

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALFREDO AGUIRRE

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Mandamus
To the United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF MANDAMUS

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October 15, 2018

RULINGS BELOW

The Habeas Corpus Petitioner is not authorized to file a second or successive petition. He argues that Nelson v. Colorado, 137 S. Ct.1249 (2017), prevents the use of relevant conduct as to offenses for which he was never convicted, and under Nelson, he is now "presumed innocent".

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should issue a writ of habeas corpus on the ground that Nelson v. Colorado, has been or should be made retroactively applicable to cases on collateral review?
2. Whether the decision in Nelson v. Colorado has overruled [sub silentio] the prior precedent in United States v. Watts.
3. Whether the use of acquitted conduct, or offenses for which there is no final conviction, to enhance a sentence, violates due process.
4. Whether under the Supreme Court decision under Nelson, a criminal defendant's presumption of innocence is restored, when charges are dismissed, acquitted, or uncharged.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Other than Petitioner and the Respondent, the caption of the case contains the names of all the parties to the proceeding before the court of appeals.

The Petitioner is an individual and thus no parent corporation or publicly held corporations are involved in this matter.

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Coffin v. United States, 156 US 432 (1895)

Taylor v. Kentucky, 436 US 478 (1978)

Statutes:

18 U.S.C. § 3661

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Petition for Writ of Mandamus
From the United States Court of Appeals

PETITION FOR WRIT OF MANDAMUS

Petitioner hereby respectfully petitions for a Writ of Mandamus, to review the judgment of the Court of Appeals for the Fifth Circuit in the below referenced matter.

Opinion Below:

Ruling below (5th Cir., No. 18- 50325). The habeas corpus Petitioner is not authorized to file a second or successive Motion. He argues that Nelson v. Colorado, 137 S. Ct. 1249 (April 2017) which held that "Absent a final conviction, one is presumed innocent" establishes that 18 U.S.C. § 3661, and the Sentencing Guidelines "Relevant Conduct" violates the Constitution's guarantee of Due Process, creates a new rule of constitutional law that entitles him to authorization. However, Nelson does apply retroactively because it is not subject to the Teague analysis established in Teague v. Lane, 489 US 288, a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings, nor is it a procedural rule, but instead, a substantive rule, thus making it exempt from application of Teague.

Statement Of The Basis For Jurisdiction:

The judgment of the court of appeals was entered on May 31, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

Rules involved in the Case:

See Appendix.

STATEMENT OF THE CASE

On April 19, 2017, the United States Supreme Court issued an intervening decision in Nelson v. Colorado, 137 S. Ct. 1249, which Petitioner submits overruled, Sub Silentio its prior precedent in United States v. Watts, 519 US 148, or at the very least, called Watts into question.

Notably, the holdings in Nelson, and the plain language stating "Absent a final conviction, one is presumed innocent", simply cannot be reconciled with the prior holdings in Watts, which held that acquitted conduct may be used to enhance a sentence, providing it is proved by the government, by a "proponderance of the evidence"

In light of the holdings in Nelson, even if it did not overrule Watts, Sub Silentio or otherwise, notably, it simply cannot be said, that if one is presumed innocent absent a final conviction, then acquitted offenses cannot be proved by a proponderance, or any standard, absent a "final conviction."

On April 14, 2018, Petitioner filed for permission to the Fifth Circuit Court of Appeals, for leave to file a "second or successive" motion under 28 U.S.C. § 2255, raising the Nelson claim.

On June 19, 2018, the Fifth Circuit Court of Appeals, issued its per curiam order, which not only denied Petitioner any permission to file a second or successive motion, but in fact claimed that the Nelson claim "did not implicate Nelson", because the Nelson decision did not "mention Watts".

STATEMENT OF THE FACTS

The Fifth Circuit Court of Appeals declined to extend the rational of *Nelson v. Colorado*, where the Supreme Court held "Absent a final conviction, one is presumed innocent". Once the presumption of innocence is restored, a person is actually innocent of such offense, unless and until there is a "final conviction".

Watts said that that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a properdiance of the evidence." Notably however, this decision was only in the very narrow context of "Double Jeopardy", and admittedly failed to consider the Due Process aspect of the use of actuitted conduct.

