

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR IGBOANUGO,
Petitioner,

-v-

UNITED STATES OF AMERICA,
Respondent.

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

DEVIN BURSTEIN
Warren & Burstein
501 W. Broadway, Suite 240
San Diego, California 92101
Telephone: (619) 234-4433
Facsimile: (619) 234-4433

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a heightened standard of proof is required for sentencing factors that have a disproportionate impact on Sentencing Guidelines range.

--prefix--

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	prefix
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
JURISDICTION.....	2
RELEVANT PROVISION	2
STATEMENT OF THE CASE.....	3
A. Mr. Igboanugo, his arrest, and guilty plea	3
B. The initial sentencing	6
1. The initial sentencing submissions	6
2. The initial sentencing hearing	7
C. The first appeal.....	7
D. The resentencing.....	8
1. The resentencing submissions.....	8
2. The resentencing hearing	8
E. The second appeal	9
REASON FOR GRANTING THE PETITION	9
Review is warranted to determine whether, and under what circumstances, due process requires a heightened standard of proof at sentencing.....	9

A.	There is substantial Circuit conflict as to when due process requires a heightened standard of proof at sentencing.....	10
B.	This case is the right vehicle	13
CONCLUSION.....		15
APPENDIX A		
APPENDIX B		

TABLE OF AUTHORITIES

Federal Cases

<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986)	9, 10
<i>United States v. Berger</i> , 587 F.3d 1038 (9th Cir. 2009)	11
<i>United States v. Harrison-Philpot</i> , 978 F.2d 1520 (9th Cir. 1992)	11
<i>United States v. Hopper</i> , 177 F.3d 824 (9th Cir. 1999)	10
<i>United States v. Hymas</i> , 780 F.3d 1285 (9th Cir. 2015)	11, 12, 13
<i>United States v. Igboanugo</i> , 655 Fed. App'x 578 (9th Cir. 2016)	7
<i>United States v. Jordan</i> , 256 F.3d 922 (9th Cir. 2001)	12, 13
<i>United States v. Long</i> , 328 F.3d 665 (D.C. Cir. 2003)	10
<i>United States v. Mezas de Jesus</i> , 217 F.3d 638 (9th Cir. 2000)	10, 11
<i>United States v. Munoz</i> , 233 F.3d 1117 (9th Cir. 2000)	10
<i>United States v. Restrepo</i> , 946 F.2d 654 (9th Cir. 1991) (en banc)	10
<i>United States v. Romero-Rendon</i> , 220 F.3d 1159 (9th Cir. 2000)	11
<i>United States v. Sanchez</i> , 967 F.2d 1383 (9th Cir. 1992)	11

<i>United States v. Treadwell</i> , 593 F.3d 990 (9th Cir. 2010)	11
<i>United States v. Valensia</i> , 222 F.3d 1173 (9th Cir. 2000)	11, 12, 13
<i>United States v. Valensia</i> , 532 U.S. 901 (2001)	12
<i>United States v. Watts</i> , 519 U.S. 148 (1997)	10

Federal Statutes

18 U.S.C. § 1341	5
18 U.S.C. § 1343	5
28 U.S.C. § 1254(1)	2

United States Sentencing Guidelines

U.S.S.G. § 2B1.1	6
U.S.S.G. § 3A1.1	6
U.S.S.G. § 3E1.1	6

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR IGBOANUGO,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner Victor Igboanugo respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

In an unpublished memorandum, the Ninth Circuit affirmed petitioner's sentence. *United States v. Igboanugo*, No. 16-50367 (9th Cir. 2017).¹ In a summary order, the Ninth Circuit denied the petition for rehearing en banc.²

JURISDICTION

On November 17, 2017, the Ninth Circuit denied the petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

The Fifth Amendment to the United States Constitution provides: "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 offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

¹ A copy of the memorandum is attached as Appendix A.

² A copy of the order denying the petition for rehearing en banc is attached as Appendix B.

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.”

STATEMENT OF THE CASE

A. Mr. Igboanugo, his arrest, and guilty plea.

Mr. Igboanugo emigrating from Nigeria to Canada. While there, he met Okechukwu Cyril, another Nigerian. ER:110.³ Mr. Cyril was a professional fraudster, who recruited Mr. Igboanugo to assist with a so-called “secret shopper” scheme. ER:110.

