of Appeals, granted Mr. Ross additional time to file his petition for certiorari by October 31, 2022. Appx. 11. This petition is timely filed by mailing on October 31, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS

18 U.S.C. § 3553. Imposition of a sentence.

- a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
 - (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced;

.....

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

This petition presents a recurrent problem in Federal criminal sentencing under the advisory Sentencing Guidelines regime the Court established in 2005 and the appellate review for substantive unreasonableness this produced. It provides a proper vehicle for the Court to resolve whether a District Court can increase a sentence far beyond the advisory Sentencing Guidelines range based on disputed facts the judge finds only by a preponderance of evidence, without which the sentence would be stricken on direct appeal as substantively unreasonable.

A federal grand jury charged 23-year-old Malik Ross and his aunt with conspiring to embezzle and actual embezzlement of \$50,000 on August 13, 2019. Malik drove an armored truck assigned to transport financial deposits in St. Louis, Missouri. His embezzlement consisted of placing a bag containing \$50,000 outside of his armored truck on a city street, where his aunt retrieved it to divide into backpacks for the two of them. Police arrested Malik the next day and recovered about \$23,800 from the backpack his aunt prepared for him. Police found a total of \$3,415 at his aunt's home, plus a strong aroma of marijuana, a scale and baggies. They found her backpack empty in a hotel room she had rented.

A coworker told detectives he did not think Malik had the mental capacity to conceive of the embezzlement on his own. A Special School District in St. Louis diagnosed Malik at age 7 with intellectual disability the year he repeated the first grade. His disability causes poor comprehension of oral and written directions, poor math skills and poor socialization. It impairs one's cognitive skills, reasoning, learning, and problem solving as well as "adaptive behavior." In the seventh grade, he read at a second to third grade level and, at age 18, he still needed help maintaining his hygiene. In 2018, Malik had secured work driving an armored truck transporting money for Garda World Logistics. The job required him to carry a semi-automatic pistol.

Malik pled guilty to the embezzlement and conspiracy on August 26, 2020. The Sentencing Guidelines set a base offense level of seven for the grouped charges and added six levels for an intended loss exceeding \$40,000. Subtracting two levels for Malik's prompt acceptance of responsibility, the total offense level was 11. He had no prior convictions. The Sentencing Guidelines recommended eight-to-14 months in prison, and authorized probation. At sentencing, however, the District Court heard evidence the government offered through two police officers summarizing their investigations and impressions about an August 12, 2019, shooting in which a seven-year-old hidden from view by foliage died from a stray bullet. Neither of the detectives witnessed the incident and no surveillance camera visually recorded it. The Court heard this evidence over defense counsel's due process objection that St. Louis prosecutors declined to file charges for a lack of probable cause to charge Malik, yet the Court took the evidence explicitly to find facts only by a preponderance of the evidence presented as Eighth Circuit precedent allowed.

One officer recounted Malik's statement about the August 12 incident, although the officer was unaware of Malik's intellectual disability and its impact on his cognitive, communicative, and problem solving capacities. Malik told the officer that he had caught a ride home after work on August 12, still in uniform. As he walked around a street corner, two other young men later identified as A.H. and M.P. came toward him from a porch asking about his ballistic vest and shooting at him. Malik said he returned fire with his work gun and ran away from them while firing more shots back at the two men. A.H. was struck by a bullet and ran about a block away where he collapsed. A.H. initially denied having any weapon at the time, but, on his third or fourth statement to police, he admitted that he did have a gun. A.H. claimed

he fired only one shot to attract help after he ran away injured. A resident who heard the shooting commence saw M.P. holding a gun while pounding on a house door.

A stray bullet struck a seven year-old playing down the block from where Malik encountered A.H. and M.P., the child's presence being obscured from their view by foliage. The bullet that struck the child was never recovered and was not ballistically linked to either Malik's gun or the weapons carried by the other men. Police identified multiple shell casings in the vicinity of the incident that matched Malik's work firearm. They did not find a casing for the shot A.H. said he fired to summon help and could not state with certainty who fired the fatal shot that struck the child playing behind the foliage.

