No. 21-1418

In the Supreme Court of the United States

MEDARDO QUEG SANTOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury that it could find petitioner guilty of unauthorized distribution of controlled substances, in violation of 21 U.S.C. 841(a), if it found that petitioner knew he was distributing controlled substances not for a legitimate medical purpose and not in the usual course of professional practice.

2. Whether the district court plainly erred in admitting the testimony of an expert witness that petitioner's prescribing practices failed to comply with normal standards of medical practice.

3. Whether the district court erred in considering conduct that it found to be established by a preponderance of the evidence in determining petitioner's advisory Sentencing Guidelines range.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is not published in the Federal Reporter but is available at 2021 WL 6071511. The order of the district court (Pet. App. 28a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2021. On March 15, 2022, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including April 20, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiring to unlawfully distribute oxycodone, hydromorphone, morphine, methadone, hydrocodone, and alprazolam, in violation of 21 U.S.C. 841(b)(1)(C), (b)(2), and 846; and three counts of unlawfully distributing and dispensing combinations of oxycodone, morphine, and alprazolam, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1), (b)(1)(C), and (b)(2). Judgment 1; see Pet. App. 2a, 33a. The court sentenced petitioner to 72 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-27a.

1. Petitioner was a licensed physician who served as medical director at a pain-management clinic in Tampa, Florida, that operated as a "pill mill" to "prescribe controlled substances regardless of whether its patients ha[d] a medical need for them." Pet. App. 1a-2a.

When petitioner interviewed for the medical director position in 2014, the clinic's owner "made it clear that [clinic] patients expected to receive controlled substances during their visits" and informed petitioner "about key aspects of the business model: very short, timed patient appointments, high patient volume (30–40 patients per day), and cash only—no insurance payments." Pet. App. 3a; see *id.* at 2a. "[C]haracteristics of the clinic" likewise "suggested that it was not a legitimate medical operation." *Id.* at 3a. For example, "the clinic had barely any medical equipment—only an exam table for the patients to sit on—or supplies." *Ibid.* Clinic staff who "had no medical or administrative training" handled patient intake and "wrote prescriptions for controlled substances for the doctor to sign after each

patient's brief visit." *Ibid.* And the staff members' "other duties included collecting cash payments from patients and knocking on [petitioner's] door to indicate that the ten-minute appointment should end." *Ibid.*

The clinic's "patients exhibited recognizable signs of drug-seeking behavior and drug addiction." Pet. App. 3a. Many patients "ha[d] bloodshot eyes, slurr[ed] their words, look[ed] sleepy, and stumbl[ed] when they walked." *Id.* at 3a-4a. "Some of them had visible track marks, indicating intravenous drug abuse," and "[o]thers looked like they were going through opiate withdrawal—sweating, shaking, vomiting, and experiencing hot and cold flashes." *Id.* at 4a. Patients "'nodd[ed] out' in the waiting room and 'sho[t] up'" in the parking lot, leaving behind "baggies, blunt wrappers, and syringes." *Ibid.* (citation omitted). "[A]s many as one in five patients tested positive for illegal drugs during their drug tests," which the clinic would "administer[] * * * to pass state inspections," unless the patient "bribed [clinic] staff to skip" the test and "falsif[y]" the results. *Ibid.* But "patients always left" the clinic "with new prescriptions for controlled substances." *Ibid.*

Petitioner's behavior at the clinic "failed to comport with usual professional practice." Pet. App. 4a. He "saw [patients] in brief appointments, timed by [clinic] staff," during which he often gave only "'cursory physical examinations.'" *Id.* at 5a, 17a (citation omitted). He prescribed controlled substances even when "his patient's medical history or drug test was missing" and even after "a patient told him she shared her pills with friends or family." *Id.* at 5a. And he "prescribed drugs in * * * dangerous combinations." *Ibid.* His conduct

also included prescribing controlled substances to "people who looked like drug users." *Ibid.* And petitioner "went on vacations but left prewritten, postdated prescriptions for his patients" to obtain in his absence. *Ibid.*