The con was simple. Mr. Igboanugo and Mr. Cyril would tell the victim in the United States (usually via mail) that he or she had been selected as a secret shopper to help assess the services of MoneyGram or Western Union. ER:3-4. The victim would then receive a check with instructions to deposit it in his or her bank account, and send some lesser amount to a specified person through MoneyGram or Western Union. ER:3-4.

The victim was then supposed to report on his or her experience (customer service, ease of transaction, etc.), and could keep the balance of funds – the difference between the amount of the check and the lesser amount sent – as the fee

³ The Excerpt of Record (ER) is on file with the Ninth Circuit, as is the Presentence Report (PSR).

for being a secret shopper. ER:4. The check, however, was fraudulent. ER:3-6. After a few days, it would bounce. ER:5-6. The victim would lose the amount he or she sent through MoneyGram or Western Union, as there was no legitimate check to cover the cost. ER:5-7.⁴

Mr. Cyril was also perpetrating a lottery scheme, with different victims. ER:110. As alleged by the government, in the course of the lottery scheme, Mr. Cyril and his co-schemers would contact a victim and falsely claim he or she had won the lottery or a sweepstakes. ER:3. To collect their winnings, however, they needed to prepay taxes and other fees. When the victim wired the prepayment money, Mr. Cyril and others would take those funds. As discussed below, the dispute in this case centered on whether Mr. Igboanugo was involved in this scheme – which he denied – such that he could be held accountable for its losses during sentencing. ER:24, 38.

⁴ The government further alleged Mr. Igboanugo and Mr. Cyril worked with a co-schemer in the United States, Alvin Asieru. ER:61. According to the government, “Asieru was an intermediary in the scam chain. Other people, such as defendant, would defraud the victims. Asieru would then withdraw the victims’ money from the MoneyGram system, and would then re-enter the money in the system and send it on to the perpetrators of the fraud.” ER:61. The government separately prosecuted Mr. Asieru. ER:61.

After a joint U.S.-Canadian investigation, authorities in Canada searched Mr. Cyril's house, where both men lived, and extradited them to the United States. A nineteen-count indictment was waiting. It charged mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343. ER:1-11.

Mr. Cyril pleaded guilty with a plea agreement. He admitted to both the lottery scheme and the secret shopper fraud. MJN:A.⁵ Mr. Igboanugo, however, denied involvement in the lottery scheme. ER:24. Eventually, the government agreed that, if he pleaded guilty to three wire-fraud counts related *only* to the secret shopper fraud, it would dismiss the remaining charges. ER:26.

To that end, during the change of plea hearing, the government told the district court: "The defendant has maintained that the scope of his participation and the scope of the scheme in which he was involved was only the mystery shopper scope, not the lottery scope. And *the factual basis does not reference the lottery portion of the scheme at all.*" ER:24 (emphasis added).

⁵ Mr. Cyril's plea agreement, which was relied on by the district court in sentencing Mr. Igboanugo, is exhibit A to Mr. Igboanugo's unopposed motion for judicial notice ("MJN"), which was granted by the panel. App.A at 3.

B. The initial sentencing.

1. The initial sentencing submissions.

The PSR calculated the Sentencing Guidelines as follows:

Base Offense Level: [§ 2B1.1]	7
Loss Amount \$400,000 - \$1,000,000: [§ 2B1.1(b)(1)]	+14
More than 50 Victims: [§ 2B1.1(b)(2)(B)]	+4
Conduct Committed Outside the U.S.: [§ 2B1.1(b)(10)(B)]	+2
Vulnerable Victim: [§ 3A1.1(b)(1)]	+2
Acceptance of Responsibility: [§ 3E1.1]	-2
Adjusted Offense Level:	27
PSR:6-8.	

In Criminal History Category I, the range was 70-87 months. As to the loss enhancement, the PSR determined Mr. Igboanugo's "relevant conduct" resulted in a total loss of \$663,577.42, based on all the losses from both the secret shopper and lottery schemes. PSR:6.

The government concurred with the PSR's calculation. ER:59. Mr. Igboanugo disagreed. He argued the loss amount improperly held him responsible for two frauds, when he "admitted only to involvement in the secrete shopper scheme and not the lottery scheme." ER:115.

2. The initial sentencing hearing.

During the sentencing hearing, the district court confirmed that, "when [Mr.] Igboanugo entered the plea, at the time of the plea he indicated he was not admitting to a lottery scheme. He was admitting to the secret shopper scheme." ER:205-06. Nevertheless, as to the loss calculation, the district court sided with the government: "It's clear to the Court that the Government has met its burden in establishing a 14-level increase for . . . loss[.]." ER:219. The court then adopted the Guidelines calculation set forth in the PSR including a sentencing range of 70-87 months. ER:224. Ultimately, the court imposed a 60-month sentence. ER:225.