The District Court explicitly stated it found Malik responsible for the child's death only by a preponderance of evidence. The Court relied on these facts to impose a 10 year sentence approximately nine years longer than the Sentencing Guidelines calculation of eight-to-14 months for the embezzlement offenses to which he pled guilty. The Court concluded that a "preponderance of evidence" showed Malik knowingly assumed the risk of shooting a child and that it was "inextricably intertwined" with the conspiracy and embezzlement, based upon Mr. Ross's belief that he was, in fact, responsible for the death of the 7-year-old based on sorrow he expressed after seeing news reports of the child's death. The Judge stressed that "in a sentencing hearing in federal court, the issue is not what is proven beyond a reasonable doubt; it's what can be proven by a preponderance of the evidence, that is, in more simple words, more likely than not." The District Court accepted the Officer's hearsay account of A.H.'s statements denying that he and M.P. fired any shot at Malik when they encountered him and dismissed Malik's claims of self-defense on the basis that the two men's "words alone [did] not justify the use of the

discharge of the weapon.” The Court declared Malik’s conduct on August 12 to be “reckless,” and found that he attempted to evade responsibility, making him a danger to the community.

The Court declared that the eight-to-14 month Sentencing Guidelines range did not reflect the seriousness of Malik’s conduct. It opted to incorporate the Sentencing Guidelines ranges for involuntary manslaughter and second degree murder which it deemed more appropriate for the facts the Court found by a preponderance of the evidence in the 24-hour period preceding the embezzlement. The Court declared that the reckless nature of Malik’s conduct on August 12 and his embezzlement to avoid criminal liability for the uncharged homicide warranted an upward variance. The Court declared that it chose the 10 year sentence because it fell between a 27-to-33 month Sentencing Guidelines range recommended for involuntary manslaughter and a 235-to-293 month range for second degree murder.

The Eighth Circuit’s opinion

On direct appeal, Malik argued that the District Court imposed a substantively unreasonable sentence in that it based its nine-year variance from the applicable Sentencing Guideline range on findings it made only by a preponderance of evidence rather than a finding of their truth beyond a reasonable doubt. He argued that a substantively unreasonable sentence constitutes an illegal sentence under the appellate review regimen this Court established in *United States v. Booker*, 543U.S. 220, 261 (2006). He argued that the due process right to a finding of every fact necessary to the punishment imposed beyond a reasonable doubt extended to facts essential to a sentence’s capacity to survive an appellate claim that it is substantively unreasonable. Counsel cited the St. Louis Circuit Attorney’s determination that the same evidence the District Court received did not support probable cause to charge Malik with any crime as proof the facts the District Court found by a preponderance of evidence did not support

a finding of proof beyond reasonable doubt. Counsel argued that those facts could not support a finding that Malik was guilty of manslaughter or second degree murder beyond a reasonable doubt required to justify the nine years the Court added to the advisory range for his embezzlement.

A three-judge panel of the Eighth Circuit affirmed Mr. Ross's conviction on April 4, 2022. Appendix 1. The Court summarily dismissed his Constitutional challenge to the increase of his sentence in a footnote reciting circuit precedent approving the use of the preponderance of evidence standard in federal sentencing:

Ross also argues that it was error to apply the preponderance of the evidence standard to the uncharged conduct. However, we have repeatedly held that a district court may vary upward based on uncharged conduct that it finds by a preponderance of the evidence, so long as the sentence does not exceed the statutory maximum. *See e.g. United States v. Smith*, 681 F.3d 932, 935-36 (8th Cir. 2012); *United States v. Shield*, 831 F.3d 1079, 1083 (8th Cir. 2016). Here, the embezzlement offense has a maximum statutory sentence of thirty years, and Ross was sentenced to ten years' imprisonment. *See* 18 U.S.C. §656 Thus, the district court's application of the preponderance of the evidence standard to the uncharged conduct was not error. *See Smith* 681 F.3d at 936.