On three occasions petitioner prescribed controlled substances to an undercover Drug Enforcement Agency (DEA) agent, Kathy Chin, who posed as a patient, and a confidential informant, Robert Vasilas, who was a returning patient posing as Chin's boyfriend. Pet. App. 5a-6a. At the first visit, petitioner saw the two together; Vasilas stated that Chin had "'robb[ed]' him of his pills when she ran out of hers." *Id.* at 5a (citation omitted). "Instead of investigating th[at] red flag, [petitioner] gave them prescriptions for greater quantities of oxycodone." *Ibid.* He also wrote Vasilas a Xanax (alprazolam) prescription without obtaining his relevant medical history, discussing tools to manage his putative condition, or suggesting alternative treatments. *Id.* at 5a-6a. At the second visit, which only Chin attended, petitioner wrote prescriptions for Vasilas, gave them to Chin, and made her "pay for a visit for Vasilas" although he was not actually present. *Id.* at 6a. Petitioner also "fill[ed] out Vasilas's file as though he had examined him." *Ibid.* At the third visit, Vasilas stated that he had run out of his pills and had obtained medications from friends and family. *Ibid.* Petitioner "responded by giving Vasilas extra prescriptions" and charging him for them. *Ibid.*

2. In 2017, a federal grand jury returned a superseding indictment charging petitioner with one count of conspiring to unlawfully distribute oxycodone, hydromorphone, morphine, methadone, hydrocodone, and alprazolam, all controlled substances, in violation of 21

U.S.C. 841(b)(1)(C), (b)(2), and 846; and five counts of unlawfully distributing and dispensing various combinations of those controlled substances, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1), (b)(1)(C), and (b)(2). D. Ct. Doc. 38, at 2-6 (Oct. 3, 2017). The grand jury also charged the clinic's owner, a clinic executive, and another clinic physician with related offenses. *Id.* at 1-2. Petitioner and the other physician proceeded to trial.

a. At trial, the clinic's owner, patients and employees of the clinic, and government agents testified regarding petitioner's prescribing conduct and clinical practices. Pet. App. 6a; see pp. 2-4, *supra*. Petitioner himself admitted "to treating patients who presented with red flags, like obtaining medications from illegitimate sources, obtaining medications earlier than the medically appropriate 30-day period, or traveling long distances." Pet. App. 36a-37a (citations omitted). And the government's expert witness, who was a licensed physician and pain-management specialist, provided "background testimony" on appropriate prescribing practices based on standards outlined in a "DEA manual, state and federal regulations, and his own pain management practice," *id.* at 23a; compared petitioner's prescribing practices to legitimate ones, *id.* at 23a-24a; and testified that "'most of' the prescriptions that [petitioner] wrote for controlled substances 'were provided for no legitimate medical purpose, and * * * not issued in the course of [his] professional practice,'" *id.* at 7a (brackets and citation omitted).

At the close of trial, the district court instructed the jury that, in order to return a guilty verdict on the counts for unlawfully dispensing a controlled substance, it was required to find that (1) petitioner "distributed, dispensed, and caused to be distributed and dispensed,

the controlled substance(s) as charged," and (2) "at the time of the distribution and dispensing, [petitioner] knew that he was distributing and dispensing a controlled substance not for a legitimate medical purpose and not in the usual course of professional practice." D. Ct. Doc. 337, at 20 (May 23, 2019). The court further instructed the jury that

> [w]hether [petitioner] acted outside the usual course of professional practice is to be judged objectively by reference to standards of medical practice generally recognized and accepted in the United States, including the State of Florida. However, whether [petitioner] acted without a legitimate medical purpose depends on [his] subjective belief whether he was distributing the controlled substance for a legitimate medical purpose. Therefore, in order for the Government to establish that [petitioner] was acting without a legitimate medical purpose, the Government must prove beyond a reasonable doubt that [he] did not subjectively believe that he was acting with a good faith belief that he was distributing the controlled substance for a legitimate medical purpose.

Id. at 20-21.

