NO._____

IN THE
SUPREME COURT
OF THE
UNITED STATES

2017-2018 TERM

BRIAN DERONCELER

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED DERONCELER'S CONVICTIONS WHERE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT DERONCELER'S CONVICTION AND THEREFORE, DERONCELER'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED DERONCELER'S SENTENCE WHERE THE DISTRICT COURT COMMITTED SENTENCING ERRORS.

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The Petitioner, BRIAN DERONCELER (hereinafter "DERONCELER"), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceedings on March 22, 2018.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered a non-published opinion affirming the District Court's Order of Detention, *United States of America v. Brian Deronceler,* on March 22, 2018. *Appendix 1*.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals affirming the Judgment of the United States District Court was entered on March 22, 2018. The Eleventh Circuit Court of Appeals entered its Order Denying DERONCELER'S Petition for Rehearing and Petition for Rehearing *En Banc* on June 1, 2018. *Appendix 2*. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254 and Rule 10.1, Rules of the Supreme Court. This Petition for Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

The Fifth Amendment to the Constitution provides, in relevant part that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person … be deprived of life, liberty, or property, without

due process of law…."

UNITED STATES CONSTITUTION, AMENDMENT VI

The Sixth Amendment to the Constitution provides in relevant part that: "In all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

On January 22, 2015, the Federal Grand Jury in the Southern District of Florida issued a forty-one (41) count indictment charging Stanley Presendieu, Scarlee Valias Jean, DERONCELER, Latasha Pharr and Jason Miles with willfully, with the intent to further the object of the conspiracy and knowingly combine, conspire and agree with each other and others known and unknown with the intent to defraud, execute and cause the execution of a scheme and artifice to obtain moneys, funds, credits, assets owned by and under the custody and control of financial institutions, by means of materially false and fraudulent pretenses, representations and promises relating to a material fact, in violation of 18 U.S.C. §1349 and 18 U.S.C. §1344(2) (Count 1); knowingly and with intent to defraud, execute, and cause for the execution of a scheme and artifice to obtain moneys, funds, credits, assets and other property owned by and under the custody and control

of financial institutions, by means of materially false and fraudulent pretenses, representations and promises relating to a material fact in violation of 18 U.S.C. §1344(2) (Counts 2-22); did knowingly transfer, possess and use, without lawful authority, the means of identification of another person, that is, the name and social security number of various individuals in violation of 18 U.S.C. §1028A(a)(1) and 18 U.S.C. §2 (Counts 23-41) and a forfeiture action pursuant to 18 U.S.C. §981(a)(1)(C)[1] (DE:3).

The matter went to trial on August 10, 2015 and lasted eight days. (DE: 250-257) On August 19, 2015, the jury returned its verdict finding DERONCELER guilty of Counts 1, 17-20, 38-41. (DE: 213;257:149-151).

On September 1, 2015, DERONCELER filed his Notice of Judgment of Acquittal. (DE:222, 225) DERONCELER filed his Judgment of Acquittal on September 14, 2015. (DE: 231). Said Motion was denied by the District Court on October 6, 2015. The District Court denied said Motions finding that the jury's verdict was supported by the evidence and testimony and in compliance with applicable law. (DE:260,261,262).

On November 2, 2015, the District Court sentenced DERONCELER on all counts of conviction charged in the indictment for a total term of 183 months

[1] DERONCELER was only charged in Counts 1, 17-20, 38-41.

consisting of 87 months as to Counts 1, 17, 18, 19 and 20, to be served concurrently to each other and 24 months as to Counts 38, 39, 40 and 41, to be served consecutive to each other and consecutive to the term imposed for Counts 1, 17, 18, 19 and 20, followed by 5 years supervised release for Counts 1, 17-20 and 1 year for Counts 38-41, all to be served concurrently. In addition, the District Court waived fines, there was restitution ordered in the amount of $109,378.23 and a $900.00 assessment. (DE:320;383:95-97). DERONCELER timely filed his Notice of Appeal and is confined. (DE:333)

On March 22, 2018, the Eleventh Circuit affirmed DERONCELER'S convictions and sentence. On June 1, 2018, the Eleventh Circuit denied DERONCELER'S Petition for Rehearing and Rehearing *En Banc*.

2. <u>Statement of the Facts</u>.

The matter went to trial on August 10, 2015 and lasted eight days. (DE: 250-257) The government's first witness was Wayne Everett ("Everett") who works for the Department of Treasury, Bureau of the Fiscal Service, in Philadelphia. He testified that the Bureau of the Fiscal Service operates the government's collection and deposit systems. (DE:251:40)

The government called Husein Habib ("Habib") to testify (DE:251:76). Habib testified that he "decided to work with the Government by eliminating most of the charges in exchange for cooperating with the government and stopping the

illegal check cashing activity". (DE:251:83) Habib admitted he resolved the charges by pleading guilty.

Habib testified that when he originally cashed checks at his Kwik Stop store, that said transactions were legal and then he was approached by a man named James around March of 2010 who proposed the illegal check cashing business to Habib. (DE:251:90-92). Habib identified several checks that he illegally cashed and deposited into various banks and in identifying said checks he testified that these checks were checks brought to him by James. He also confirmed that when a check was over $1,000.00, the customer was to put his thumb print on it – but that no customer did that. (DE:251:100-102). Habib confirmed that James was really Jason Miles and he advised the FBI of his correct name and the other information he had. (DE:251:105). Habib continued to testify that when he stopped cashing checks for James, that James introduced him to Stanley Presendieu, ("Presendieu") who was the head of the operation. (DE:251:115-116).

