IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2018

No.

BRIAN THURMAN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, BRIAN THURMAN, through his attorney, hereby moves pursuant to Supreme Court Rule 39.1, for leave to proceed *in forma pauperis* before this Court. In support of his motion, the Petitioner states that he has been represented by appointed counsel acting *pro bono* in the appellate proceedings below and remains without sufficient funds to afford counsel or payment of costs.

WHEREFORE, Petitioner respectfully prays that an order be entered granting him leave to proceed *in forma pauperis*.

Dated August 1, 2018, at Chicago, Illinois

Andréa E. Gambino
Counsel of Record for Brian Thurman

LAW OFFICE OF ANDRĒA E. GAMBINO
53 West Jackson Blvd., Suite 1332
Chicago, IL 60604
(312) 322-0014

DECLARATION

I, Andréa E. Gambino, state that I am an attorney and that I was hired by Brian Thurman to represent him in the United States District Court for the Northern District of Illinois, Eastern Division. Mr. Thurman exhausted his ability to pay for representation, so I represented the petitioner in the United States Court of Appeals for the Seventh Circuit as appointed counsel.

The petitioner is in custody and does not have the financial ability to afford an attorney on this petition to the United States Supreme Court for a writ of certiorari.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate.

Executed on August 1, 2018, at Chicago, Illinois.

_____

Andréa E. Gambino

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2010

No.

BRIAN THURMAN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

Andréa E. Gambino
Law Office of Andréa E. Gambino
53 West Jackson Blvd., Suite 1332
Chicago, IL 60604
(312) 322-0014

Counsel of Record for BRIAN THURMAN

August 1, 2018

QUESTIONS PRESENTED FOR REVIEW

Whether the District Court violated Mr. Thurman's Fifth and Sixth Amendment rights under the United States Constitution when it increased his sentence based on acquitted conduct?

Whether this Court's decisions in *Apprendi v. New Jersey,* 528 U.S. 1018 (1999); *Blakely v. Washington,*542 U.S. 296 (2004); and *United States v. Booker*, 543 U.S. 220 (2005), require that it reconsider its decision in *United States v. Watts,* 519 U.S. 148 (1997), permitting the enhancement of a defendant's sentence based on conduct for which he has been acquitted?

Whether the warrantless and non-consensual search of Mr. Thurman's cellular telephone violated his Fourth Amendment right to be free from illegal searches and seizures?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND GUIDELINES

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2018

No.

BRIAN THURMAN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner, BRIAN THURMAN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, which was entered in the above-entitled case on May 2, 2018.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is a published opinion reported at *United States v. Thurman*, 889 F.3d 356 (7th Cir. 2018), and is included in the appendix attached hereto at page A-1.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to Title 28, United States Code, Section 1254(1). The judgment of the Court of Appeals was entered on May 2, 2018. The Court of Appeals' decision is included in the appendix attached hereto at page A-1. Petitioner did not seek rehearing.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law. . ."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."

Title 18, United States Code, Section 3553(a), provides: **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…."

(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 . . .

STATEMENT OF THE CASE

On June 24, 2014, defendant Brian Thurman originally was charged by indictment, R. 1, with knowingly and intentionally distributing 100 grams or more of a mixture and substance containing a detectable amount of heroin, in violation of Title 21, United States Code, Section 841(a)(1). On September 3, 2015, a superseding indictment was returned, containing the same charge, numbered count 2, and two additional charges: knowingly using and maintaining a residence, 1043 S. Massasoit, for the purpose of distributing a controlled substance, in violation of Title 21, United States Code, Section 856(a)(1), charged in count 1; and knowingly possessing a firearm in furtherance of a drug trafficking crime, in violation of Title 18, United States Code, Section 924(c)(1)(A), charged in count 3. R. 74.

Mr. Thurman proceeded to trial on July 11, 2016, R. 107, and the jury returned its verdict on July 14, 2016, finding Mr. Thurman guilty of count 2 and not guilty of counts 1 and 3. R. 112. The District Court imposed sentence on Mr. Thurman on March 2, 2017. R. 157. Final judgment was entered on March 16. 2017. R. 157.

Notice of appeal was timely filed on March 20, 2017. R. 161. The appeal was briefed and argued. The Court of Appeals issued its opinion, affirming the decisions of the District Court, on May 2, 2018. The opinion in *United States v. Thurman,*

889 F.3d 356 (7th Cir. 2018), is attached hereto at A-1. No petition for rehearing was filed.

STATEMENT OF FACTS

Brian Thurman was a high school teacher and dean of discipline at an alternative High School, he was working toward his Masters' Degree in special education, and he is the devoted father of an adolescent son. Prior to becoming a teacher, Mr. Thurman played football for Purdue University, then professionally in the Canadian football league, following which he worked for a series of communications companies before arriving at his vocation as a teacher. Sen. Hrg. 63-78; R. 153; PSI at 14 et seq.

Mr. Thurman did not have a criminal history. He chose to remain living in the house he grew up in on the west side of Chicago, in order to provide a positive example for other young people to emulate, and to maintain the house and neighborhood to which he was committed. By all accounts of those who know him best, Mr. Thurman was a leader and positive role model in his community. Sen. Hrg. 68-78. Brian Thurman is not, and was never, a drug dealer.

During the summer of 2014, a co-operating informant, Courtney Williams, caught red-handed in Minnesota with a quantity of heroin, hidden in a spare tire, pointed an accusatory finger at a person he knew as "B" who lived in the same neighborhood as his brother and other friends. In order to deflect attention from himself and his true suppliers, and to get himself out of from under the potential for

life in prison, Williams falsely accused and then set-up Mr. Thurman to look as if he were the informant's supplier of heroin.