The jury found petitioner guilty on the conspiracy charge and three distribution charges, acquitting him on the other two distribution charges. Pet. App. 7a. The district court denied petitioner's post-verdict motion for acquittal or for a new trial. *Id.* at 28a-39a.

b. Before sentencing, the Probation Office determined that, pursuant to Sentencing Guidelines § 2D1.1, petitioner's base offense level was 38, based on the total drug quantity involved in 86 of the clinic's patient files. Presentence Investigation Report ¶¶ 40, 63, 72-73. The

government subsequently determined that the relevant drug quantity should be derived from a subset of those patient files, resulting in a base offense level of 32. D. Ct. Doc. 425, at 9-10 (Mar. 5, 2020). Petitioner agreed that, "by a preponderance of the evidence * * * the drug weight equates to a base offense level of 32," *id.* at 10 n.4, but argued that the appropriate standard of proof should be clear and convincing evidence, which would result in a base offense level of six, D. Ct. Doc. 430, at 8-11 (Mar. 5, 2020).

At sentencing, the district court found the government's recommended drug quantity by a preponderance of the evidence, calculated petitioner's base offense level at 32, and set his advisory Guidelines range at 151 to 188 months. 9/16/20 Tr. 33-34. The court imposed a below-Guidelines sentence of 72 months of imprisonment, to be followed by three years of supervised release. *Id.* at 70.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-27a.

The court of appeals found, *inter alia*, "sufficient evidence to support the jury's finding that [petitioner] knowingly joined an agreement to unlawfully dispense controlled substances." Pet. App. 16a. And it rejected petitioner's claim, raised for the first time on appeal, that the district court erred in allowing the government's expert to testify that petitioner's prescriptions lacked a legitimate medical purpose and were not issued in the usual course of professional practice. *Id.* at 21a-25a.

The court of appeals observed that "[t]o convict a doctor for violating 21 U.S.C. § 841(a), the government must prove that she issued prescriptions with no legitimate medical purpose or outside of the usual course of

professional practice." Pet. App. 21a. The court further observed that "[t]he government often uses the testimony of a medical expert witness to satisfy its burden," as it did at petitioner's trial. *Id.* at 21a-22a. And the court emphasized that although an "expert witness can give his opinion about an ultimate issue," he "'must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense,'" "giv[e] legal opinions," or "tell the jury what result to reach." *Id.* at 22a (quoting Fed. R. Evid. 704(b)).

After reviewing the trial record, the court of appeals found that because the government's expert "testified about [petitioner's] conduct and his professional opinion of that conduct" and "did not speculate about what was going on in [petitioner's] mind," he did not violate Federal Rule of Evidence 704(b). Pet. App. 23a. In addition, citing circuit precedent, the court found no plain error in the district court's admission of expert "testimony [that] reached the ultimate issue of whether [petitioner] prescribed drugs for no legitimate medical purpose and outside the usual course of professional practice." *Id.* at 23a, 25a (citing *United States* v. *Azmat*, 805 F.3d 1018, 1036 (11th Cir. 2015), cert. denied, 578 U.S. 979 (2016)).

The court of appeals also rejected petitioner's contention that the district court should have calculated the total drug quantity using a clear-and-convincing-evidence standard. Pet. App. 26a-27a. The court of appeals noted that it had "consistently held that district courts are required to make factual findings for sentencing purposes by a preponderance of the evidence." *Id.* at 27a (citing *United States* v. *Aguilar-Ibarra*, 740 F.3d 587, 592 (11th Cir. 2014) (per curiam)).

ARGUMENT

Petitioner suggests (Pet. 16, 21-22) that the Court could grant the petition for a writ of certiorari, vacate the decision below, and remand the case for further consideration in light of *Ruan* v. *United States*, 142 S. Ct. 2370 (2022). But the jury instructions in petitioner's case comported with the Court's holding in *Ruan* because they required the jury to find that petitioner subjectively believed that he was distributing controlled substances not for a legitimate medical purpose before finding him guilty of unlawful drug distribution. Petitioner also renews his contentions (Pet. 17-27) that the district court erred both in its admission of the government expert's testimony and in its application of a preponderance-of-the-evidence standard when finding facts to determine the applicable Guidelines range. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or implicate a circuit conflict that warrants this Court's intervention. The petition for a writ of certiorari should be denied.

1. Petitioner briefly suggests (Pet. 16) that the result in *Ruan* (which was not decided at the time that the petition was filed) may cast doubt on his jury instructions. It does not.