Appendix 5 & n.2.

The Eighth Circuit denied a timely motion for rehearing *en banc* on June 3, 2022. Appendix 10. He filed this petition by mail within the time granted by Justice Kavanaugh, Circuit Justice for the Eighth Circuit Court of Appeals. Appendix 11.

GROUNDS FOR GRANTING THE WRIT

- I. **The Court should decide whether the Fifth Amendment prohibits district courts from basing dramatic increases in federal sentences on disputed facts proved only by a preponderance of evidence but for which the sentence would be reversed as substantively unreasonable on appeal.**

The record in this case spotlights constitutional problems posed when federal district courts rely on disputed facts not proved beyond a reasonable doubt to justify a sentence far above the advisory U.S. Sentencing Guidelines range--facts without which the sentence would not survive appellate review for substantive unreasonableness under *United States v. Booker*, 543 U.S. 220, 261 (2005), and *Gall v. United States*, 552 U.S. 38, 51-52 (2007). This case presents an excellent vehicle to resolve the issue in a context where the District Court bases a dramatic increase of sentence on the very same evidence that led a state prosecutor to find no basis to charge petitioner with any crime—illustrating the starkly disparate sentences resulting based on which burden of proof is used.

- A. The Fifth Amendment demands proof beyond reasonable doubt of all facts required to impose a sentence lawfully

The Due Process Clause prescribes what a factfinder must determine to return a verdict of guilty. *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993). The Government's obligation to prove guilt beyond reasonable doubt "counts among the historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *In re Winship*, 397 U.S. 358, 362 (1970), quoting *Davis v. United States*, 160 U.S. 469, 488 (1895). "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. It extends to jury-waived trials conducted by a judge and guarantees one shall not suffer the onus of a criminal conviction except upon

“evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.” *Jackson v. Virginia*, 443 U.S. 307, 316 (1979), *superseded by statute on other grounds*.

This burden also extends the guarantee of a finding beyond reasonable doubt to “any fact that increases the penalty for a crime beyond a prescribed statutory maximum,” other than the fact of a prior conviction. *Blakely v. Washington*, 542 U.S. 296, 302 (2004), quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In *Blakely*, the Court struck down a Washington state sentencing scheme which set a “standard” punishment range within broader statutory limits of 0-to-10 years in prison, unless a judge found aggravating facts justifying an exceptional sentence above that range. In *Blakely*’s case, the standard sentencing range based upon his guilty plea to kidnapping was 49-to-53 months, but the judge found as an aggravating factor that Blakely had acted with “deliberate cruelty” and sentenced him to 90 months. *Id.* at 300.

This Court held that the Washington sentencing scheme denied defendants the Sixth Amendment right to have a jury find every fact necessary to the punishment the Court imposed. *Id.* at 304-305. Although the Court made these declarations while focusing on the Sixth Amendment right to a jury trial, the Sixth Amendment guarantee necessarily includes the interrelated Fifth Amendment right to a finding of the requisite facts beyond a reasonable doubt. *See Sullivan*, 508 U.S. at 278.

B. Disputed facts cited to justify a sentence that would otherwise be reversed as substantively unreasonable on appeal must be found beyond a reasonable doubt.

Blakely presaged this Court’s 2005 *Booker* decision that the Sixth Amendment right to a jury finding of facts on which a person’s sentence depends beyond a reasonable doubt applied to the mandatory Sentencing Guidelines established by the Sentencing Reform Act of 1984 (“SRA”). Like the state sentencing regime struck down in *Blakely*, the SRA established

“mandatory” Sentencing Guidelines which established base offense levels applicable to convictions by trial or guilty plea, to which additional levels could be added to increase the length of sentence a court could impose based on facts a district court found at sentencing that were not admitted by a guilty plea or found beyond a reasonable doubt by the jury. Justice Stevens’ merits opinion in *Booker* established that the Sixth Amendment right to a jury determination of facts necessary to the punishment imposed beyond a reasonable doubt applied to the original mandatory Guidelines Scheme the SRA created. 543 U.S. at 226.