Moreover, the sentencing courts have used so called "relevant conduct" to enhance sentencing ranges, far beyond the actual guideline range. As noted in United States v. Bell (Supra) "Based on a defendant's conduct apart from the conduct encompassed by the offense of conviction - in other words, based on a defendant's uncharged or acquitted conduct - a judge may impose a sentence higher than the sentence the judge would have imposed, absent consideration of that uncharged or acquitted conduct." id.

Further, sentencing courts have used actual offenses, for which a defendant has never been convicted, and is presumed innocent, as "relevant conduct", based merely on a properdence standard, which under *Nelson*, clearly violates Due Process.

Although Petitioner never even suggested that the Supreme Court directly stated that Watts has been overruled, however the reasoning and language of Nelson has unquestionably resulted in overruling Watts [Sub Silentio]. Usually the Supreme Court does not overrule prior cases sub silentio, however given the decision in Nelson, it cannot be contested that Watts has been overruled by necessary implication, silently, sub silentio.

While the Court of Appeals for the Fifth Circuit relied solely and exclusively on the fact that Nelson does not mention Watts, as the basis to deny Petitioner. Notably when an earlier case holds for example: That [a] homeowner has no obligation to remove the snow in front of his house. A later case ruled upon by a higher court then decides that the homeowner does have that obligation. The later case does not mention or specifically reference the earlier case. By necessary implication the later case overruled Sub Silentio, the prior case. See Blacks law dictionary, Ninth Ed. 2012. See also Barron's law dictionary, third edition.

Unquestionably, Nelson does not have to "mention" Watts, for it to overrule sub silentio, the prior holdings in Watts. The Fifth Circuit's reliance on this lone and single claim, does not create a basis for the Fifth Circuit to either deny Petitioner, or to impose monetary sanctions for simply seeking permission under § 2244.

GROUND FOR GRANTING THE WRIT

The question here is: Based on a defendant's offense conduct, separate, and apart from the conduct encompassed by the offense of conviction - in other words, a defendant's uncharged or acquitted offenses. A judge may impose a sentence higher than the sentence the judge would have imposed absent consideration of that uncharged or acquitted offense. See United States v. Watts, 519 US 148.

The overarching concern about the use of acquitted conduct to enhance a sentence is that it clearly violates the Sixth Amendment and Due Process Clause. Of course, resolving that concern as a constitutional matter would likely require a significant change in criminal sentencing jurisprudence, one that the Supreme Court has already embraced in cases such as Blakely v. Washington, 542 US 296.

Under Blakely, a judge could not rely on acquitted conduct, which constitute elements of acquitted offenses, to increase a sentence, even if the judge found the conduct proved by a preponderance of the evidence standard. Likewise, a judge could not rely on dismissed offenses or uncharged offenses, proved by a preponderance of the evidence. "Allowing judges to rely on acquitted or uncharged offenses to impose higher sentences than otherwise would impose, seems a dubious infringement of the rights to due process and to a jury trial." United States v. Bell, 808 F. 3d 926 (DC Cir. 2015). It is hard to describe Bell's sentence as anything other than a "perverse result" of United States v. Watts, 519 US 148.

The problem here, is not only the panel opinion, which completely failed and refused to apply the reasoning of Nelson, or even to address the overruling [Sub Silentio] of Watts. But also the Supreme Court justices Scalia, Thomas and Ginsburg that the "incursion on the Sixth Amendment has gone long enough,"

First, allowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct, or even dismissed and uncharged offenses, is at war with the fundamental purpose of the Sixth Amendment's jury trial guarantee. The Constitution affords defendants the "right to a speedy and public trial, by an impartial jury." U.S. Constitution, Amendment VI. That right is "designed to guard against a spirit of oppression and tyranny on the part of rulers[.]" United States v. Guardin. 515 US 506.

Second, while the Panel understandably rows with the tide of past decisions, nevertheless the panel failed and refused to resolve the issue of whether the Holdings in Nelson have overruled [Sub Silentio] the prior holdings in Watts. but instead merely concluded that "Nelson has no bearing on the case," without reaching the necessary challenge to Watts, there is no method or means by which the Panel could make such determinations.