The Controlled Substances Act (CSA or Act), 21 U.S.C. 801 *et seq.*, makes it a federal crime "for any person knowingly or intentionally * * * to manufacture, distribute, or dispense * * * a controlled substance," "[e]xcept as authorized" by the Act. 21 U.S.C. 841(a)(1). A prescription is "authorized" by the Act when a licensed practitioner issues it "for a legitimate medical purpose * * * acting in the usual course of his professional practice." 21 C.F.R. 1306.04(a). In *Ruan*, this

Court held that the CSA's "'knowingly or intentionally' *mens rea* applies to authorization." 142 S. Ct. at 2375. Accordingly, "[a]fter a defendant produces evidence that he or she was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so." *Ibid.*

The jury instructions in this case were fully consistent with the Court's decision in *Ruan*. They required the jury to find that, "at the time of the distribution and dispensing, [petitioner] *knew* that he was distributing and dispensing a controlled substance not for a legitimate medical purpose and not in the usual course of professional practice." D. Ct. Doc. 337, at 20 (emphasis added). And in accord with *Ruan*'s recognition that "the regulation defining the scope of a doctor's prescribing authority does so by reference to objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice,'" 142 S. Ct. at 2382 (quoting 21 C.F.R. 1306.04(a)), the district court explained that the phrase "usual course of professional practice" itself "is to be judged objectively by reference to standards of medical practice generally recognized and accepted in the United States, including the State of Florida," D. Ct. Doc. 337, at 20.

The district court further instructed the jury that whether petitioner "acted without a legitimate medical purpose depends on [petitioner's] subjective belief whether he was distributing the controlled substance for a legitimate medical purpose." D. Ct. Doc. 337, at 20-21. "Therefore," the court continued, "in order for the Government to establish that [petitioner] was acting without a legitimate medical purpose, the Government

must prove beyond a reasonable doubt that [he] did not subjectively believe that he was acting with a good faith belief that he was distributing the controlled substance for a legitimate medical purpose." *Id.* at 21.

Because the instructions here, *inter alia*, directed the jury to determine whether petitioner "subjectively believe[d]" that he had prescribed controlled substances for a legitimate medical purpose, D. Ct. Doc. 337, at 21, the jury necessarily found that he "knowingly or intentionally acted in an unauthorized manner," when it convicted him of the Section 841(a) offenses, *Ruan*, 142 S. Ct. at 2376. And because those instructions are consistent with the Court's decision in *Ruan*, they provide no basis for the Court to grant the petition, vacate the judgment below, and remand for further proceedings in light of *Ruan*.

2. Petitioner principally contends (Pet. 16-23) that the government's expert improperly commented on petitioner's state of mind and provided legal opinions during his testimony. Because petitioner did raise those objections at trial, the court of appeals reviewed those arguments for plain error, Pet. App. 22a-23a, 25a, which requires petitioner to show "an error or defect" that was "clear or obvious," that "affected [petitioner's] substantial rights," and that "'seriously affects the fairness, integrity or public reputation of judicial proceedings,'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (brackets and citation omitted). The court's factbound determination that petitioner failed to satisfy those prerequisites is correct, and its unpublished decision does not conflict with any authority from this Court or another court of appeals. Petitioner's challenges to the particular expert testimony in his case accordingly do not warrant this Court's review. See Sup. Ct. R. 10 ("A

petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

a. The admissibility of expert testimony is governed by Rule 702, which provides that a qualified expert witness may testify if "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue" and if (1) "the testimony is based on sufficient facts or data"; (2) "the testimony is the product of reliable principles and methods"; and (3) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. Although an expert witness in a criminal case "must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged," an expert opinion "is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704. And a trial court has "broad latitude" in determining whether to admit or exclude expert testimony based on "the particular circumstances of the particular case at issue." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 142, 150 (1999).

The court of appeals correctly applied those principles in this case. At trial, the government's expert provided "background testimony" regarding the use of controlled substances for legitimate medical purposes in the usual course of professional practice based on standards outlined in a "DEA manual, state and federal regulations, and his own pain management practice." Pet. App. 23a; see *id.* at 23a-24a. And based on evidence

about petitioner's conduct with the undercover DEA agent and others, the expert "gave his opinion" that petitioner "prescribed [the patients] controlled substances for no legitimate medical purpose and outside the scope of professional practice." *Id.* at 24a; see, *e.g.*, *id.* at 7a.