Facts underlying the Motion to Suppress Evidence

Mr. Thurman averred, in an Affidavit filed with his motions to suppress evidence and statements, that he was presented with two consent to search forms – one for his phone and one for another property on Massasoit that he owned, and one advice of rights and waiver form, each of which he refused to sign. R. 45-2, 46-2. He also stated that he did not give consent to either of the searches and that he did not agree to waive his rights and talk to agents without the presence of an attorney. *Id.* The District Court set a date for a hearing on the Motions.

At the hearing Agent Darin Nemerow of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, who worked in St. Paul, Minnesota, testified that on August 6, 2013, he conducted a traffic stop on an individual, Courtney Williams, and seized approximately 500 grams of heroin from him. Supp. Hrg. 18. Agents conducted a video recorded interview of Williams, who was at the time a suspect and not a cooperator, Supp. Hrg. 31, at the Deluth Police Station. Supp. Hrg. 30. Williams decided to cooperate with law enforcement and told them that "B" was his source for heroin and that "B" lived in the Chicago area. Supp. Hrg. 19. Law enforcement "was ultimately able to identify B as Brian Thurman." *Id*. Agent Nemerow had no prior knowledge or information about Brian Thurman, and Mr.

Thurman was not the subject of any investigation prior to the agents' encounter with the cooperator on August 6, 2013. Supp. Hrg. 29.

According to Agent Labno of the Chicago office of the ATF, agents in Minnesota sought the Chicago office's help with its investigation, and the Chicago ATF office agreed to assist the ATF agents from Minnesota in identifying the source of the heroin that Courtney Williams had in his car at the time he was stopped by law enforcement in Minnesota, on August 6, 2013. Supp. Hrg. 67.

The next step in the investigation took place on August 20, 2013, when law enforcement sent Williams to Brian Thurman's house with $10,000 in pre-recorded buy funds, which the cooperator ostensibly left at Mr. Thurman's house, at 1043 N. Massasoit Avenue, in Chicago. *Id.* Law enforcement took no steps to determine whether the money was actually left with Mr. Thurman, and none of the pre-recorded funds were recovered when law enforcement conducted their first search of Mr. Thurman's house on the evening of September 23, 2013..

Based on the word of the Courtney Williams and the fact that he claimed to have left the pre-recorded buy money at Mr. Thurman's house in partial payment for the heroin he had in his car tire when he was stopped in Minnesota, law enforcement obtained an anticipatory search warrant for Mr. Thurman's residence. Supp. Hrg. 69. The search warrant was contingent on Williams providing heroin to law enforcement that he claimed he would purchase from Mr. Thurman. Supp. Hrg. Tr. 20.

Agent Nemerow testified that the cooperator provided agents with approximately 158 grams of heroin on the night of September 23, 2013, and that a search of Mr. Thurman's home followed. Agent Nemerow participated in the search but did not have contact with Mr. Thurman during the search. Supp. Hrg. 21. In fact, Agent Nemerow stated on cross-examination that he was with a group of individuals that were with the cooperating informant, Mr. Williams, at the time the execution of the search warrant began. Supp. Hrg. 38.

Agent Labno led the team that executed the search warrant. Armed agents forced entry into Mr. Thurman's house, found him in his basement, ordered him to the ground, placed him in handcuffs, and removed him from the residence. Supp. Hrg. 70-71. There were 11-12 agents in addition to police officers who ran into Mr. Thurman's home that night. Supp. Hrg. 92. All the agents and officers were armed either with pistols or long guns- semi-automatic rifles, and they all entered the home with their guns drawn. *Id.* All law enforcement had "lethal coverage", meaning everybody came in ready to fire their weapons. Supp. Hrg 95. They began with the basement and then went through the first and second floor apartments.

After detaining Mr. Thurman and cuffing him behind his back, Agent Labno brought him out to Agent Heiserman's car and placed him in the back seat. He did not read Mr. Thurman his rights but did tell him he was under arrest and did not have to say anything. Supp. Hrg. 72. The cooperator had provided incorrect information about the house that agents were searching. *Id.* Williams claimed that

the house he visited was a single-family house, but Mr Thurman's house is actually a two-flat building with a basement. Supp. Hrg. 91.

ATF Agent Tony Heiserman testified that he participated in the execution of the search warrant on September 23, 2013. Supp. Hr. 46. Agent Labno asked Heiserman to be present when Agent Labno talked to Mr. Thurman when they were outside of Mr. Thurman's house while other agents were searching the house. Supp. Hrg. 48. Mr. Thurman expressed concern about his then-girlfriend [she is now his wife], their son, and his tenants, and he also informed the agents that there were two firearms in the house. Supp. Hrg. 49. Agent Labno left Mr. Thurman in the custody of Agent Heiserman, handcuffed and in the back seat of Agent Heiserman's car. *Id.*

About 15 minutes later, Agent Labno returned to the car and presented Mr. Thurman with a consent to search form that Mr. Thurman refused to sign, indicating his refusal to consent to the search of his second property. Supp. Hrg. 52. The form itself was blank when Agent Labno brought it out to have Mr. Thurman sign it. Supp. Hrg. 59- 60. Agent Labno wrote on the form that Mr. Thurman "refused to sign but consented." Agent Labno asked Agent Heiserman to sign the form, as well, which he did. *Id.* In his Affidavit, in support of his Motions to Suppress Evidence and Statements, Mr. Thurman made it clear that he did not consent – either in writing or verbally – to the search of his second property. R. 45-2, 46-2.