Habib testified that the checks he received from Presendieu were all returned, and he refused to do business with him. As a result of that, Presendieu introduced Habib to Grace Vila. (DE:251:122-123). Habib testified that Grace Vila told him that she was going to open a tax processing center to process refund checks and proceeded to give Habib a punch of illegal checks to cash, so she could finance her office. (DE:251:124). Habib also testified that Grace Vila told him they would file

tax returns for the homeless people who hung out at the store and pay them some money and that she and Habib would keep the rest. (DE:251:125). Habib further testified that Grace Vila introduced him to Latasha Pharr ("Pharr"). (DE:251:126).

Habib testified that he again met Pharr in March of 2013 at the Kwik Stop and she gave him checks to cash and fake IDs. Pharr came again and would bring cashier's checks to cash and gave Habib 50%. (DE:251:128-129). Habib testified that he took a picture of Pharr's driver's license and that she came to the store to cash checks. (DE:251:135).

Habib then identified several pictures of himself that were taking of him while doing his illegal check cashing activities. (DE:251:135-148). Habib testified that he agreed to go undercover and wear a wire with concealed cameras and audio recording. He testified the first person he recorded was Stanley Presendieu performing illegal check cashing activities. (DE:251:169).

The government then proceeded to play the recording of the meeting between Habib and Presendieu regarding the cashing of illegal checks. (DE:251:171-198) The government then played a cassette between Habib and Pharr, where Habib and Pharr discuss the check cashing and Presendieu. (DE:254:20-37) (DE:254:41-50) (DE:254:57-60) (64-81). The government also played a CD of a meeting between Habib and someone named "Jasmine" or "Sky" who was introduced to Habib by Presendieu and a CD of a meeting between Habib and Presendieu (DE:252:74-99,

99-108). Habib further testified that he and Habib were talking about Grace Vila, who was introduced to Habib by Presendieu (DE:252:99).

The government then called James Searles ("Searles"), who testified that in 2012 he was notified by the IRS that he was receiving a refund check. Searles testified he contacted the IRS because he had not filed his taxes for 2012 and therefore he believed his identity had been stolen. He was also shown an identification and testified it was not his picture or his address and that the other identification documents were incorrect and that the check shown to him was never received by him. (DE:252:14-24). He confirmed that he does not KNOW DERONCELER and he did not recognize DERONCELER sitting in the courtroom. (DE:252:25). He also testified that he could not say that DERONCELER stole his identity. (DE:252:31).

The government then called Marilyn Crespo ("Crespo"). She confirmed that the picture on the driver's license shown to her was not her, was not her address, was not her signature and she did not know who the person was in the picture. (DE:252:34-35). She also confirmed that she never received the check shown to her and that she never applied for the check. She also confirmed that she did not know DERONCELER and she did not recognize him. (DE:252:38-41).

The government then called John Igoe ("Igoe"), who testified that he was contacted by the FBI to ask about whether he received his IRS refund check or not

and whether the driver's license shown to him was him. He explained he never got the check and had to get a replacement check and that the identification was not him. (DE:255:100-112). On cross examination, Igoe testified he never met DERONCELER and that DERONCELER never was at his house nor did DERONCELER have access to his house. (DE:255:112-113).

The government called Kaitlin Conner who also testified that she never received her refund checks from the IRS for the years 2011 and 2012. (DE:255:117). On cross examination, however, she testified that she moved and that it was possible that someone else got her check who lived where she used too. (DE:255:127).

The government also called Shonta James, who testified that she went to a company called Tax Doctor who prepared her tax return for 2014. She testified she was expecting her refund to be direct deposited into her account, but she never received it. (DE:255:137). On cross examination she confirmed that the firm, Tax Doctor had access to her driver's license and social security information. She also confirmed that DERONCELER was not at the Tax Doctor office, that she had never seen him, and he had nothing to do with the preparation of her taxes. (DE:255:147).

The government then called Agent Michael Degnan, from the FBI. Agent Degnan was lead case agent in the government investigation. (DE:255:203) He testified about the rental of a car by DERONCELER that was scene during the surveillance of the Kwik Stop store that Habib owned. (DE:255:207-217). Agent

Degnan testified that there were multiple vehicles that they saw at different times at the Kwik Stop. (DE:255:209). Agent Degnan testified, over counsel for co-defendant's objection that he obtained the records from the rental company as a result of his communications with the undercover agent who was doing the surveillance and participating in the undercover operation. (DE:255:209-216). Agent Degnan further testified that the other records showed vehicles owned by co-defendant's mother, who is Jackelyn Yvonne Rollins. (DE:255:224-225).

The government rested and DERONCELER presented his case. (DE:256:47).

DERONCELER called his first witness, ILEENE DERONCELER, his sister. (DE:256:67). She testified that DERONCELER had a twin brother and that the last time she saw him was in 2009. (DE:256:79). On cross examination Ms. Deronceler testified that the twin brother lived in Canada because that was where he was adopted. (DE:256:82-83) She confirmed the names of DERONCELER and his twin's parents and the date of birth of her brothers. (DE:256:83).