While Petitioner understands the panel's desire to avoid the jurisdictional and Constitutional impact Nelson has potentially caused, nevertheless, the Panel cannot simply ignore Constitutional decisions and Supreme Court authority.

Third, the Constitution affords the prosecution one shot at convicting a defendant of charged conduct. But counting acquitted, dismissed, and uncharged offenses at sentencing gives the

government a second bite of the apple. Sentencing has become the forum in which the prosecutor asks the judge to multiply a defendant's sentence many time over, based on offenses for which the defendant was just acquitted. See United States v. Canania, 532 F. 3d 764 (8th Cir. 2008) (Bright, J, concurring) ("We have a sentencing regime that allows the Government to try its case, not once but twice. The first time before a jury; the second time before a judge."). Clearly such a regime violates both the Sixth Amendment and the Due Process Clause.

Therefore, Petitioner respectfully requests this Court GRANT the Writ and determine these crucial questions of monumental importance to both the interests of justice, but also to the public interest.

I.

Whether the Court should issue a Writ of Certiorari to the Fifth Circuit Court of Appeals, Instructing that Court to Authorize a Second or Successive Motion under 28 U.S.C. § 2255

The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; It also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of an arrest, indictment, or from other matters not introduced as proof at trial.

Taylor v. Kentucky, 436 US 478 (1978).

Without question, the presumption of innocence plays an important role in our criminal justice system. "The presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 US 432 (1895).

On April 19, 2017, This Court issued its intervening decision in Nelson v. Colorado, which Petitioner submits, overruled sub silentio, the Court's per curiam decision in United states v. Watts, 519 US 148 (1997). As the Court observed in Nelson, "Once...the presumption of their innocence was restored," the government "may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions," including costs, fees, and restitution. *id* at 1255-56. Thus, if the decision in Nelson has not overruled sub silentio the prior holdings in Watts, certainly Nelson has called Watts in to question.

The reasoning in Nelson, particularly the holding that "absent a final conviction, one is presumed innocent," unquestionably applies where liberty interests, as opposed to property interest is at stake. To be sure, the Court's holding in Nelson did not rest on the fact that the defendants there, were convicted of "no crime", i.e., that they had been acquitted of [ALL] their counts of conviction. Instead, the Court held "Absent conviction of a crime, one is presumed innocent [OF THAT OFFENSE]" id. (emphasis added). Because, "To hold otherwise, we hold, offends the Fourteenth Amendment." id.

Further indicating that Nelson has overruled Watts, or at least called it into question, is the plain language in the Nelson decision, which is impossible to reconcile with the prior decision in Watts. Notably, the tension between Nelson and Watts is the presumption of innocence.

The Watts Court held that an acquittal is irrelevant for purposes of sentencing; because an acquittal is not a finding of innocence. In stark contrast, the Nelson court held that an acquittal is absolutely relevant because of the reversion to a presumption of innocence. So relevant in fact, as to preclude any penalty being sustained subsequent to the acquittal.

If an acquittal precludes a defendant from being financially penalized for certain offenses, then how can an acquittal still allow a defendant to lose his liberty for such offenses? Particularly for offenses for which he was never convicted.

Petitioner submits the presumption of innocence has far reaching application, as the reasoning of Nelson applies not only

to acquitted offenses, but also to dismissed offenses, and even to uncharged offenses. Unquestionably the holdings in Nelson greatly circumscribes, if not eliminates the use of relevant conduct for offenses for which there is no final conviction, and to which the presumption of innocence is restored absent such final conviction.

Importantly, the DC Circuit has recently recognized the same concerns regarding the use of relevant conduct and the proponderance standard to enhance sentences, for offenses which a defendant was never convicted. In United States v. Bell, 808 F. 3d 926 (DC Cir. 2015). ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement on the rights of due process.") id at 928. The Circuit Court in Bell also noted "While I am deeply concerned about the use of acquitted conduct... only the Supreme Court can resolve the contradictions in the current state of the law...to take up this important, frequently recurring, and troubling contradiction in sentencing law." id.