During his testimony, Agent Heiserman did not recall more than he actually remembered. Most importantly, on cross-examination, Agent Heiserman did not recall how Mr. Thurman was presented with the form, but he did remember that Mr. Thurman refused to sign it. Supp. Hrg. 65. He did not remember how many people were involved in the execution of the warrant, whether there was dog used in the search, what time they arrived to begin the search, what type of car he arrived in, what Mr. Thurman was wearing, whether he was cuffed in front or behind his back, how long he was there, whether he in or outside the vehicle while Mr. Thurman was in the back seat, which rights Mr. Thurman was advised of, whether he had a rifle with him that night. Agent Heiserman answered "I don't recall" or "I don't remember" at least 27 times, and remembered virtually nothing about the events of September 23, 2013, but somehow he was able to remember that Mr. Thurman supposedly gave verbal consent to go into another property to search.

Agent Labno, the one who completed the form that was presented at the hearing, also testified that Mr. Thurman gave "verbal" consent, even though he refused to sign the form and that it was the agent – and *not* Mr. Thurman, who wrote "refused to sign but consented." Supp. Hrg. 77.

Agent Nemerow testified that he returned to AFT offices in Chicago, and later during the evening of September 23 and early morning hours of September 24, he was present when Agent Chris Labno, the case agent, interviewed Mr. Thurman.

According to Agent Nemerow, Task Force Officers Jason Eikam1 and Pat Munyon were also present at the beginning of the interview. Supp. Hrg. 22. Unlike the interview conducted with the cooperator, Courtney Williams, agents in Mr. Thurman's case decided *not* to record Mr. Thurman's interview.2

There were five people in the room with Mr. Thurman when the interview began - 4 agents and Mr. Thurman, who was handcuffed to a rail- or a chair -- in the room. The room had no windows, and the door remained closed unless people were entering or leaving the room. Supp. Hrg. 39. Although Agent Nemerow claimed to have participated in the interview of Mr. Thurman, he could not remember any specific questions he asked and claimed that really Agent Labno had the lead. Supp. Hrg. 39-40.

The interview began at approximately 1:00 a.m., on September 24, 2013. Supp. Hrg. 23. Agent Nemerow claimed that the Advice of Rights form that Agent Labno presented to Mr. Thurman was signed by Agent Nemerow, Chris Labno, Jason Eikam, and Pat Munyon, on September 24, 2013, at 0100 hours. Supp. Hrg. 23-4. The top portion of the form sets out the Miranda rights and at the bottom of

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1 Jason Eikam is part of the Lake Superior Drug and Violent Crime Task Force, in Duluth Minnesota, where he also works for the Deluth Police Department. TFO Pat Munyon is with the ATF in Chicago. Supp. Hrg. 22.

2 Both Mr. Williams' post –arrest interview and the debriefing interview held on September 23, 2013, were recorded, in contrast to the alleged interview with Mr. Thurman – during the very same time period – that was not recorded. Supp. Hrg. 137-138. Agent Eikam believed that ATF specifically had a policy against recording interviews at the time of Mr. Thurman's interview. Supp. Hrg. 143.

the from, where there is a signature line for the waiver of rights, "refused" was written on the line. Supp. Hrg. 24. Unlike the first Consent to Search form, this form was not marked, "refused but consented to speak"—only "refused." Agent Labno did not provide any reasonable explanation for this difference in treatment, but said, "I just wrote "refused" because we were conducting the interview and going through it." Supp. Hrg. 81.

Agent Nemerov testified that he had no experience with such forms and that typically he would read from his *Miranda* card while the interview was being recorded. Supp. Hrg. 32. The agent also testified that now – at the time of the hearing in 2015 – the ATF has a policy "where we have to record," but that was not the policy at the time of Mr. Thurman's interview. Nonetheless, it was a practice familiar to the AFT agents in Minnesota, as evidenced by the recording of Courtney Williams' interview. Agent Nemerow conceded that having a recording of a statement protects both the agents and the defendants by having irrefutable evidence of what transpired. Supp. Hrg. 35.

Agent Nemerow alleged that Mr. Thurman gave verbal consent to talk with the agents, but that he refused to sign the form. Supp. Hrg. 25. Contrary to Mr. Thurman's Affidavit, in which he stated that he refused to talk to the agents without an attorney, Agent Nemerow claimed that Mr. Thurman did not ask for an attorney and was very cooperative in answering agents' questions. Supp. Hrg. 26.

Although Agent Nemerow apparently recalled Mr. Thurman asking about an attorney toward the end of the interview. Supp. Hrg. 27.

No agent sought or obtained a warrant to search Mr. Thurman's cell phone. Supp. Hrg. 115. Agent Nemerow remembered seeing Mr. Thurman's cell phone but did not remember who was holding it – either Mr. Thurman or Agent Labno—and the other agent and Mr. Thurman were looking at the cell phone and reviewing numbers and names. *Id.* Agent Labno testified that he kept the phone and agreed that there was "never a point in time in which Mr. Thurman was able to keep his phone." Supp. Hrg. 113. Agent Nemerow did not sign a consent to search form for the cell phone, nor did he recall seeing anyone present such a form to Mr. Thurman. *Id.* and Supp. Hrg. 41. Agent Nemerow claimed that he may have left the interview room to go to the bathroom when the form was presented, Supp. Hrg. 42, but he also claimed that Agent Labno never asked him to sign a consent to search form for the phone, as he had for the interview, and that the two forms were not presented at the same time. Supp. Hrg. 42-43. Similarly, Agent Eikam never saw anyone present Mr. Thurman with a consent to search form for his cell phone. Supp. Hrg. 146. For his part, Agent Labno claimed that Agent Munyon signed the form, that was also marked "refused". Supp. Hrg. 85.