DERONCELER then called his other witness, Thomas Mundy ("Mundy") who is an ex-police detective for the City of North Miami Beach and is now a private investigator and has been for 25-plus years. (DE:256:101). DERONCELER had a report from Mundy regarding his twin brother which DERONCELER attempted to have introduced into evidence; however, the government objected as to the testimony of Mundy and the introduction of his report based on hearsay. Said

objection was granted. (DE:256:101-112). The defense rested, and the jury charge was given and closing arguments were made. (DE:257:23-129) On August 19, 2015, the jury returned its verdict finding DERONCELER guilty of Counts 1, 17-20, 38-41. (DE: 213;257:149-151).

On September 1, 2015, DERONCELER filed his Notice of Judgment of Acquittal. (DE:222, 225) DERONCELER filed his Judgment of Acquittal on September 14, 2015. (DE: 231). Said Motion was denied by the District Court on October 6, 2015. The District Court denied said Motions finding that the jury's verdict was supported by the evidence and testimony and in compliance with applicable law. (DE:260,261,262).

3. <u>Facts Pertaining to DERONCELER'S Sentence and Sentencing Hearing.</u>

The PSI filed September 28, 2015, the PSI filed October 26, 2015, the addendum to the PSI, DERONCELER'S written objections to the PSI DERONCELER'S supplement to his written objections, sentencing memorandum and the material facts adduced and determined by the District Court at the sentencing hearing, as governed by Fed.R.Crim.P. 32, will impact the outcome of this sentence on direct appeal. (DE:284,285,316,317) The probation officer who prepared DERONCELER'S PSI set his base offense level at 7, pursuant to U.S.S.G.§2B1.1(a)(1). (PSI:89) DERONCELER'S base offense level was enhanced by 10 pursuant to U.S.S.G.§2B1.1(b)(1)(F) because the loss was more than

$120,000.00 but not more than $200,000.00.(PSI:90) DERONCELER'S base offense was further enhanced as follows: by 4 levels for the offense involving 250 or more victims pursuant to U.S.S.G.§2B1.1(b)(2)(C), by 2 levels for the offense involving sophisticated means pursuant to U.S.S.G.§2B1.1(b)(10)(C), by 2 levels because the offense involved the production or trafficking of unauthorized or counterfeit access devices pursuant to U.S.S.G.§2B1.1(b)(11)(B)(i) and another two levels for obstruction of justice pursuant to U.S.S.G.§3C1.1. (PSI:91-93). DERONCELER received no reductions for minor role on any other reductions. (PSI:94-99). DERONCELER'S total offense level was 27 (PSI:27). DERONCELER had a criminal history category of III. (PSI120). Accordingly, DERONCELER'S presumptive guideline imprisonment range was 87 to 108 months. However, as to each of Counts 38 to 41, a term of imprisonment of two years under 18 U.S.C. §1028A(a)(1) was to run consecutively to any other term of imprisonment. (PSI:172).

DERONCELER filed his written objections and Sentencing Memorandum of Law. (DE:284). DERONCELER objected to the facts as alleged in the Presentence Investigation Report, the loss amount, the number of victims and he sought a minor role reduction. (DE:284).

In his Sentencing Memorandum, DERONCELER sought both a departure and a variance in his sentence. (DE:285). DERONCELER sought a downward departure

pursuant to United States Sentencing Guidelines, Sections 5H1.3, due to DERONCELER'S mental disabilities. DERONCELER also sought a downward departure due to his criminal history being overrepresented. (DE:285). DERONCELER also sought a variance based upon his diminished capacity and other objections. (DE:285).

As a result of DERONCELER'S objections, probation issued another presentence investigation report that was filed on October 26, 2015. In the new presentence investigation report, DERONCELER'S base offense level was increase by two levels instead of four levels, finding that there were 10 or more victims, instead of 250 or more victims. (PSI:91). Accordingly, DERONCELER'S total offense level became 25, his criminal history remained the same, and his guideline became 70 to 87 months. (PSI:100,121,173).

DERONCELER'S sentencing hearing was held on November 2, 2015 (DE:383). At the hearing, DERONCELER'S counsel argued his factual objections to the PSI, his request for a minor role reduction and his request for a departure due to diminished capacity and because his criminal record was overstated. DERONCELER'S counsel also argued for a variance. (DE:383).

DERONCELER'S counsel argued his factual objections in connection with the facts as written by Probation in the PSI (DE:383:3-18). Counsel argued that because of the November 1, 2015 amendments to the guidelines, that

DERONCELER'S enhancement pursuant to U.S.S.G. §2B1.1(b)(1)(F) should only be eight levels and not ten levels as stated in the PSI. (DE:383:6). Counsel also argued that there should be no enhancement for the sophisticated means because "whatever Mr. Deronceler did in and of himself, basically check cashing, in and of itself was not sophisticated, it was pretty simple matter." (DE:383:7). Counsel also argued against the two-level enhancement because the offense involved the production of trafficking of unauthorized access devices. Counsel argued that "Mr. Deronceler himself did not traffic in unauthorized devices in this particular matter nor did he possess any unauthorized devices nor would it be reasonably foreseeable that Mr. Deronceler would have known or should have known that others may or may not have been trafficking in unauthorized devices." (DE:383:8). Counsel continued and argued DERONCELER'S objection to the two-level enhancement for obstruction of justice. Counsel argued that because DERONCELER acted as his own attorney, that he did not testify and therefore he could not be found to have obstructed justice. Counsel argued that "under 3C1.1, that is really applicable for someone who testifies at trial and someone who is subject to cross-examination and someone who testifies falsely. . . . And I think its unfair to allow Mr. Deronceler to represent himself at trial and then when he does things at trial that are objectionable or seem to be improper, that he be penalized for that. So I don't think Mr. Deronceler should be penalized because he made certain statements in front of the jury during

an opening statement or penalized for his conduct during the course of the trial." (DE:383:8-12, 12-14).

