No.

in the

Supreme Court

of the

United States

Term,

DAVID MCSHAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Where the government's case against a defendant is extremely weak, does the prosecutor's persistent misconduct during trial by making improper insinuations and assertions which prejudiced the cause of the accused, falsely creating the appearance to the jury that the prosecution's case was strong including assertions of items of evidence which did not exist, deny a defendant due process of law and require a new trial pursuant to Berger v. United States, 295 U.S. 78 (1935)?

II.

Where Petitioner was charged with conspiracy to possess with intent to distribute one kilogram of heroin, but was convicted of conspiracy to possess less than 100 grams of heroin, such a verdict was an acquittal of attribution to Petitioner of more than 100 grams of heroin. Therefore, computation of Petitioner's sentence by attribution of more than 100 grams of heroin denied Petitioner's right to the presumption of innocence per Nelson v. Colorado, ____ U.S. ____, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017).

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The Petitioner, David McShan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on February 4, 2019.

OPINION BELOW

The Sixth Circuit's opinion in this matter was not published and is attached hereto in Appendix 1. The Sixth Circuit's order denying en banc review was unpublished and is attached as Appendix 2. The Sixth Circuit's mandate was issued February 4, 2019, and is attached as Appendix 3.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on February 4, 2019. This petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. '1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

File NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 18a0602n.06

Nos. 17-3935/4075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 30, 2018
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID MCSHAN (17-3935), and FREDERICK ALLEN MCSHAN (17-4075), Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: MERRITT, COOK, and LARSEN, Circuit Judges.

LARSEN, Circuit Judge. A jury convicted Frederick McShan and his brother David McShan of possession with intent to distribute heroin, as well as conspiracy to do the same. The jury also convicted Frederick of money laundering. In Frederick's case, the district court misspoke when reading aloud the jury's verdict, mistakenly omitting a zero from the jury's written determination that Frederick's crime had involved "1000 grams or more of heroin." Frederick appeals, arguing that the district court lacked authority to re-poll the jury to correct this error, after it had been "discharged," but before the jurors had dispersed. He also appeals the district court's failure to grant his motion to sever. David appeals on grounds that the prosecutor's opening remarks, and various statements during trial, amounted to prosecutorial misconduct, and that the district court erred by using acquitted conduct to calculate his sentence. Having considered the arguments raised by the parties, we AFFIRM the judgment of the district court.

I.

A grand jury indicted Frederick and David McShan along with five co-defendants on charges arising from their participation in a heroin-trafficking organization. Using surveillance, GPS tracking, and a confidential informant, law enforcement officials identified Frederick as the leader of the organization, which operated in Steubenville, Ohio, and obtained its supply from a contact in Chicago, Illinois. David, along with others, distributed heroin and collected proceeds on Frederick's behalf. For these deeds, Frederick and David faced several charges, including conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. §§ 841 and 846 and possession with intent to distribute heroin in violation of 21 U.S.C. § 841. Frederick was also charged with eleven additional counts of possession with intent to distribute heroin in violation of 21 U.S.C. § 841 and one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956.

Following a five-day trial, the jury found Frederick and David guilty of all charges. The district court announced the verdicts in open court, specifically stating, "On Special Verdict Form No. 1, having found . . . Frederick . . . guilty of the charge of conspiring to possess with intent to distribute heroin, We, the Jury, find, check one, *100 grams or more* of heroin." (Emphasis added.) As to Special Verdict Form 2A, the court recited, "[H]aving found . . . David . . . guilty of the charge of conspiring to distribute heroin, We, the Jury, do unanimously find beyond a reasonable doubt the conspiracy involved a quantity of, and the box that is marked is *less than 100 grams* of heroin." (Emphasis added.) The district court then proceeded to poll the jury. Thereafter, the jury was excused (4:50 p.m.) and asked to wait in the jury room, so the judge could personally thank the jurors for their service. The court had been in recess for 14 minutes (4:51 p.m. to 5:05 p.m.) when the jury was asked to return to the courtroom. Once the jury was reassembled in the

courtroom, the district judge explained that the "jurors were taken directly from the courtroom to the adjoining jury room." And when the judge addressed the jurors, "an inquiry was made regarding the amount set forth in the verdict—Special Verdict Form No. 1A," which pertained to Frederick. The district judge then acknowledged: "It appears that I have misread in open court what is actually very clear on the verdict form filled in by the jury and I want to reread this into the record." The judge then reread the special verdict forms for David and Frederick, according to which the jury had found David guilty of conspiring to possess with intent to distribute *less than* 100 grams of heroin (no change) and had found Frederick guilty of conspiring to possess with intent to distribute *1000 grams or more* of heroin, not 100 grams or more, as the judge had previously, but mistakenly, read. The court then re-polled the jury, which gave its assent. David objected to the re-polling while Frederick, who now challenges the jury re-polling, simply asked the court to clarify that defense counsel had not been present when the judge spoke with the jury in the jury room.

Frederick was ultimately sentenced to concurrent sentences of twenty-four years for conspiracy to possess with intent to distribute heroin, twenty years for the remaining counts, and five years of supervised release for conspiracy to possess with intent to distribute heroin and the remaining counts. David was sentenced to concurrent sentences of seventy-four months in prison and eight years of supervised release. Both Frederick and David appeal.