Justice Breyer wrote a separate opinion for the Court announcing a “*Booker* remedy” designed to preserve the Sentencing Guidelines without grafting onto the SRA a jury requirement to find sentencing factors that Congress did not intend. *Id.* at 233. The Court struck the provisions of the SRA that operated to make the Sentencing Guidelines mandatory, resulting in an “advisory Guidelines” regimen “that recommended, rather than required” the Guidelines range. *Id.* One of the SRA provisions enforcing application of the Guidelines range the *Booker* remedy invalidated consisted of a 2003 amendment mandating *de novo* appellate review of every “departure” from the Sentencing Guidelines range. *Id.* at 260, referring to 18 U.S.C. § 3742(e). Excising that subsection, Justice Breyer’s “remedy opinion” reasoned that the pre-2003 statutory text directed appellate courts to review non-Guidelines sentences to determine whether they were “unreasonable, having regard for . . . the factors to be considered in imposing a sentence,” as established in 18 U.S.C. 3553(a). *Id.* at 261.

Two years later, this Court clarified the terms of and standards for “reasonableness review” in *Gall*, 552 U.S. at 51-52. District Courts were to first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a)

sentencing factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. *Id.* at 51. Assuming no procedural error occurred, the appellate court would consider the substantive reasonableness of the sentence under an abuse of discretion standard. *Id.*

Members of the Court foresaw Constitutional implications arising from substantive reasonableness review on appeal in that “some federal sentences would be upheld as reasonable only if the judge made additional findings of fact beyond those encompassed by the jury verdict or guilty plea.” *See Rita v. United States*, 551 U.S. 338, 369 (2007) (Scalia, J., concurring in part, and concurring in judgment). *See also Cunningham v. California*, 549 U.S. 270, 309 and n. 11 (2007) (Alito, J., dissenting) (noting that post-*Booker* some federal sentences will be upheld as reasonable only if the judge made additional findings of fact beyond those encompassed by the jury verdict or guilty plea). In *Rita*, Justice Stevens, joined by Justice Ginsburg, also questioned whether such cases would, yet agreed that “[s]uch a hypothetical case should be decided if and when it arises.”). 551 U.S. at 366 (Stevens, J., concurring).

C. Past and present members of the Court have recognized the problem posed in this case and have urged its resolution when a proper case presented it.

Members of the Court continued to note such potential problems in the ensuing years in the context of sentences enhanced by a sentencing judge based on conduct for which the defendant was acquitted at trial. In one such case, three defendants were convicted of distributing small amounts of crack but acquitted of conspiring to distribute drugs. *United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014). The judge found they had engaged in the charged conspiracy notwithstanding their acquittal and relied heavily on its contrary finding of their guilt by a preponderance of evidence and used this finding to increase their sentences far longer than what the Guidelines otherwise recommended. *Id.* The D.C. Circuit followed the

prevailing lower court view that sentences based on acquitted conduct do not violate the Sixth Amendment when the conduct is established by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the charged crime. *Id.*, citing *United States v. Watts*, 519 U.S. 148 (1997).¹ The Eighth Circuit’s precedent approving consideration of conduct proved only by a preponderance of evidence at sentencing rests upon *United States v. Galloway*, 976 F.2d 414 (8th Cir. 1992) (en banc). *Galloway* relied on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which found constitutional the imposition of increased *minimum* sentences based on judicial findings of fact by a preponderance of evidence. *Id.* at 422 This Court repudiated *McMillan* in *Alleyne v. United States*, 570 U.S. 99, 107, 113 (2013).