The government argued for the obstruction enhancement due to the actions of DERONCELER during the trial and the fact that he continuously made false statements and was introducing falsified documents into evidence. (DE:383:18-22). The District Court overruled DERONCELER'S objection, again based upon DERONCELER'S conduct at trial where again he was representing himself. (DE:383:26-27).

The government then argued that the enhancement of DERONCELER'S sentence for sophisticated means was justified based upon the evidence at trial. (DE:383:27-31). Counsel argued that "[w]hat Mr. Deronceler himself did was higly unsophisticated. He was a check cashier. A lot of what has been produced in the PSR and in the government's response were essentially words that were coming out of Mr. Deronceler's mouth. I think the issue of sophisticated means deals with what Mr. Deronceler was actually physically doing in the confines of this particular conspiracy. And I think clearly, if we look at what Mr. Deronceler did in this particular case himself, what he did is not sophisticated at all." (DE:383:31). After hearing argument, the District Court overruled the objection and found that the enhancement applied. (DE:383:31).

Counsel then objected to the loss amount as it related to DERONCELER and the production enhancement. The District Court overruled DERONCELER'S objection to the production enhancement finding that the "defendant caused the production of counterfeit access devices." (DE:383:42).

The District Court then heard testimony from Special Agent Michael Degnan, who was the lead agent in the investigation of the case. (DE:383:43-44). Special Agent Degnan testified concerning the loss amount attributable to DERONCELER. (DE:383:43-67). Counsel further argued that based on Special Agent Degnan's testimony regarding DERONCELER'S involvement in the conspiracy that his request for a minor role reduction should be granted. (DE:383:68-69).

The District Court sustained DERONCELER'S objection to the loss amount to be attributed to him and reduced it to $109,378.23 finding no connection between DERONCELER and the checks cashed by Latasha Pharr, his co-defendant. (DE:383:76). The District Court overruled DERONCELER'S request for a minor role reduction and his other factual objections. (DE:383:77-78).

Based on the District Court's ruling, DERONCELER'S base offense level was reduced to 23 and his criminal history category became a level four, although in the PSI and the addendum to the PSI his criminal history was a level III. As such, the new guideline range became 70 to 87 months plus 24 months to be served consecutively to any other sentence. (DE:383:78). His sentence should have been

57-71 months. Counsel then argued his request for a downward departure due to diminished capacity and that his criminal history category was overrated and also seeking a variance for the reasons stated herein. (DE:383:79-95)

On November 2, 2015, the District Court sentenced DERONCELER on all Counts of conviction charged in the indictment for a total term of 183 months consisting of 87 months as to Counts 1, 17, 18, 19 and 20, to be served concurrently to each other and 24 months as to Counts 38, 39, 40 and 41, to be served consecutive to each other and consecutive to the term imposed in Counts 1, 17, 18, 19 and 20, followed by 5 years supervised release for Counts 1, 17-20 and 1 year for counts 38-41, all to be served concurrently. In addition, the District Court waived fines, there was restitution ordered in the amount of $109,378.23 and a $900.00 assessment. (DE:320;383:95-97). DERONCELER timely filed his Notice of Appeal and is confined.

A. DERONCELER'S Conviction Should Not Have Been Affirmed Where the Evidence the Government Introduced Was Insufficient to Support DERONCELER'S Convictions.

Challenges to the sufficiency of the evidence in a criminal case are reviewed *de novo*. *United States v. Evans*, 473 F.3d 1115, 1118 (11th Cir. 2006). When making a *de novo* review of the sufficiency of the evidence, the reviewing court examines the evidence in a light most favorable to the prosecution with all

reasonable inferences and credibility determinations being in the government's favor. *United States v. Hamaker*, 455 F.3d 1316, 1332 (11th Cir. 2006). The reviewing court must ask whether any reasonable fact finder could conclude that the evidence demonstrates the guilt of the defendant beyond a reasonable doubt. *United States v. Eckhardt*, 466 F.3d 938, 944 (11th Cir. 2006). In order for DERONCELER'S convictions to be upheld, there had to be sufficient evidence to prove all of the elements of the crimes charged. *United States v. Ndiaye*, 434 F.3d 1270, 1294 (11th Cir. 2006). DERONCELER argues that the evidence does not support his convictions. The affirming of DERONCELER'S convictions by the Eleventh Circuit allowed DERONCELER to be convicted in violation of his due process rights. Accordingly, DERONCELER'S Petition for Writ of Certiorari must be granted.

The Fifth and Sixth Amendments guarantee that "criminal convictions [will] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt". *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995). Therefore, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged". *United States v. Gaudin*, 115 S.Ct at 2314.