Agent Labno claimed that "several people got up and left, just to check on things, got to the bathroom, that type of thing." Supp. Hrg. 78. This was contrary to Agent Nemerow, who claimed that no one left to do other tasks. Labno also

seemed to contradict Nemerow as to who led the interview. Labno did not take full responsibility and claimed that he *and* Patrick Munyon led the interview, Supp. Hrg. 79 – a fact not mentioned by Agent Nemerow. Labno's assertion was also contradicted by Officer Munyon, who stated that it was Labno who led the interview – not he and Labno. Supp. Hrg. 127. Officer Munyon did not take notes during the interview and did not remember seeing anyone else take notes. Nor was the interview recorded. Supp. Hrg. 130.

According to Agent Nemerow, Mr. Thurman was willing to cooperate with the agents but was concerned about the safety of his family. Supp. Hrg. 27. Agent Nemerow recalls Mr. Thurman asking if he should have an attorney with him, and Agent Labno told him that was his choice, Agent Labno couldn't advise him about that. Supp. Hrg. 27.

Agent Nemerow alleged that Mr. Thurman was released – not because they had insufficient evidence to hold him at that time, but because he was going to cooperate with the agents. Supp. Hrg. 28. Subsequently, Agent Labno received a call from a lawyer who informed agents that Mr. Thurman would not speak with them again. Supp. Hrg. 29.

The District Court's Decision Denying the Motions to Suppress Statements and Evidence

After post-hearing briefing, R. 58 and 59, the District Court filed a Memorandum Opinion and Order, denying Mr. Thurman's Motion to Suppress

Evidence and Statements. R. 73. In the absence of testimony from Mr. Thurman, and in light of the testimony of four agents that Mr. Thurman refused to sign a waiver but spoke with them nonetheless in an effort to cooperate, the district court found that Mr. Thurman's conduct in speaking with the agents contradicted his refusal to sign the written waiver. The court also disagreed with counsel that the circumstances preceding and surrounding the interview rendered Mr. Thurman's statements involuntary. R. 73 at 10.

The District Court disregarded Mr. Thurman's refusal to consent to the search of his phone, as indicated by his refusal to sign the Consent to Search Form, finding instead that Mr. Thurman was cooperating with authorities during the search of his cell phone to gain a benefit. R. 73 at 13.

The Trial

On September 3, 2015, a superseding indictment was returned, containing the same charge, numbered count 2, and two additional charges: knowingly using and maintaining a residence, 1043 S. Massasoit, for the purpose of distributing a controlled substance, in violation of Title 21, United States Code, Section 856(a)(1), charged in count 1; and knowingly possessing a firearm in furtherance of a drug trafficking crime, in violation of Title 18, United States Code, Section 924(c)(1)(A), charged in count 3. R. 74.

Mr. Thurman proceeded to trial on July 11, 2016, R. 107. At trial, the government introduced into evidence contacts and messages that had been deleted

from Mr. Thurman's cell phone, but that had been reconstituted for use at trial by a police officer who was qualified as an expert in computer forensics. Trial Tr. 503-512.

The jury returned its verdict on July 14, 2016, finding Mr. Thurman guilty of count 2 and not guilty of counts 1 and 3. R. 112. The District Court imposed sentence on Mr. Thurman on March 2, 2017. R. 157. Final judgment was entered on March 16. 2017. R. 157.

The Sentencing Hearing

Mr. Thurman's sentencing hearing began on March 2, 2017, at 1:20 p.m. R. 155. The District Court imposed sentence on Mr. Thurman on March 14, 2017, and final judgment was entered on March 16, 2017. R. 157. At the sentencing hearing, there were four disputed issues, including whether Mr. Thurman should be held accountable for the firearm that was found in his basement as a weapon possessed in relation to a drug trafficking crime. Sen. Hrg., 24. The District Court ultimately found that despite the fact that the jury found Mr. Thurman "not guilty" of the 924(c) count for possession of firearms in furtherance of a drug trafficking crime, he should be held accountable for the firearms under the lesser standard of proof and with respect to the language of the sentencing guidelines, Sen. Hrg. 46, increasing the adjusted base offense level to 30.

Four character witnesses testified about Mr. Thurman's character and his importance to their lives. Sen. Hrg. 68-78. The Court also heard from Mr.

Thurman, himself. Sen. Hrg. 78-80. Taking into account the sentencing guidelines, the factors that a court must consider under Title 18, United States Code, Section 3553(a), the submissions and argument of the parties, and the testimony of Mr. Thurman and his witnesses, the District Court imposed a sentence of 72 months in the custody of the Bureau of Prisons, one year above the mandatory minimum in the case, four years of supervised release, and a special assessment of $100. Sen. Hrg. 85.

REASONS FOR GRANTING THE WRIT

I. The District Court violated Mr. Thurman's Fifth and Sixth Amendment rights under the United States Constitution when it increased his sentence based on acquitted conduct.

At trial, the jury acquitted Mr. Thurman of possessing a firearm in furtherance of a drug trafficking offense, in violation of Title 18, United States Code, Section 924(c). The very evidence introduced at trial and rejected by the jury, was relied upon at sentencing by the district court to enhance Mr. Thurman's sentence. The District Court applied 1 which states "[i]f a dangerous weapon (including a firearm) was possessed, increase by 2 levels." Application Note 11(A) provides, in relevant part, "[t]he enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." According to the trial testimony of Courtney Williams, neither he nor Mr. Thurman, ever conducted a transaction with weapons present. Although the District Court found Williams' testimony credible, it ignored Williams' testimony with respect to the presence of weapons.