Moreover, United States Senator Orin Hatch recently stated that the use of relevant conduct in sentencing is "an outrage". noting that prisoners are serving extraordinary long sentences, due to enhancements for offenses, for which they were never convicted. Notably, Senator Hatch further stated that he intends to introduce legislation which would prevent the use of relevant conduct, for offenses for which a defendant has never been convicted, and presumed innocent.

Notably however, the Fifth Circuit Court of Appeals declined to extend the rational of Nelson to the Petitioner. In the face of overwhelming and compelling evidence that Petitioner was never convicted, and presumed innocent of the offenses, to which he was sentenced, the Court of Appeals claimed that the authority of the Supreme Court and the holdings in Nelson were "frivolous", and inapplicable to the use of relevant conduct.

In the same arrogant disregard for Supreme Court authority in Johnson v. United States, the Fifth Circuit Court of Appeals simply refuses to apply the law, because it apparently disagrees with the decision. (See also Rosales-Merilis v. United States).

Although the Court clarified the Johnson decision in Welch, and provided clear instruction to the lower courts, nevertheless the conscience of the Fifth Circuit is not easily shocked, and it continues and persists in resisting Supreme Court authority.

Therefore, it can only be construed that the Fifth Circuit simply intends to ignore the authority of the Supreme Court, and avoid the application of Nelson, until it is instructed to do otherwise.

In light of the public importance and constitutional significance of the Nelson Decision, together with the disregard by the Circuit Courts, similar to the acceptance of Johnson, it appears that Petitioner has no alternative but to seek to enforce Supreme Court authority through Mandamus. Particularly in light of the restrictions placed upon Petitioner by the Circuit Court.

Therefore, Petitioner respectfully requests the Court to GRANT the Petition, and mandate the lower court to apply the law.

II.

WHETHER THE USE OF RELEVANT CONDUCT
AS TO OFFENSES FOR WHICH A DEFENDANT
HAS NEVER BEEN CONVICTED, AND IS PRESUMED INNOCENT
VIOLATES DUE PROCESS

Unquestionably, the Supreme Court decision in Nelson, has overruled [Sub Silentio] the Court's per curiam decision in Watts.. At the very least, the Nelson decision has called Watts into question, because it is simply not possible to reconcile the reasoning of Nelson with that of Watts.

Indeed, numerous commentators have stated "There is every reason to believe that should the Court ever reconsider Watts directly, it will not hesitate to overrule it."

As the Court in Nelson observed, "[t]he vulnerability of the State's argument is that it can keep the amount exacted so long as it prevailed in the court in the first instance, is more apparent still if we assume a case in which the sole penalty is a fine." Nelson, 137 S. Ct. at 1256. Because "once the presumption of their innocence was restored," a State may not presume a person adjudged not guilty of such crime, but nonetheless guilty enough to impose monetary exactions, restitutions, or other punishment. *Id* at 1255-56.

The same surely holds true where liberty, as opposed to property is at stake. To be sure, the Court's holding in Nelson did not rest on the fact that a defendant was convicted of "no crime", i.e. that they had been acquitted of all their counts of conviction. (See Nelson, 137 S. Ct. at 1250). Thus, the reasoning of Nelson is more far reaching than just acquitted conduct. The Nelson Court has stated "for once those convictions were erased [for any reason] the presumption of innocence was restored. *id.*

CURRENT PRACTICE

Although United States v. Watts presented a "very narrow question regarding the interaction of the guidelines with the Double Jeopardy clause, and did not even have the benefits of full briefing or oral arguments." And that the Supreme Court has criticized its own ruling in Watts, noting "it is unsurprising that we failed to consider fully," the questions of Due Process, nevertheless, Sentencing Courts have misinterpreted Watts to provide no limits on what may be considered as "relevant conduct" for sentencing purposes, despite the Constitutional limitations.