It is quite clear that in reviewing the evidence and testimony presented by the government that the elements required to support DERONCELER'S convictions, were not proven beyond a reasonable doubt. Therefore, DERONCELER'S motions for judgment of acquittal should have been granted. *United States v. Garcia,* 405 F.3d 1260 (11th Cir. 2005). Accordingly, the failure of the Eleventh Circuit to reverse the denial of DERONCELER'S motion for judgment of acquittal justifies the granting of DERONCELER'S Petition for Writ of Certiorari.

B. DERONCELER'S Sentence Should not have been Affirmed by the Eleventh Circuit Where the District Court Committed Sentencing Errors.

The denial of DERONCELER'S request for a minor role and a downward departure and variance by the District Court should not have been affirmed by the Eleventh Circuit due to DERONCELER'S diminished capacity and his other objections. In conclusion, DERONCELER'S sentence was unreasonable in light of the sentencing factors listed in 18 U.S.C. §3553(a)-(f) and the totality of the circumstances. Moreover, the sentence was not minimally sufficient, but greater than necessary to comply with the purposes of sentencing under 18 U.S.C. §3553(a). Therefore, the District Court did in fact err in sentencing DERONCELER as it did, and because of this, the Eleventh Circuit should not have affirmed DERONCELER'S sentence. Based on the above, DERONCELER'S Petition for Writ of Certiorari must be granted.

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED DERONCELER'S CONVICTIONS WHERE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT DERONCELER'S CONVICTION AND THEREFORE, DERONCELER'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

At trial, the evidence presented by the government was not sufficient to establish the offenses charged in the indictment as to DERONCELER'S role in the conspiracy and his involvement in the bank fraud and identity theft. In other words, "[a] conviction must be reversed, if a reasonable jury must necessarily entertain a reasonable doubt as to the defendant's guilt". *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983). Accordingly, the District Court should have granted a judgment of acquittal under Fed.R.Crim.P. 29(b) and because the District Court did not, the Eleventh Circuit should have reversed the convictions. *United States v. Salman*, 378 F.3d 1266 (11th Cir. 2004). However, the Eleventh Circuit affirmed DERONCELER'S convictions and the denial of his judgment of acquittal and therefore his Petition for Writ of Certiorari must be granted.

To establish the offense and elements of criminal conspiracy, the government must prove: (1) an agreement among two or more persons to achieve an unlawful objective; (2) knowing and voluntary participation with agreement; and (3) an overt act by a conspirator in furtherance of the agreement. *See generally*, *United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003); *United States v. Brantley*, 68 F.3d 1283 (11th Cir. 1995). In other words, for the conviction to be upheld, the government had to prove that there was an agreement by two or more persons to commit an unlawful act and that DERONCELER knew of the plan and was willing to participate in it. *United States v. Moran*, 778 F.3d 942 (11th Cir. 2015).

It is a known fact that mere presence is not enough to uphold a conviction for conspiracy. *United States v. Brantley*, 68 F.3d 1283 (11th Cir. 1995). A person who does not know about a conspiracy but happens to act in a way that advances some purpose of a conspiracy, does not automatically become a conspirator. There was no evidence to even find that DERONCELER willfully joined in the agreement or plan or his knowledge of the alleged conspiracy. In fact, Special Agent Wayne F. Plympton and Special Agent Paul Blomer who are both with the FBI, testified about the surveillance they were involved in and that they had no pictures of DERONCELER on their surveillance. (DE:255:148-182). Furthermore, not one of the alleged victims testified that they knew DERONCELER, that they had seen him or that they had any involvement with him. Again, in reviewing the evidence and

testimony, it is quite clear that the government failed to introduce any evidence that DERONCELER was a part of a conspiracy or that he knew about said conspiracy.

There was no evidence, other than DERONCELER'S co-defendant's testimony, to support a finding that DERONCELER was guilty of being involved in the conspiracy. And, most if not all of the evidence presented was about Habib and his participation in the conspiracy along with Pharr and the other co-defendants and not DERONCELER. (DE:251:76-137). (evidence of Habib's illegal cash checking activity – not DERONCELER). For example, Rabinovich testified that his company's primary purpose was when a return is filed electronically, and the preparer is being paid a fee from the refund, his company makes sure the preparer receives its money and the rest is sent to the taxpayer. (DE:251:48). Everett who works for the Department of Treasury, Bureau of the Fiscal Service, testified that the Bureau of the Fiscal Service operates the government's collection and deposit systems. (DE:251:40) Neither of these witnesses connected DERONCELER to the conspiracy what-so-ever.

The government had to prove that DERONCELER knew of the conspiracy and voluntarily participated in it. *United States v. Guerrra*, 293 F.3d 1279, 1285 (11th Cir. 2002). And, that DERONCELER intended to be involved in a conspiracy to commit bank fraud for a profit. The evidence did not support such a finding.

Again, to be involved in a conspiracy, you do not need to know all of the

elements, but you do need to have the intent – which DERONCELER did not have. *United States v. Avila-Dominguez*, 610 F.2d 1266, 1271 (5th Cir. 1980). Therefore, DERONCELER should not have been convicted of the conspiracy.