Rather, the District Court again focused on the statement allegedly made by Mr. Thurman, which he clearly rejected, to establish the presence of weapons for drug dealing. Sen. Hrg. 38. The court also found that the firearms were accessible, that Mr. Williams' testimony that he never saw him with the weapon was irrelevant "because that's just his personal dealings", that the weapons were loaded, and that it's "possible"

that even the gun upstairs in a bedroom closet was connected with drug dealing. Sen. Hrg. 45. The District Court pointed out that the language of the statute, Title 18, United States Code, Section 924(c), differed from the language of the guideline, which only required possession of the weapon to found by a preponderance of the evidence. Sen. Hrg. 43. The District Court cited this Court's holdings in *United States v. Starks,* 309 F.3d 1017 (7th Cir. 2002); *United States v. Wetwattana,* 94 F.3d 280(7th Cir. 1996); and *United States v. Zehm*, 217 F.3d 506 (7th Cir. 2000), in support of its position.

The District Court's reliance on *Starks* was misplaced. In that case the court focused on possession of the weapons – whether actual or constructive – and whether or not the weapons were within arms' reach of the defendants at the time of their arrest. "We have found that a defendant exercised control over guns--and therefore possessed them for purposes of § 2D1.1(b)(1) -- when the defendant was within arm's reach of those guns at the time of arrest. *[citations omitted].*" *United States v. Starks*, 309 F.3d 1017, 1026-1027 (7th Cir. Wis. Nov. 4, 2002). *See also, United States v. Wetwattana*, 94 F.3d 280, 284 (7th Cir. Ill. Aug. 22, 1996) [Wetwattana admits that he owned the handgun and that he stored the handgun in the tissue box in his car. . . Wetwattana was seated in the rear seat of his car next to the tissue box when he was apprehended. . . .the record supports the district court's conclusion that the handgun was within his reach and control.]; *United States v. Zehm,* 217 F.3d 506 (7th Cir. 2000)[same].

In the 1990s, prior to the Court's more recent evolution in thinking with respect to the appropriate respective roles of juries and judges, the Court decided *United States v. Watts,* 519 U.S. 148 (1997), in which it held that conduct for which a defendant is

acquitted at trial may be used against him at sentencing, nonetheless, if the government establishes the conduct by a preponderance of the evidence. This decision, irrespective of its legal bases, is counterintuitive and evokes a visceral reaction in the lay person. It sounds unfair – and it is. If a jury acquits a person, a court should not be able to, in effect, override that decision by using the conduct against him at sentencing.

The legal foundation for the Supreme Court's decision has since been called into question, although not yet overruled, by the Supreme Court's subsequent decisions in *Apprendi v. New Jersey,* 528 U.S. 1018 (1999); *Blakely v. Washington,*542 U.S. 296 (2004); and *United States v. Booker*, 543 U.S. 220 (2005). The net effect of this line of cases is to protect the defendant's right to jury trial, and to require that any fact upon which a court relies to establish either a mandatory minimum or statutory maximum sentence, must be submitted to a jury and proved beyond a reasonable doubt.

In this case, the testimony at trial did not support a finding that Mr. Thurman possessed, let alone used, firearms *in connection with* a drug offense. Nor did the evidence establish that he maintained a property *for the purpose of conducting* a drug offense. Under either the trial standard or the lesser preponderance standard, the evidence at trial did not support the application of acquitted conduct to enhance Mr. Thurman's advisory sentencing guidelines in this case.

2. The facts presented at trial do not support the application of a firearm enhancement, pursuant to U.S.S.G. §2D1.1(b)(1).

The sentencing guidelines provide that "[i]f a dangerous weapon (including a firearm) was possessed, increase by 2 levels." U.S.S.G. 2D1.1(b)(1). The Application Note to this guideline further provides that "[t]he enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. The enhancement should be applied *if the weapon was present*, unless *clearly improbable that the weapon was connected with the offense*." In this case, Mr. Thurman, who possessed a Firearms Owners Identification card, was legally entitled to possess firearms. The testimony at trial demonstrated that the firearm in the basement was not "present" for the offense in the way intended by the guidelines, because it was not in the same place and ready for use, such that it would "increase the danger of violence" by its presence.

First, the gun was in a box, in a closed plastic bag, mixed in with a full bag of other items, placed in a different section of the basement from the area in which the alleged transaction took place. Clearly, the gun was not "present" and ready to be used in any way. It was not visible, was gathered with other items and put out of the way in the way that stored things are kept out of the way and not available for immediate use without opening the closed bag, sorting the contents, and finding the box that that held the gun.

Secondly, when the government's informant was asked about the presence or involvement of weapons in his conduct with Mr. Thurman, the informant denied that

weapons were present and further stated that they were not necessary because it "wasn't like that" with him and Mr. Thurman. In fact, Mr. Williams testified to the following:

Q: Mr. Williams, you didn't take a gun into B's house, did you?

A: I didn't need to.

Q: You didn't take a gun into his house at all.

A: No.

Q: And you didn't ever see a gun while you were in his house, did you?

A: No.

Trial Tr. 366-367.

Not only was the weapon not "present" at the time of the offense, in the way intended by the guidelines - that it would increase the danger of violence – the testimony of the government's informant was that weapons were not needed. Even if the weapon – in a box, in a bag, in a different part of the basement – could be said to be "present", it was "clearly improbable that the weapon was connected with the offense."

The presentence investigation report based its assessment of the two-level enhancement on Mr. Thurman's alleged "admissions" that he possessed the guns to protect his drugs and drug profits. Mr. Thurman rejected the validity of these "admissions", based as they were on the notes of an agent that were not in any way adopted by Mr. Thurman. In fact, the agent's own evidence, apart from his testimony, was that Mr. Thurman refused to adopt the statements that the agent alleged that Mr. Thurman made. Furthermore, despite the obvious availability and use of recording

equipment – to record the statement initially made by the cooperating informant, for example – no such recording was made of any statements allegedly made by Mr. Thurman. More importantly, the jury, too, rejected the validity of the alleged statements, by finding that Mr. Thurman not guilty of possession a firearm in connection with a drug offense.