For example: Assuming a defendant has been charged with two counts relating to fraud. Count 1 pertains to Conspiracy and Count 2 pertains to the substantive offense (the object of the conspiracy), in this instance "wire fraud". The Defendant goes to trial and is convicted of Count 1 but acquitted of Count 2. Under the current practice as a result of Watts, as long as the Defendant is convicted (by plea or trial), the defendant is held accountable for the conduct underlying Count 2, in this instance "loss amounts". So despite being convicted only of Count 1 (the mere agreement), the conduct underlying Count 2 is still considered for purposes of enhancing the Defendant's sentence.

Notably however, the intervening Supreme Court decision in Nelson, precludes, prohibits, and forecloses any such practice.

Because, "Absent Conviction of a crime, one is presumed innocent."

Thus, the facts that may violate due process, as announced in Nelson--may not be included in that otherwise broad universe of facts that may be considered for purposes of sentence enhancement.

NELSON PRECLUDES PUNISHMENT

I. Acquitted Conduct:

Assume that a defendant has been charged with two counts. Count 1 for Conspiracy, and Count 2 for Wire fraud. The Defendant goes to trial and is convicted of Count 1 and Count 2. Now, under the intervening decision in Nelson, if the Defendant is acquitted by any means of Count 2 then he may not be penalized, in any way, for the conduct underlying Count 2, i.e., the substantive count. The relevant conduct may not be used to enhance the Defendant's sentence. Why? Because, per Nelson, the Defendant is now "presumed innocent" of the conduct underlying Count 2, regardless of the means of acquittal. The presumption of innocence is restored.

II. Dismissed Conduct:

The reasoning of Nelson, however, clearly reaches farther than just precluding acquitted conduct. Assume that a defendant is charged with two counts pertaining to fraud. Count 1 pertains to conspiracy and Count 2 pertains to wire fraud. Now, the Defendant decides to plead guilty to Count 1 (conspiracy) in exchange for the Government dismissing Count 2. Under the current practice, the sentencing court may consider as relevant conduct, the conduct underlying Count 2, absent a conviction. But, under Nelson, the presumption of innocence is restored upon dismissal of Count 2, and the Defendant must be presumed innocent of that conduct. i.e. the substantive count, and any conduct underlying the substantive count. Because, "Absent a conviction...one is presumed innocent."

After all, the presumption is only overcome by a conviction that becomes final. Accordingly the defendant may not be punished for conduct, for which he is presumed innocent. Why? Because, per Nelson, if the Defendant is presumed innocent of acquitted conduct, then certainly that presumption remains for dismissed conduct. Particularly when the Government itself, dismisses Counts, for which there would not even be an indictment, much less a final conviction.

Because the presumption of innocence is restored upon dismissal, the defendant is presumed innocent. As the presumption of innocence can only be overcome by a final conviction, a defendant cannot be punished, or held criminally liable for dismissed counts.

III. Uncharged Conduct:

Perhaps the most startling result of the holdings in Nelson, is that of uncharged conduct. Assume again, that a defendant is charged with only one count pertaining to conspiracy. The Government for whatever reason, decides to not charge the defendant with the substantive count, (the object of the conspiracy). Now the Defendant decides to plead guilty to the single count indictment. As the presumption of innocence can only be overcome by a final conviction, the defendant cannot be held criminally liable for the uncharged fraud. Otherwise, the government could easily circumvent Nelson by simply not charging a defendant with conduct it subsequently will use to penalize the defendant at sentencing.

Likewise, the government could simply circumvent Nelson, and Due Process, while avoiding its burden of proof, and dismiss, or

never even charge certain conduct, it will subsequently use to penalize or enhance the Defendant at sentencing.

Whether loss amounts, or drug quantity, or any other conduct which is dismissed, or never charged, under Nelson, the Defendant is presumed innocent of such conduct. "Absent a conviction... one is presumed innocent."

In summary, if a defendant is presumed innocent upon acquittal, then it necessarily follows that he is innocent of charges for which he was never convicted, regardless of whether the "non-conviction" results from a dismissal or a failure to charge outright. The presumption of innocence is restored. Nelson, 137 S. Ct. at 1249.

The Constitutional limitations imposed on relevant conduct by Nelson does not mean that a defendant may only be sentenced based exclusively on facts he either admitted to pursuant to a plea of guilty, or were found by a jury beyond a reasonable doubt.