Most if not all of the evidence introduced concerning DERONCELER came from his co-defendant, Habib, who was testifying to obtain a lesser sentence. Habib confirmed that he was testifying and working with the government in order to reduce the charges against him. (DE:254:183-187). Because the evidence as to the actual involvement of DERONCELER in the conspiracy and his position is based upon the evidence of the other co-conspirator's connections and actions, the government failed to prove DERONCELER'S knowing and intentional participation in the conspiracy by substantial evidence. *See, United States v. Avila-Dominguez*, 610 F.2d 1266, 1271 (5th Cir. 1980); *see* also, *United States v. Guerra*, 293 F.3d 1279, 1285 (11th Cir. 2002) (the government must prove that the defendant knew of the conspiracy and voluntarily participated in it). Therefore, the government did not meet its burden and this conviction must be reversed. Therefore, the government did not meet its burden and because the Eleventh Circuit affirmed the conviction, DERONCELER'S Petition for Writ of Certiorari must be granted.

The same is true as to the charge of bank fraud; the government failed to prove all of the elements of the charges. As such, the Eleventh Circuit should not have affirmed said conviction. For DERONCELER'S conviction for bank fraud to have

been upheld, the government had to prove (1) that a scheme existed to obtain monies, funds, or credit in the custody of a federally-insured bank by fraud; (2) that DERONCELER participated in the scheme by means of material false pretenses, representations or promises; and (3) that DERONCELER acted knowingly. *United States v. Goldsmith*, 109 F.3d. 714 (11th Cir. 1997); *United States v. Swearingen*, 858 F.2d 1555 (11th Cir. 1988). Accordingly, there had to be a showing by the government that DERONCELER had the specific intent to commit the crimes as charged. *United States v. De La Mata*, 266 F.3d 1275 (11th Cir. 2001); *see also, United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984).

DERONCELER'S intent to knowingly and willingly defraud a financial institution was not proven beyond a reasonable doubt. In fact, none of the government's witnesses could testify about DERONCELER'S knowledge or intent. There was reasonable doubt as to DERONCELER'S intent, and therefore his conviction should have been reversed and not affirmed by the Eleventh Circuit.

As to DERONCELER'S conviction for aggravated identity theft; for same to have been upheld correctly by the Eleventh Circuit, the government needed to prove that DERONCELER, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person". In reviewing the evidence and testimony, nowhere does the government prove this beyond a reasonable doubt. The government called Aretha Swaby ("Swaby") to testify about her identity being

stolen. (DE:254:4). Swaby testified that she retained Tax Nation to prepare and file her 2013 tax return, she testified that there was a problem and that she had to provide documentation to the IRS showing she was Ms. Swaby. (DE:254:6). Swaby was shown a check from the IRS and driver's licenses with her name on them, but with the incorrect address and wrong pictures and signatures. She further testified that she did not know DERONCELER nor any of the other co-defendants and that she never went to a Kwik Stop convenience store. (DE:254:7-14). In fact, she testified that she did not recognize him and that there was no way that DERONCELER could have gotten her personal information. (DE:254:18). Furthermore, there was no evidence or testimony that would support a finding that DERONCELER knew that Swaby's identity was fraudulent or that said identity was being used without her authority.

The same is true for James Searles and Marilyn Crespo. Searles confirmed that he did not know DERONCELER and he did not recognize DERONCELER sitting in the courtroom. (DE:252:25). Searles also testified that he could not say that DEORNCELER stole his identity. (DE:252:31). Therefore, where is the evidence that DERONCELER stole Searles identity; there was no evidence or testimony that would support a finding that DERONCELER knew that Searles' identity was fraudulent, or that said identity was being used without his authority. The same is true for Crespo. Crespo confirmed that she did not know

DERONCELER and she did not recognize him. (DE:252:38-41). In fact, all of the government's witnesses testified they did not know DERONCELER nor did any of these witnesses testify that it was DERONCELER who used their identity and/or received income as a result of DERONCELER using their identity. (DE:255:100-148). Therefore, based on the testimony presented, the evidence was circumstantial at best. *United States v. Kim*, 435 F.3d 182, 183 (2nd Cir. 2006). Where the government's case is based on circumstantial evidence, "reasonable inferences, and not mere speculation, must support the jury's verdict". *United States v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002) [*quoting, United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994)]. As such, there was no evidence that DERONCELER knew that any of the victim's identity was false, that it was being used without the person's consent or that he had the specific intent to steal anyone's identity. *See generally, United States v. Williams*, 390 F.3d 1319 (11th Cir. 2004); *United States v. Morris*, 20 F.3d 1111 (11th Cir. 1994).

Pursuant to Fed.R.Crim.P. 29(c)(2), "[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal", if there is insufficient evidence to convict. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

In deciding a Rule 29 motion for judgment of acquittal, a District Court must determine whether viewing all the evidence in a light most favorable to the government and drawing all reasonable inferences and credibility choices in favor

of the jury's verdict, a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. The District Court's decision on sufficiency of the evidence in determining a motion for judgment of acquittal is entitled to no deference by the Appellate Court which reviews the denial of a motion for acquittal *de novo*. *United States v. Ellington*, 348 F.3d 984 (11th Cir. 2003). Accordingly, a defendant's motion for judgment of acquittal must be granted if the evidence was insufficient to support the conviction. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

The Fifth and Sixth Amendments guarantee that "criminal convictions [will] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt". *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995). Therefore, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged". *United States v. Gaudin*, 115 S.Ct at 2314. DERONCELER, who was representing himself during the trial did not argue a Rule 29 motion at the end of the government's case. However, DERONCELER filed his Notice of Judgment of Acquittal on September 1, 2015 (DE:222) and his Judgment of Acquittal on September 2, 2015 and then again on September 14, 2015 (DE:225,231) (DE:160). Said written notice and motions were denied by the District Court on October 6, 2015. (DE:260,261,262).