The court of appeals correctly found that the district court did not plainly err in admitting that testimony. The expert's opinion that petitioner prescribed controlled substances for no legitimate medical purpose outside the scope of professional practice "is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). And because the expert's "specialized knowledge * * * help[ed] the trier of fact to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702(a)—generally accepted practices for controlled-substance prescriptions—his testimony was admissible.

Petitioner errs in asserting (Pet. 20) that the expert's testimony "was riddled with inadmissible state-of-mind and legal opinions." As the court of appeals found after reviewing the record, the expert "testified about [petitioner's] conduct and his professional opinion of that conduct, but he did not speculate about what was going on in [petitioner's] mind," Pet. App. 23a, and petitioner identifies no instance of such state-of-mind testimony. Nor did the expert provide a "legal definition" of the phrase "'legitimate medical purpose,'" Pet. 20; instead, he testified about appropriate medical practices based on his specialized knowledge of federal and state controlled-substances regulations and guidance, as well as his professional experiences, Pet. App. 23a-25a. That was permissible because there is "no [federal] interpre-

tive rule seeking to define a practice as lacking any legitimate medical purpose." *United States* v. *Lovern*, 590 F.3d 1095, 1100 (10th Cir. 2009) (Gorsuch, J.). The government thus typically establishes the content of "usual course of professional practice the old-fashioned way: through witnesses and documentary proof at trial focused on the contemporary norms of the medical profession." *Ibid.* The government's expert here did just that, and "the jury * * * remained free to sort out all the competing proof" on "what constitutes usual medical practice." *Ibid.*

Petitioner also errs in asserting (Pet. 22) that the government's expert improperly treated the concepts of "legitimate medical purpose" and "usual course of professional practice" as "objective" standards. As this Court observed in *Ruan*, "the regulation defining the scope of a doctor's prescribing authority does so by reference to *objective criteria* such as 'legitimate medical purpose' and 'usual course' of 'professional practice.'" 142 S. Ct. at 2382 (quoting 21 C.F.R. 1306.04(a)) (emphasis added). And the objective bounds of those standards are relevant in Section 841(a) prosecutions; as this Court explained in *Ruan*, "'the more unreasonable' a defendant's 'asserted beliefs or misunderstandings are,' especially as measured against objective criteria, 'the more likely the jury . . . will find that the Government has carried its burden of proving knowledge.'" *Ibid.* (quoting *Cheek* v. *United States*, 498 U.S. 192, 203-204 (1991)).

b. Even assuming that the district court erred in admitting portions of the expert's testimony, petitioner cannot prevail on the third element of the plain-error test, which requires him to show that the alleged error prejudiced his substantial rights. See *Puckett*, 556 U.S.

at 135. He cannot make that showing because he cannot establish "a 'reasonable probability' that he would have been acquitted" had the court excluded the government's expert. *Greer* v. *United States*, 141 S. Ct. 2090, 2097 (2021) (citation omitted).

At trial, the clinic's owner, patients and employees of the clinic, government agents, and petitioner himself testified regarding the problematic nature of petitioner's prescribing conduct and clinical practices—including various characteristics that indicated that the clinic "was not a legitimate medical operation." Pet. App. 3a; see pp. 2-4, *supra*. And petitioner's own expert, a pain-management doctor, provided evidence that matched the government expert's. For example, he testified that it was a red flag if a patient traveled a long distance to obtain controlled substances, obtained medication from friends or family members, or presented with inconsistent drug test results—all of which are fact patterns petitioner saw but ignored. 5/21/19 Tr. 84, 87-90.

Petitioner offers no reason to conclude that—despite that evidence—his prescriptions reflected a legitimate medical purpose in the usual course of professional practice. This Court has already recognized that similar conduct—such as "g[iving] inadequate physical examinations," "t[aking] no precautions against * * * misuse and diversion," and charging a "fee according to the number of tablets desired"—"exceed[s] the bounds of 'professional practice.'" *United States* v. *Moore*, 423 U.S. 122, 142-143 (1975). Thus, even assuming *arguendo* that admission of all or part of the expert testimony offered by the government was erroneous, petitioner cannot show a reasonable probability that he

would have been acquitted, and accordingly can show no plain error.