This Court denied a petition for certiorari in *Jones*. Dissenting from that denial, Justice Scalia explained that (1) the Sixth and Fifth Amendments required every element of a crime to be admitted or proved to a jury beyond a reasonable doubt, (2) this included any fact that increased the penalty to which a defendant was exposed, and (3) a substantively unreasonable penalty is illegal and must be set aside under *Gall*. *Jones v. United States*, 574 U.S. 948, 948-49 (2014). “It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must either be admitted by the defendant or found by the jury. . . . For years, however, we have refrained from saying so.” *Id.* at 949. Joined by Justices Thomas and Ginsburg, Justice Scalia noted that the petitioners in *Jones* presented a “particularly appealing case” to decide the Sixth Amendment and Fifth Amendment issues, “because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a

¹ *Watts* was decided prior to *Apprendi* and addressed only a Double Jeopardy challenge to reliance on acquitted conduct at sentencing. See *Booker*, 543 U.S. at 240 & n.4 (describing *Watts* as a narrow ruling).

jury *acquitted* them of that offense.” *Id.* (Emphasis in original). Justices Kavanaugh and Gorsuch expressed similar concerns prior to joining this Court. *See United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc) (“Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.”); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) (questioning whether the Constitution allows a sentencing judge to increase a sentence “based on facts the judge finds without the aid of a jury or the defendant’s consent,” citing *Jones*, 574 U.S. 948 (Scalia, J., dissenting)).

D. Petitioner’s case offers a perfect vehicle to decide the Fifth Amendment issue as the State saw no basis to charge the conduct the Federal Court punished by 9 more years.

Similar to the appealing circumstances making *Jones* a good vehicle to resolve the Sixth Amendment claim, Petitioner’s case also presents an exceptional vehicle to examine the Fifth Amendment challenge he preserved to the District Court’s application of the “preponderance of evidence” burden of proof to inflate his punishment. The same investigation St. Louis homicide detectives summarized to the federal judge District Court who sentenced Petitioner for embezzlement led the St. Louis Circuit Attorney to conclude probable cause did not exist to charge him for manslaughter, murder, or anything else. The detectives summarized statements by witnesses to the August 12 shooting including the father of the 7-year-old-victim who heard and saw A.H. and M.P. with guns during the incident, consistent with Malik’s claim of self-defense. One witness reported that A.H. was showing off a gun inside the house from which they emerged just before he and M.P. crossed the street toward Malik. Another witness saw A.H. return fire at Malik during the incident and another witness heard a possible argument before the gunfire. The detectives confirmed no one could establish which gun fired the bullet that struck

the child behind the bushes. A.H.'s denial of assailing Malik warranted suspicion given his string of inconsistent statements to police disavowing that he had any gun at the time of the incident. Malik repeatedly insisted A.H. and M.P. approached him with their guns drawn and firing. Police established that both Malik and A.H. possessed Glock semi-automatic pistols.

State case law also supported the St. Louis Prosecutor's decision that charges were unwarranted in light of Missouri's law concerning self-defense. In Missouri, a sudden approach of two people emerging from a house bearing guns and calling out a stranger for wearing a bullet proof vest could well support a reasonable belief that deadly force may be necessary to protect oneself "against death, serious physical injury or any forcible felony." *See State v. Comstock*, 492 S.W.3d 204, 209 (Mo. 2016). A reasonable belief means "a belief based on reasonable grounds, that is, grounds that could lead a reasonable person in the same situation to the same belief." *State v. Smith*, 456 S.W.3d 849, 852 (Mo. 2015). "It does not depend upon whether the belief turned out to be true or false." *Id.*

Petitioner's case further presents a clear and practical framework to analyze the Constitutional issue because Eighth Circuit precedent establishes that improper sentencing procedures resulting in sentences multiple years longer than the applicable Guidelines range recommends qualify as "substantively unreasonable." *See United States v. Martinez*, 821 F.3d 984, 989 (8th Cir. 2016) (mistaken application of the career offender enhancement guideline range resulted in a severe variance nine-years greater than the applicable guidelines). The issue Petitioner presents focuses on the constitutionality of a federal court finding disputed facts only by a preponderance of evidence. The abuse of discretion standard of review governing review for substantive unreasonableness, *Gall* at 51, will be established by a mistake of law such as using too low a standard of proof. *See Koon v. United States*, 518 U.S. 81, 100 (1996).

CONCLUSION

WHEREFORE, Petitioner requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,



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