The presentence report's assessment was further undermined by the testimony at trial that the firearm found in the bedroom closet of Mr. Thurman's house had been purchased more than a decade ago, when Mr. Thurman was going to college and playing football at Purdue University, in Indiana. Evidence at trial about the acquisition of the second firearm also pre-dated the conduct alleged against Mr. Thurman, and was purchased not at Mr. Thurman's behest, but in response to a requests for help from Mr. Thurman's cousin. The second firearm, found in the box, in the bag, in the basement, was sold to Mr. Thurman by his cousin, who solicited the sale from Mr. Thurman at a time when the cousin was short of funds and needed to make some extra money. Mr. Thurman bought the firearm to help his cousin, not for the purpose of protecting "drugs or drug profits".

The District Court, when imposing sentence on Mr. Thurman, found that, "I don't see him as a person who uses a weapon in his community for any violent activity at all. And – but I do believe that that the way that enhancement is phrased, I ruled correctly, but now I'm also taking into account that that two-level increase is something that I'm moving lower from under the 3553 factors." Sen. Tr. 85-86. The evidence at trial clearly showed that the firearms in Mr. Thurman's possession were not purchased for drug

dealing, were not used for drug dealing, and should not have used to enhance the guideline calculations in this case.

II. This Court's decisions in *Apprendi, Blakely, and Booker*, require that it reconsider its decision in *Watts*, permitting the enhancement of a defendant's sentence based on conduct for which he has been acquitted.

This Court's decision in *United States v. Watts,* was a *per curiam* decision to which were appended two different concurring opinions and two stinging dissents. The Court's decision rejected the Ninth Circuit's absolutist rejection of applying acquitted conduct at sentencing, but it did not go as far as requiring it.

The two obvious objections to the Supreme Court's position in *Watts* were (1) that a defendant may be placed in double jeopardy if he is punished twice for the same offense, in the case of uncharged conduct or the use of previous convictions, and (2) such an approach negates the role of the jury as the fact-finder and allows the judge to do through a back door what the jury was unwilling to do through the front door. In overcoming these objections, the Court distinguished the bases for punishment, finding that, "[c]onsideration of information about the defendant's character and conduct at sentencing does not result in punishment for any offense other than the one of which the defendant is convicted. Rather, the defendant is punished only for *the fact that the present offense is carried out in a manner that warrants increased punishment*. *United States v. Watts,* 519 U.S. 148, 149, 117 S. Ct. 633, 634, 136 L. Ed. 2d 554, 560 (U.S. 1997)[emphasis added].

In the case of acquitted conduct, the argument follows that application of facts rejected by the jury results in a defendant is being unfairly punished for conduct for which he was not found guilty. The Court's finding that evidence that is not sufficient to prove a charge beyond a reasonable doubt, may nonetheless be proved by the lesser preponderance standard, has a semantic character, when, as in this case, the conduct rejected at trial is precisely the conduct the District Court relied on to enhance a sentence. The law respects the jury's verdict and prevents examination of it in all respects, except that it allows the court to independently decide that the jury was wrong and that the defendant deserves to be punished as if he had been convicted, after all. Justice Stevens issued a stinging rebuke to the Court for making this decision:

> Whether an allegation of criminal conduct is the sole basis for punishment or merely one of several bases for punishment, we should presume that Congress intended the new sentencing Guidelines that it authorized in 1984 to adhere to longstanding procedural requirements enshrined in our constitutional jurisprudence. [*170] The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.

United States v. Watts, 519 U.S. 148, 169-170, 117 S. Ct. 633, 644, 136 L. Ed. 2d 554, 573 (U.S. 1997)[J. Stevens, dissenting].

In a separate dissent, Justice Kennedy criticized the Court for failing to address the distinction to be made between relying on uncharged conduct at sentencing and relying on conduct for which a defendant has been acquitted:

> At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted ***does raise concerns about undercutting the verdict of acquittal***, concerns noted by Justice Stevens and the other federal judges to whom he refers in his

> dissent. If there is no clear answer but to acknowledge a theoretical contradiction from which we cannot escape because of overriding practical considerations, at least we ought to say so. Finally, as Justice Stevens further points out, the effect of the Sentencing Reform Act of 1984 on this question deserves careful exploration. This is illustrated by the fact that Justices Scalia and Breyer each find it necessary to issue separate opinions setting forth differing views on the role of the Sentencing Commission.

United States v. Watts, 519 U.S. 148, 170-171, 117 S. Ct. 633, 644, 136 L. Ed. 2d 554, 573 (U.S. 1997)[J. Kennedy, dissenting] [emphasis added].

III. The warrantless and non-consensual search of Mr. Thurman's cellular telephone violated his Fourth Amendment right to be free from illegal searches and seizures.

A. This Court has held that warrantless cell phone searches violate the Fourth Amendment, rejecting the application of the search incident to arrest exception to warrantless searches.

In *Riley v. California*, __U.S. __, 134 S. Ct. 2473, 2494-95 (2014), the Court stated:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," *Boyd, supra,* at 630, 6 S.Ct. 524. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

See, also United States v. Gary, 790 F.3d 704, 708 (7th Cir. Ill. June 19, 2015) (Applying *Riley*, the warrantless search of the cell phone cannot be justified as a search incident to arrest and therefore violated the Fourth Amendment absent some other justification for the search.)

It is undisputed that law enforcement agents did not secure a warrant before conducting a search of Mr. Thurman's cell phone. Supp. Hrg. 115. It is further undisputed that Mr. Thurman was presented with a written consent to search form that he refused to sign. Supp. Hrg. 85. Mr. Thurman also has sworn that he did not give verbal consent to the agents to search his phone. R. 45-2, 46-2. His position is supported by the consent to search form entered into evidence as Government Exhibit C, which is marked as "refused" in the signature line.