3. Finally, petitioner contends (Pet. 23, 25) that the district court "should have calculated [the] drug weight under a clear-and-convincing evidence standard" and that this Court's review is warranted to resolve a circuit conflict about the proper factfinding standard for sentencing facts that "dramatically increase a sentence." The courts below correctly rejected that argument. This Court has repeatedly and recently declined to review claims similar to the one petitioner raises. See, *e.g.*, *McCray* v. *United States*, 142 S. Ct. 1373 (2022) (No. 21-6077); *Parlor* v. *United States*, 142 S. Ct. 623 (2021) (No. 21-6148); *Idelfonso* v. *United States*, 139 S. Ct. 178 (2018) (No. 17-9470); *Siegelman* v. *United States*, 577 U.S. 1092 (2016) (No. 15-353); *O'Bryant* v. *United States*, 577 U.S. 987 (2015) (No. 15-5171); *Chandia* v. *United States*, 568 U.S. 1011 (2012) (No. 12-5093); *Butler* v. *United States*, 565 U.S. 1063 (2011) (No. 11-5952); *Lee* v. *United States*, 565 U.S. 829 (2011) (No. 10-9512); *Culberson* v. *United States*, 562 U.S. 1289 (2011) (No. 10-7097); *Gibson* v. *United States*, 559 U.S. 906 (2010) (No. 09-6907). It should follow the same course here.

a. As this Court observed in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), it has "held that [a sentencing court's] application of the preponderance standard at sentencing" to find facts that inform the court's selection of a sentence within the prescribed statutory range "generally satisfies due process." *Id.* at 156; see *Alleyne* v. *United States*, 570 U.S. 99, 116 (2013) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); *United States* v. *Booker*, 543 U.S. 220, 233 (2005)

("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); see also 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

Consistent with *Watts*, the courts of appeals have uniformly recognized that a sentencing judge may generally find facts relevant to the determination of the sentencing range under the advisory federal Guidelines by a preponderance of the evidence, so long as the judge imposes a sentence within the statutory range. See, *e.g.*, *United States* v. *Culver*, 598 F.3d 740, 752-753 (11th Cir.), cert. denied, 562 U.S. 896 (2010); *United States* v. *Grubbs*, 585 F.3d 793, 803 (4th Cir. 2009), cert. denied, 559 U.S. 1022 (2010); *United States* v. *Villareal-Amarillas*, 562 F.3d 892, 897-898 (8th Cir. 2009); *United States* v. *Sanchez-Badillo*, 540 F.3d 24, 34 (1st Cir. 2008), cert. denied, 555 U.S. 1121 (2009); *United States* v. *Sexton*, 512 F.3d 326, 329-330 (6th Cir.), cert. denied, 555 U.S. 928 (2008); *United States* v. *Bras*, 483 F.3d 103, 107-108 (D.C. Cir. 2007); *United States* v. *Grier*, 475 F.3d 556, 568 (3d Cir.) (en banc), cert. denied, 552 U.S. 848 (2007); *United States* v. *Kilby*, 443 F.3d 1135, 1140-1141 (9th Cir. 2006); *United States* v. *Garcia*, 439 F.3d 363, 369 (7th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Mares*, 402 F.3d 511, 519 (5th Cir.), cert. denied, 546 U.S. 828 (2005).

b. The district court's determination of petitioner's sentence, based in part on its finding the applicable drug quantity by a preponderance of the evidence, is consistent with that uniform authority.

As petitioner notes (Pet. 25), before this Court's decision in *United States* v. *Booker*, *supra*, "a divergence of opinion [existed] 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." *Watts*, 519 U.S. at 156. But after the Court held that the Guidelines are advisory in *Booker*, 543 U.S. at 245, the courts of appeals have clarified that a sentencing judge may find facts that increase a defendant's sentence by a preponderance of the evidence, provided that the sentence remains within the statutory range.