C. The first appeal.

Mr. Igboanugo appealed. As relevant, he argued the district court erred in its loss-amount calculation. This Court agreed, "[o]n the present record, the district court clearly erred in adopting the Presentence Report's ("PSR") loss calculation." *United States v. Igboanugo*, 655 Fed. App'x 578, 579 (9th Cir. 2016).

D. The resentencing.

1. The resentencing submissions.

On remand, Mr. Igboanugo renewed his argument that the government failed to establish any lottery-scheme losses were attributable to him. ER:242. The government, however, “urg[ed] the [district] [c]ourt to find [] that the losses from the secret shopper scheme (to which defendant pled) and the lottery scheme (which was relevant conduct in this case) are all attributable to defendant.” ER:246.

2. The resentencing hearing.

At the resentencing hearing, the district court identified the principal issue as whether the government could establish Mr. Igboanugo was responsible for all the “loss associated with the schemes, the lotto scheme and then the shopper scheme[.]” ER:291. Mr. Igboanugo maintained the appropriate standard was “clear and convincing evidence.” ER:326. The government, however, advocated for the preponderance standard. ER:289, 313, 340. The court agreed with the government: “[t]he question is whether there’s a preponderance of the evidence that supports that the defendant should be held responsible for both.” ER:328.

After testimony from a postal inspector, the district court determined – by a preponderance of the evidence – Mr. Igboanugo was responsible for the total losses

from both schemes. ER:342-45. It then sentenced Mr. Igboanugo to 60 months in custody (the same as his original sentence). ER:351.

E. The second appeal.

Mr. Igboanugo appealed again. He argued the district court utilized the wrong standard – preponderance instead of clear and convincing evidence – in holding him responsible for all the losses from both schemes. He explained, because the district court’s relevant-conduct loss determination more than doubled his sentencing range, the court was required to apply a heightened burden of proof. But it failed to do so.

The panel disagreed. It affirmed the sentence, holding: “Igboanugo argues that the district court should have used the clear and convincing evidence standard for its findings related to both schemes. But the preponderance of the evidence standard is appropriate for loss findings stemming from the offense of conviction.” App.A at 2. The court of appeals summarily denied the petition for rehearing en banc. App.B. This petition for a writ of certiorari follows.

REASON FOR GRANTING THE PETITION

Review is warranted to determine whether, and under what circumstances, due process requires a heightened standard of proof at sentencing.

In *McMillan v. Pennsylvania*, 477 U.S. 79, 87-91 (1986), the Court

recognized, “there may be an exception to the general rule that the preponderance standard satisfies due process when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction.” *United States v. Restrepo*, 946 F.2d 654, 659 (9th Cir. 1991) (en banc) (citation omitted). This Court, however, has not clarified the issue. As a result, there is “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 clear and convincing evidence.” *United States v. Watts*, 519 U.S. 148, 156 (1997); *see also United States v. Long*, 328 F.3d 665, 671 (D.C. Cir. 2003) (collecting cases and discussing the Circuit split).

A. There is substantial intra-Circuit conflict as to when due process requires a heightened standard of proof at sentencing.

The Ninth Circuit in particular has suffered from the uncertainty. For the past 20 years, panels of that court have inconsistently applied – or not applied – a heightened clear-and-convincing standard to a variety of sentencing factors.

For example, the panels required a heightened, clear-and-convincing standard in *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) (7-level enhancement); *United States v. Munoz*, 233 F.3d 1117, 1127 (9th Cir. 2000) (9-level enhancement); *United States v. Mezas de Jesus*, 217 F.3d 638, 642-43 (9th Cir. 2000) (9-level

enhancement); and *United States v. Romero-Rendon*, 220 F.3d 1159, 1161 (9th Cir. 2000) (7-level enhancement).

On the other hand, the panels held a mere preponderance standard sufficed in *United States v. Treadwell*, 593 F.3d 990, 1001-02 (9th Cir. 2010) (22-level enhancement); *United States v. Sanchez*, 967 F.2d 1383, 1384, 1386-87 (9th Cir. 1992) (14-level enhancement), and *United States v. Harrison-Philpot*, 978 F.2d 1520, 1523-24 (9th Cir. 1992) (12-level enhancement).