The agents' subsequent use of a forensic program to reconstitute the contacts, messages, and other information deleted from Mr. Thurman's cell phone, was not accomplished pursuant to a warrant, and to the extent the Court believed that Mr. Thurman's consent to search at the offices of the ATF was valid, it did not apply to any subsequent search undertaken by the agents or their technicians.

Recent cases in other circuits have found that consent is limited by the scope of what a reasonable person would have understood to be the case. For example, the Fifth Circuit has found that:

> When the Government relies on consent as the basis for a warrantless search, officers "have no more authority than they have apparently been given by the consent." *Zavala*, 541 F.3d at 576 (quoting *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 666 (5th Cir. 2003)). We measure the scope of a person's consent by what is objectively reasonable: "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991). "Thus, it is 'important to take account of any express or implied limitations . . . attending that consent which establish the permissible scope of the search in terms of . . . time, duration, area, or intensity.'" *United States v. Cotton*, 722 F.3d 271, 275 (5th Cir. 2013) (quoting 4 Wayne R. LaFave, Search and Seizure § 8.1(c) (5th ed. 2012)).

United States v. Escamilla, 852 F.3d 474, 484 (5th Cir. Tex. Mar. 29, 2017).

When the facts and circumstances surrounding a person's consent suggest a natural end to the consensual exchange with law enforcement, officers should not view the earlier consent as "authorizing a second search at some future time if the first search is not fruitful." *Id.* In *Escamilla*, because law enforcement did not obtain a warrant, and the Government did not offer any other exception to the Fourth Amendment's usual warrant requirement to justify a secondary search, the court found that the search should have been suppressed. *See Riley v. California*, 134 S. Ct. 2473, 2495, 189 L. Ed. 2d 430 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.").

Similarly, the Ninth Circuit Court of Appeals emphasized *Riley's* heightened concern about the warrantless search of cell phones, and stressed the amount and character of data contained in, or accessed through, a cell phone and the corresponding intrusiveness of a cell phone search:

> The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.
>
> . . . Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick*, [433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977),] rather than a container the [**15] size of the cigarette package in *Robinson*[, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)].

> *Riley*, 134 S. Ct. at 2489. A cell phone search "would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." *Id.* at 2491.

United States v. Lara, 815 F.3d 605, 611 (9th Cir. Cal. Mar. 3, 2016). The *Lara* court found that even when the person whose cell phone is subject to search is a probationer who has limited rights to privacy, the privacy-related concerns of a cell phone search are weighty enough that such a search may require a warrant. In the case of defendant Lara, as in the case of Mr. Thurman, when the subject has not clearly and unambiguously consented to the cell phone search at issue, law enforcement must obtain a warrant. *Id.,* at 612.

2. The burden of proof as to whether the agents obtained a valid consent to search rests with the government.

This Court has held that the burden of proving a valid – i.e., voluntary, knowing, and intelligent – consent rests with the government. *Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973) (collecting cases). The burden has been described variously as proof by a "preponderance of the evidence," *United States v. Richards*, 741 F.3d 843, 847-48 (7th Cir. 2014), or by "clear and positive testimony" that the asserted consent was "voluntary" and "unequivocally, specifically, and intelligently given." *United States v. Worley,* 193 F.3d 380, 385–86 (6th Cir.1999) (quotation marks omitted). "A consent is suspect if given by one who earlier refused to consent, unless some reason appears to explain the change in position." Wayne R.

LaFave et al., *Criminal Procedure* § 3.10(b) (2d ed.1999)," *cited in, United States v. Buckingham*, 433 F.3d 508, 514 (6th Cir. 2006).

Agent Labno claimed that "we asked him if we could search his cell phone, we could look inside his cell phone." Supp. Hrg. Tr. 82. The "we" he was referring to was himself and Officer Munyon, who signed the consent to search form. Mr. Thurman again refused to sign the form to give permission to the search. The signatures of two agents cannot be substituted for the signature of Mr. Thurman who refused to sign the consent form. Nor did any agent ask for Mr. Thurman's permission to conduct a second warrantless and more intensive forensic analysis of the phone

Agent Nemerov testified that he did not sign a consent to search form, and he could not recall whether such a form was given to Mr. Thurman to give permission to search his his cell phone, during the interview that allegedly occurred. Nor could Agent Nemerov remember whether Agent Labno or Mr. Thurman was in physical possession of the phone. Similarly, Agent Eikam was not present when the consent to search form was presented to Mr. Thurman and did not see him sign it. Supp. Hrg. 146.

Agent Labno admitted that he was in possession of Mr. Thurman's phone and that there was never a point in time in which Mr. Thurman was able to keep his phone. Hrg. Tr. 113. In fact, Mr. Thurman had to use Agent Labno's phone to call his wife to pick him up when he was released from the agents' custody. Hrg. Tr. 113-114.

Like the Advice of Rights form, while signed by the agents – and not Mr. Thurman – there is no indication on this form, that Mr. Thurman refused, but consented. He simply refused. The District Court found that testimony of four agents

was credible and consistent; however, there were only two agents that were present for the signing of the Consent to Search form for Mr. Thurman's phone and the scope of the request, even if granted, did not contain the possibility of a subsequent warrantless forensic analysis of the phone and reconstruction of its deleted data.

The testimony of Agents Labno and Munyon is not supported by any objective evidence. In fact, the conflicting testimony about who was present when the Consent to Search form was presented, and the fact that Agent Munyon recorded the debriefing of Courtney Williams and had previously recorded the post-arrest statement of Mr. Williams as well, while no one recorded what transpired between Mr. Thurman and the agents, renders suspect the allegation that Mr. Thurman provided his consent. Agent Eikam believed that the ATF office in Chicago at that time had a policy against recording suspects' statements, Supp. Hrg. 143; although, this policy has since been changed and precisely the opposite is now true. Furthermore, Agent Munyon testified that he did not take notes during the alleged interview of Mr. Thurman and that he did not recall seeing others taking notes. Supp. Hrg. 130.