Relevant conduct may still be applicable in certain cases. Notably however, in light of the Supreme Court intervening decision in Nelson, relevant conduct is now limited to the facts arising out of any count of conviction, and may no longer include conduct for which a defendant is presumed innocent.

Because, to hold otherwise, would not only be in conflict with the Supreme Court decision in Nelson, but also violates Due Process. "Absent a conviction...one is presumed innocent."

It matters not the form of the acquittal, be it by a jury; or dismissal, or otherwise. An acquittal is an acquittal is an acquittal. Because Nelson holds that the presumption of innocence is restored; and the only method or means to overcome the

Constitutional presumption of innocence, is by a final conviction, then Petitioner is "actually innocent" of the conduct used to enhance his sentence. Nothing more need be said.

And this is ultimately where the Supreme Court in Watts, admittedly got it wrong: Innocence is not a matter of degree; it is an all or nothing proposition. Or, as the Court held in Nelson "once the presumption of innocence [i]s restored," a person is actually innocent of such Offense, Count or Conduct. And just as it does not matter the mode of acquittal, so too does it not matter the sanction. The reasoning of Nelson is just as applicable to deprivation of liberty as it is to a financial sanction. If the state may not take a dollar, it certainly may not take a day.

CONCLUSION

Under the Supreme Court intervening decision in Nelson, an acquittal precludes a defendant from being financially penalized for certain conduct. Notably, an acquittal cannot still allow a defendant to lose his liberty for such conduct.

While the Watts decision was correct as it relates to the interaction of the Guidelines with the Double Jeopardy clause, the problem is that the Court in Watts admittedly overlooked the Due Process limitations on relevant conduct because the presumption of innocence is restored by either acquittal or dismissal. Something the Court has now clarified and amplified in Nelson.

The reasoning of Nelson thus compels the conclusion that Watts has been effectively overruled. Acquitted conduct can no longer be used to penalize, or increase a penalty, because an acquittal, by [any means], restores the presumption of actual innocence. And no one may be penalized for being presumed innocent.

This intervening change in the law, has far reaching application as the reasoning of Nelson applies not only to acquitted conduct, but to dismissed and even uncharged conduct. This in turn greatly circumscribes, but does not eliminate the use of relevant conduct at sentencing in terms of what may be constitutionally considered by sentencing courts.

The principle of Nelson thus is this: Only facts arising out of a final conviction, which may not also be construed as elements of acquitted, dismissed or unindicted charges, may be considered at sentencing. And this is not inconsistent with 18 U.S.C. § 3661, which provides that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." That statute, like all statutes, must be read within the context of the Constitution of the United States.

Thus, facts that may violate due process, as announced in Nelson, may not be included in that otherwise broad language of the statute.

As the Court has recognized for well over a century, "[t]he principle that there is a presumption of innocence in favor

of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 US 432, 453 (1895).

Moreover, in Watts, the Supreme Court stated that in the context of Double Jeopardy, certain conduct may be considered by sentencing courts, "so long as that conduct has been proved by the government by a properdane of evidence." Under Nelson however, such conduct can never be proved, by any standard, absent a conviction. "Absent a conviction...one is presumed innocent." id. Further compelling the conclusion that Watts has been overruled, and placing significant Constitutional limitations on the use of acquitted, dismissed and unindicted conduct.

Relevant conduct, as a result of Watts, has performed an end run around the Constitution, and the most elementary presumption of innocence, which has resulted in enhanced sentences that violate Due Process.

Whether Nelson signals the end of Relevant Conduct is not dispositive of the issues presented here. The Supreme Court has spoken. The Constitutional limitations placed on what may be considered as relevant conduct under Nelson, can only be overcome by a final conviction. Absent a conviction, one is presumed innocent. Nothing more need be said.

As this Court noted in Nelson v. Colorado, "Absent a final conviction, one is presumed innocent". Petitioner has never been convicted, and is presumed innocent of the offenses, to which he was sentenced.

Therefore, Petitioner respectfully requests that this Honorable Court issue the Writ of Mandamus.

Respectfully submitted on this 15th day of October 2018.

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