The granting of DERONCELER'S motions should have been granted as to Counts 17 through 20 due to the fact that the government failed to prove beyond a reasonable doubt that all the institutions that were defrauded were federally insured by the Federal Deposit Insurance Corporation pursuant to 12 U.S.C. §1813(c)(2). The evidence was circumstantial at best and did not prove beyond a reasonable doubt this element of the charge against DERONCELER.

The government bears the burden of proving beyond a reasonable doubt all the elements of the crime charged. *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995). No element may be removed from the jury's consideration. *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984). Furthermore, the law requires that a criminal act be performed voluntarily and intentionally and not because of mistake or accident. *United States v. Woodruff*, 296 F.3d 1041 (11th Cir. 2002). At trial, the evidence presented by the government was not sufficient to establish the offense charged in the indictment against WILLAMS, as to the amount of drugs he intended to sell.

Accordingly, the District Court should have granted DERONCELER'S motions. *United States v. Salman*, 378 F.3d 1266 (11th Cir. 2004); *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995). However, the District Court denied DERONCELER'S Motions and the Eleventh Circuit affirmed said denial.

Therefore, in the interest of justice, DERONCELER'S Petition for Writ of Certiorari must be granted.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED DERONCELER'S SENTENCE WHERE THE DISTRICT COURT COMMITTED SENTENCING ERRORS.

DERONCELER argues that the Eleventh Circuit erred in affirming his sentence where the District Court denied his request for a minor role reduction. It is quite evident that DERONCELER'S participation and role in the conspiracy was substantially less than most of the other co-defendants charged in this conspiracy. For relevant conduct to be attributable to DERONCELER, the reason needs to be set out explicitly, not simply assumed. *See, United States v. Bullock*, 454 F.3d 637 (7th Cir. 2006). In the case at hand, DERONCELER should be given a two-level decrease for his minor role due to the fact that he was not an organizer or manager and his actual benefit from the conspiracy was minimal at best. *See, United States v. De Varon*, 175 F.3d 930 (11th Cir. 1999) (*en banc*). As such, DERONCELER should receive a mitigating role reduction in comparison with the other defendants. There is no evidence to support any claim that DERONCELER was an intricate player in the conspiracy and there is no evidence that he did it for financial gain

and/or even knew the extent of the conspiracy. Accordingly, since DERONCELER established that "[he] played a relatively minor role in the conduct for which [he] has already been held accountable – not a minor role in any larger criminal conspiracy", the District Court should have granted his reduction for his minor role in the offense. *United States v. DeVaron*, 175 F.3d 930 at 944; *see also, United States v. Neils*, 156 F.3d 382 (2nd Cir. 1998); *United States v. LaValley*, 999 F.2d 663 (2nd Cir. 1993) (remanding because the District Court appeared not to determine whether defendant was substantially less culpable than codefendants); *United States v. Sostre*, 967 F.2d 728 (1st Cir. 1992).

In addition, DERONCELER should have received a minimal role reduction of two levels if for no other reason than the fact that he was a defendant "'who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered' for the reduction, and '[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative.'" *United States v. Quintero-Leyva*, 2016 WL 2865713 (9th Cir. May 17, 2016).

DERONCELER showed that the District Court did err in denying DERONCELER'S minimal role adjustment and therefore the Eleventh Circuit should not have affirmed it. It is quite evident that DERONCELER'S participation and role in the conspiracy was substantially less than most of the other co-defendants

charged in this conspiracy. *See, United States v. De Varon*, 175 F.3d 930 (11th Cir. 1999) (*en banc*). Consequently, DERONCELER was entitled to a minor role finding and because the denial of said role was denied by the District Court and affirmed by the Eleventh Circuit, DERONCELER'S Petition for Writ of Certiorari must be granted.

DERONCELER also sought a downward departure pursuant to U.S.S.G. §5K2.13 and U.S.S.G. §5H1.3 and a variance based upon diminished capacity and other arguments. The District Court denied DERONCELER'S requests. The Eleventh Circuit affirmed said denial.

U.S.S.G. §5K2.13 provides that "a downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense". A downward departure is not warranted, however, if "(1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110 or 117 of Title 18, United States Code". U.S.S.G. §5K2.13. Downward departures for

diminished capacity have been upheld provided said diminished capacity was not the result of drug abuse. *United States v. Roberts*, 313 F.3d 1050 (8th Cir. 2002); *United States v. Smith*, 289 F.3d 696 (11th Cir. 2002); *United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008). In the case at hand, DERONCELER does not suffer from any alcohol or illicit drug addictions and therefore his diminished capacity is not as a result of said abuse.

U.S.S.G. §5H1.3 provides that "[m]ental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, . . . are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines". In the case at hand, said mental illness and diminished capacity were the reasons for DERONCELER'S actions which led to him being arrested. Because of DERONCELER'S mental illness and diminished capacity, he was more vulnerable to control by others and easily influenced and therefore became involved in the conspiracy.