For example, the Third Circuit's pre-*Booker* decision in *United States* v. *Kikumura*, 918 F.2d 1084 (1990), had suggested—without deciding—that due process might require using a clear-and-convincing standard of proof to find sentencing factors in some exceptional cases. See *id.* at 1102. The Third Circuit has since expressly repudiated that suggestion, recognizing that *Booker* obviated any prior doubts about sentencing judges' ability to "find facts by a preponderance of the evidence, provided that the sentence actually imposed is within the statutory range, and is reasonable." *United States* v. *Fisher*, 502 F.3d 293, 305 (2007), cert. denied, 552 U.S. 1274 (2008).

Other courts of appeals likewise have recognized that the "debate has * * * been rendered academic" by *Booker*, for "[w]ith the guidelines no longer binding the sentencing judge, there is no need for courts of appeals to add epicycles to an already complex set of (merely)

advisory guidelines by multiplying standards of proof." *United States* v. *Reuter*, 463 F.3d 792, 793 (7th Cir. 2006), cert. denied, 549 U.S. 1186 (2007); see, *e.g.*, *Grubbs*, 585 F.3d at 801 ("Whatever theoretical validity may have attached to [an] exception to a preponderance of the evidence sentencing standard, the Supreme Court's decision in *Booker* and subsequent cases applying *Booker* have nullified its viability."); *Villareal-Amarillas*, 562 F.3d at 897 ("[D]ue process never requires applying the clear and convincing evidence standard to judicial fact-finding at criminal sentencing."); *United States* v. *Brika*, 487 F.3d 450, 462 (6th Cir.) ("[W]e reaffirm our earlier holding that due process does not require sentencing courts to employ a standard higher than preponderance-of-the-evidence, even in cases dealing with large enhancements."), cert. denied, 552 U.S. 938 (2007); *Vaughn*, 430 F.3d at 525 (Sotomayor, J.) ("We reiterate that, after *Booker,* district courts' authority to determine sentencing factors by a preponderance of the evidence endures and does not violate the Due Process Clause of the Fifth Amendment.").

The only exception is the Ninth Circuit, whose decision in *United States* v. *Staten*, 466 F.3d 708 (2006), adhered to its pre-*Booker* rule that "when a sentencing factor has an extremely disproportionate effect on the sentence relative to the conviction, the government must prove such a factor by clear and convincing evidence." *Id.* at 717 (citation omitted); see *United States* v. *Parlor*, 2 F.4th 807, 816-817 (9th Cir.), cert. denied, 142 S. Ct. 623 (2021). *Staten*'s endorsement of the clear-and-convincing standard of proof, however, "trace[d] back to," and relied heavily on, the Third Circuit's decision in *Kikumura*. *Staten*, 466 F.3d at 719; see *id.* at

719-720. The Third Circuit has since overridden that decision, explaining that any suggestion in *Kikumura* that due process requires a heightened standard of proof "was predicated on the then-mandatory nature of the Guidelines" and "does not survive *Booker*." *Fisher*, 502 F.3d at 305-306. The full Ninth Circuit might well decide in the future to likewise realign with other circuits. See *United States* v. *Singh*, 995 F.3d 1069, 1081 (9th Cir. 2021) (declining invitation to revisit *Staten* to decide whether "the preponderance of the evidence standard should apply * * * once the Guidelines became permissive" because "the record support[ed] the application of the enhancement under either standard of proof"), cert. denied, 142 S. Ct. 1422 (2022); see also *United States* v. *Buchan*, No. 19-50272, 2021 WL 4988020, at *1 (9th Cir. Oct. 27, 2021) (R. Nelson, J., concurring) ("[T]he clear and convincing evidence rule should be reversed en banc because it is incorrect, unmoored from its original basis in the mandatory nature of the Guidelines, and contrary to the law of every other circuit.").

The sentencing question presented by the petition accordingly continues not to warrant this Court's review, and the Court should deny the petition as it has repeatedly done with similar petitions. See p. 16, *supra*. Indeed, this case—which involves a substantially below-Guidelines sentence, see 9/16/20 Tr. 34, 70—would be an especially unsuitable vehicle for reviewing the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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