There are myriad other examples. And in at least one case, the panel concluded both the preponderance *and* clear-and-convincing standard applied to different parts of the sentencing calculation. In *United States v. Hymas*, 780 F.3d 1285, 1290-92 (9th Cir. 2015), the panel concluded a preponderance of the evidence standard was sufficient to support a 10-level enhancement based on the count of conviction. But an 8-level enhancement triggered by conduct not part of the conviction necessitated “a heightened clear and convincing standard of proof.” *Id.* at 1291.

Although the court of appeals has repeatedly complained about the intra-Circuit inconsistency, *see Romero-Rendon*, 220 F.3d at 1161; *United States v. Berger*, 587 F.3d 1038, 1048 (9th Cir. 2009), it has not acted to clarify the matter. Nor has the effort to formulate a multi-factor test helped. In *United States v.*

Valensia, 222 F.3d 1173 (9th Cir. 2000), the panel identified six factors to guide the standard-of-proof inquiry:

1. whether the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment;
2. whether the enhanced sentence negates the presumption of innocence or the prosecution's burden of proof for the crime alleged in the indictment;
3. whether the facts offered in support of the enhancement create new offenses requiring separate punishment;
4. whether the increase in sentence is based on the extent of a conspiracy;
5. whether an increase in the number of offense levels is less than or equal to four; and
6. whether the length of the enhanced sentence more than doubles the length of the sentence authorized by the initial sentencing guideline range in a case where the defendant would otherwise have received a relatively short sentence.

See id. at 1182.

Although the opinion in *Valensia* was vacated by this Court, *see United States v. Valensia*, 532 U.S. 901 (2001), the court of appeals continues to utilize these factors. *See, e.g., Hymas*, 780 F.3d at 1290. To no avail.

Many of the factors are often inapplicable to the case. *See, e.g., United States v. Jordan*, 256 F.3d 922, 929 (9th Cir. 2001) ("Considering the six *Valensia* factors, we conclude that factors one, two, three, and four do not apply to this

matter.”). In *Valensia* itself, “the first four factors [did not] apply.” See 222 F.3d at 1182. In fact, it is hard to envision a case where the first three would ever be satisfied. Moreover, the factors are susceptible to cherry picking, such that a panel can focus on those supporting its decision, while largely ignoring those that cut the other way: “the fifth and sixth *Valensia* factors support the use of the heightened standard for the other loans, even though the first four factors may not require that result.” *Hymas*, 780 F.3d at 1291.

Accordingly, given the court of appeals’ inconsistent application of the heightened standard at sentencing, further review is warranted. And this case is a worthy vehicle.

B. This case is the right vehicle.

The standard-of-proof issue was thoroughly litigated below. In the government’s words: “There is really only one critical question that matters to the resolution of this appeal, and that is, was the district court required to use a different standard than it did when it found defendant was responsible for the lottery-scam losses as relevant conduct?”⁶

⁶ See oral argument video at 11:54, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012249

The standard of proof was particularly important because the district court's relevant-conduct loss determination resulted in a massive Guidelines increase. Its finding by a preponderance of the evidence that the government established Mr. Igboanugo's "relevant conduct" resulted in total losses of \$638,020 (from both schemes) raised the final offense level from 14 to 26, and the sentencing range from 15-21 months to 63-78 months. ER:342-45.⁷ But the government's evidence tying Mr. Igboanugo to much of the loss was tenuous.

Thus, it would have – or at least should have – failed under the heightened standard. In other words, applying a heightened clear-and-convincing standard, the relevant-conduct losses would have been far less, with a concomitant reduction in the Guidelines range. As such, this case is an appropriate vehicle for the Court to consider and clarify if, when, and how to apply a heightened standard for sentencing enhancements.

⁷ The calculation is as follows: Base offense level of 7, which would be increased by 2-levels for the admitted loss of \$6,045. Additionally, there was a 4-level increase for number of victims, a 2-level increase for vulnerable victims, a 2-level increase for conduct taking place outside of the United States, and a 3-level decrease for acceptance of responsibility. PSR:7; ER:345. This equals – without the additional losses – an adjusted offense level of 14. In Criminal History Category I, the range is 15-21 months.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: January 19, 2018

s/ Devin Burstein
DEVIN BURSTEIN
Warren & Burstein
501 West Broadway, Suite 240
San Diego, CA 92101
(619) 234-4433
Attorney for Petitioner