Although he was evaluated and found to be competent to stand trial (DE:350), his actions throughout the trial were very concerning and questionable even to the District Court: [t]he doctor or doctors concluded that he is competent. I made a finding. I have no reason to believe that finding is not correct. There may be some other issues at foot, but I want to notify counsel for both sides that that's an issue I may take up later." (DE:252:7-8).

It is quite clear that DERONCELER has and will be suffering from diminished capacity. It is also quite clear that the facts in the indictment do not indicate a "need to protect the public because the offense involved actual violence". Therefore, there is no "need to incarcerate the defendant to protect the public" and he has not been convicted of an offense under "chapter 71, 109A, 110 or 117, of Title 18, United States Code". *United States v. Cook*, 53 F.3d 1029, 1031 (9th Cir. 1995).

Because of the above, it is quite clear that DERONCELER does in fact suffer from a mental deficiency and diminished capacity and that said mental deficiency and diminished capacity is present to such an unusual degree that DERONCELER'S request for a downward departure should have been granted. DERONCELER'S diminished capacity was clearly seen throughout the trial by his actions and his comments. Clearly the fact that DERONCELER believed he could represent himself at the trial supports a finding that DERONCELER does suffer from some mental diminished capacity.

The denial of said requests by the District Court and the Eleventh Circuit was not supported by the evidence or testimony and clearly was an abuse of discretion. Although DERONCELER was evaluated and found to be competent to stand trial (DE:350), his actions throughout the trial were very concerning and questionable to the District Court: [t]he doctor or doctors concluded that he is competent. I made a finding. I have no reason to believe that finding is not correct. There may be some

other issues at foot, but I want to notify counsel for both sides that that's an issue I may take up later." (DE:252:7-8). It is quite clear that DERONCELER does suffer from diminished capacity and that said mental deficiency and diminished capacity is present to such an unusual degree that DERONCELER'S request for a downward departure and variance should have been granted.

DERONCELER'S request for a variance comported with the sentencing procedures that have evolved since the Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), and *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007). *See, United States v. Livesay*, 525 F.3d 1081, 1089-90 (11th Cir. 2008) (summarizing current sentencing procedures in Eleventh Circuit); *United States v. Pugh*, 515 F.3d 1179, 1188-91 (11th Cir. 2008). The statutory factors set forth in Section 3553(a) weigh strongly in favor of a sentence substantially below the sentence given. *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007); *see also, United States v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010). The actions of DERONCELER during the trial and at sentencing clearly warranted the granting of DERONCELER'S request for a variance; but the District Court failed to grant same and the Eleventh Circuit affirmed said denial. Said denial was clearly an abuse of discretion. *United States v. Flanders*, 752 F.3d 1317 (11th Cir. 2014); *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007).

Furthermore, it is clear that the facts in the indictment do not indicate a "need to protect the public because the offense involved actual violence". Therefore, there is no "need to incarcerate the defendant to protect the public" and he has not been convicted of an offense under "chapter 71, 109A, 110 or 117, of Title 18, United States Code". *United States v. Cook*, 53 F.3d 1029, 1031 (9th Cir. 1995).

It is quite clear that the strict application of the advisory sentencing guidelines produced a sentence greater than necessary for punishment under Section 3553(a) for DERONCELER. The statutory factors set forth in Section 3553(a) weigh strongly in favor of a sentence outside of and below the advisory sentencing guidelines. Case law is clear that where circumstances warrant, a District Court can impose sentences that vary downward significantly from the advisory guidelines range and the Appellate Court will affirm such sentences as reasonable. *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007); *see also, United States v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010). However, that is not what happened in the case at hand. "This standard requires that there be error, that the error be plain, and that the error affect a substantial right." *United States v. Bennett*, 472 F.3d 825, 831 (11th Cir. 2006). "A substantial right is affected if the appealing party can show that there is a reasonable probability that there would have been a different result had there been no error." *United States v. Bennett*, 472 F.3d at 831-32.

Because of the above, the sentence imposed by the District Court should have been reversed by the Eleventh Circuit as there was a "definite and firm conviction that the District Court committed a clear error of judgment in weighing the §3553(a) factors". *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). DERONCELER'S sentence was unwarranted and it was "greater than necessary". *See, United States v. Livesay*, 525 F.3d 1081, 1090 (11th Cir. 2008). Accordingly, the Eleventh Circuit should have reversed the sentence and because it did not, DERONCELER'S Petition for Writ of Certiorari must be granted.

In considering all of DERONCELER'S arguments, it is clear that DERONCELER has met his burden of demonstrating that the sentence imposed by the District Court was substantially unreasonable and that the sentence should have been vacated. *United States v. Thomas*, 446 F.3d 1348 (11th Cir. 2006); *see also, United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011). *See also, United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009). Because DERONCELER'S sentence was affirmed by the Eleventh Circuit, his Petition for Writ of Certiorari must be granted.

CONCLUSION

This Court should explicitly adopt DERONCELER'S position based upon law and equity. The upholding of his conviction and sentence by the Eleventh Circuit seriously affects the fairness, integrity and public reputation of the judicial proceedings. *See generally, United States v. Rodriguez,* 398 F.3d 1291 (11th Cir.

2005); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). For all of these reasons and in the interest of justice, the Petitioner, BRIAN DERONCELER, prays that this Court will issue a Writ of Certiorari and reconsider the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of August, 2018, to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

By /s/David J. Joffe
DAVID J. JOFFE, ESQUIRE