3. Consent must be unequivocal, specific, and freely and intelligently given, viewed under the totality of the circumstances surrounding the alleged consent.

"Consent can be inferred from non-verbal actions, but it must be unequivocal and specific and freely and intelligently given." *United States v. Basher,* 629 F.3d 1161, 1167 (9th Cir.2011) (quotation omitted). Law enforcement does not need reasonable suspicion or probable cause to ask questions or request consent to search, so long as the consent is not coerced. *See, Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389

(1991); *Schneckloth,* 412 U.S. at 225. Whether consent to a search was voluntary or was "the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."[6] *Schneckloth,* 412 U.S. at 227.

The Seventh Circuit has enumerated a list of factors bearing on the question of voluntariness, including, but not limited to, (1) a person's age, intelligence, and education; (2) whether he was advised of his constitutional rights; (3) how long he was detained before he gave his consent; (4) whether his consent was immediate, or was prompted by repeated requests by the authorities; (5) whether any physical coercion was used; and (6) whether he was in police custody when he gave his consent. *United States v. Beltran*, 752 F.3d 671, 679 (7th Cir. 2014). Other factors that have been important to the analysis include the individual's experience with law enforcement and other conditions under which consent was allegedly given, such as the officer's conduct; the number of officers present; and the duration, location, and time of the encounter. *See United States v. Watson,* 423 U.S. 411, 424 (1976).

Mr. Thurman is an educated person with no experience with law enforcement. On the evening of September 23, 2013, he and his family experienced the trauma of being raided by armed agents, under the curious and shocked watch of friends and neighbors. He was not told the reason for his arrest, was apprehended at gunpoint, handcuffed, kept waiting under law enforcement supervision for at least 2 ½ hours while his home is being torn apart and his family terrorized. At all times he was in custody and when presented with the Advice of Rights form and the consent to search form he refused to sign them. The District Court erred in finding that the circumstances of Mr.

Thurman were not coercive, relying on Mr. Thurman's intelligence, rather than taking into account that Mr. Thurman had never before been arrested for a felony offense and taken into custody in such a violent and purposefully intimidating manner.

Mr. Thurman did not cooperate with the agents. The agents' attempts to make what was an overwhelming show of force and intimidation sound like a casual and friendly encounter are belied by the facts surrounding the execution of the search warrant. Late on a Monday evening, while his family was preparing for bedtime, at least 20 armed and vested agents broke the doors down, rushed into the home "doing a dynamic entry", forced Mr. Thurman to the ground at gun point using "lethal coverage", and held his family and tenants hostage while the entire building was searched. This was not an event that was done in the spirit of cooperation or voluntariness.

4. Refusal to sign a written consent form raises doubts about the voluntariness of an alleged verbal consent.

Other Circuits have found that a person's refusal to sign a written consent raises serious questions concerning the voluntariness of his consent. *United States v. Lattimore*, 87 F.3d 647, 652 (4th Cir. 1996). The Sixth Circuit, in *United States v. Buckingham*, 433 F.3d 508 (6th Cir. 2006), reversed and remanded a case, finding that the "district court erred in denying defendant's motion to suppress evidence found in his vehicle on the basis of his oral consent to the search of his vehicle, without considering whether defendant later withdrew that consent when he refused to sign the written consent form." The Fifth Circuit pointed to the refusal to sign a written form as undermining a claim of verbal consent, "In only two respects is the evidence slightly

questionable as to the voluntariness of consent: First, Boukater refused to sign a written waiver; second, after he refused to sign, Agent Rivers said something to him about getting a search warrant. While the refusal to sign a waiver might cast doubt on the first oral consent, Boukater reiterated his consent after his refusal to put anything in writing, thereby clarifying his position as to the search." *United States v. Boukater*, 409 F.2d 537, 538 (5th Cir. 1969).

The District Court relied on *United States v. McGlothin,* 391 F.App'x. 542, 545 (7th Cir. 2010) to support its decision rejecting Mr. Thurman's position, asserted in his Affidavit, that he did not give consent to search his phone, and the written evidence of the same – the "refused" inscribed in place of his signature on the agents' consent to search form. Citation to *McGlothin,* apart from being a non-precedential decision that pre-dates the Supreme Court's decision in *Riley*, is inapt in this case.

The defendant in *McGlothin* was not in custody when he was approached by a law enforcement officer who asked permission to see his cell phone. Defendant McGlothin, a man of lower than average intelligence, did not object and freely handed over his phone to the officer, after the officer simply asked for it. *Id.* This Court found that phone was in plain view and that its seizure was permissible on that basis. The search was justified by the defendant's consent. None of the circumstances surrounding Mr. Thurman's arrest and over-night detention, or his refusal to consent – as evidenced by his refusal to sign the Consent to Search form, were similar to those at issue in *McGlothin.*

CONCLUSION

WHEREFORE, Brian Thurman, through counsel, respectfully requests that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 2, 2018.

Dated this 1st day of August 2018, at Chicago, Illinois.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2018

No.

BRIAN THURMAN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

CERTIFICATE OF SERVICE

I, Andréa E. Gambino, counsel of record for Brian Thurman, hereby certify that in his case I have served the Petition for a Writ of Certiorari and Motion to Proceed in Forma Pauperis on the United States of America by mailing three copies of each on August 1, 2018, in an envelope properly stamped and addressed to the Solicitor General of the United States, 950 Pennsylvania Avenue, N.W., Room 5614, Washington D.C. 20530-001, which envelope was deposited in the United States Post Office at Chicago, Illinois.

_____
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