II. Frederick McShan's Appeal

Frederick makes two claims on appeal: that the district court lacked authority to re-poll the jury regarding the verdict and that the district court abused its discretion by not severing his trial from David's.

A. Re-polling the Jury

Frederick argues that the district court abused its discretion when it re-polled the jury after discovering its mistake in announcing the jury's verdict (reading 100 grams instead of 1000 grams of heroin). We disagree.

Federal Rule of Criminal Procedure 31(d) speaks to the polling of a criminal jury. It states:

> After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

Although Frederick's appellate brief asserts that the trial court violated this rule, he makes no real argument to that effect. As we see it, the rule does not quite speak to the situation presented here. Rule 31(d) surely governs when a court may or must poll the jury the first time; but we see nothing in the rule that addresses when a judge may poll a jury a second time, to correct an error in the first. Therefore, any authority the district court had must have come from its inherent powers.

The parties do not dispute that, generally speaking, federal district courts have the inherent authority to re-poll a jury to correct an error in reading the verdict. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1891–93 (2016). They do dispute whether the district court's exercise of that power was appropriate in this case.

The common law rule was that once the judge discharged a jury, the jury could not be re-called to amend its verdict. *Dietz*, 136 S. Ct. at 1897 (Thomas, J., dissenting) (describing the common law rule). But, as Frederick acknowledges, it was "well-settled that a trial court merely using the word 'discharged' d[id] not negate the court's power to reconvene a jury." Appellant Frederick McShan Br. at 9 (citing *United States v. Rojas*, 617 F.3d 669 (2d Cir. 2010) and *Summers v. United States*, 11 F.2d 583 (4th Cir. 1926)). As the rule was described in *Summers*:

> [A jury] may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within [the] control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here, the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any other business.

Summers, 11 F.2d at 586.

In *Dietz*, the Supreme Court rejected this test for civil cases, adopting instead a multi-factored "inquiry focused on potential prejudice." *Dietz*, 136 S. Ct. at 1896. But *Dietz* cautioned that its "recognition . . . of a court's inherent power to recall a jury is limited to civil cases only. Given additional concerns in criminal cases, such as attachment of the double jeopardy bar, we do not address here whether it would be appropriate to recall a jury after discharge in a criminal case." *Id.* at 1895. It is thus unclear whether *Dietz* meant to leave in place the common law rule in criminal cases, or whether, absent double-jeopardy concerns,[1] *Dietz*'s potential prejudice rule should apply. Under either test, we have no difficulty concluding that there was no error here.

In *Rojas*, the Second Circuit adopted the common law rule set forth in *Summers*. *Rojas*, 617 F.3d at 677 (quoting *Summers*, 11 F.2d at 586). Applying this rule, the court in *Rojas* found it "significant" that, while the jury in that case "had technically been declared 'discharged' by the court, it had not dispersed. The jurors were therefore not exposed to 'outside factors,' which might 'render[] the reliability of any poll on recall problematic.'" *Rojas*, 617 F.3d at 678 (quoting *United States v. Marinari*, 32 F.3d 1209, 1213 (7th Cir. 1994)). The court held that, under those

[1] Frederick makes no meaningful double jeopardy argument. Although he fleetingly asserts that the trial court's re-polling of the jury violated his right against double jeopardy, he does nothing to develop the argument. He merely declares, without argument or citation, "that double jeopardy does in fact attach and the defendant-appellant can only be subjected to the penalties which he faced at the time of the original polling of the jury." This will not do. Under this court's caselaw, "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation" are forfeited. *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996).

circumstances, the jury "'retain[ed] its function[],' and that it was proper to return it to the courtroom for a re-reading of the verdict form and for a re-polling." *Rojas*, 617 F.3d at 678 (internal citation omitted and alteration in original).

This case is *Rojas*'s twin. In *Rojas*, a courtroom deputy, reading aloud the jury's written verdict, mistakenly omitted the word "base" and instead stated that the jury had found the defendant guilty of a conspiracy involving distribution of "five grams or more of a mixture and substance containing a detectable amount of *cocaine*." *Id.* at 673. The jury was then polled, discharged, and returned to the deliberation room to await the thanks of the court. *Id.* While the jury waited, counsel alerted the judge to the mistake. *Id.* Over defense counsel's objection, the jurors were reassembled, provided with an explanation of the error, re-read the verdict form, and re-polled. *Id.* The jurors gave their assent to the correct reading of the verdict. *Id.*

The Second Circuit found no error:

> [N]otwithstanding the fact that the jury assented to the improperly read verdict form when polled for the first time, the initial misreading of the written verdict form in no way calls into doubt our conclusion that the actual verdict reached by the jury is reflected in the written form. Nor does the recitation error leave us with any uncertainty that the written verdict form reflects an uncoerced and unanimous jury verdict.

Id. at 677. We reach the same conclusion.

As in *Rojas*, this case involves a misstatement of the verdict, caught after the judge pronounced the jury "discharged" but before the jurors had left the deliberation room. The judge explained, on the record, that the jurors "were taken directly from the courtroom to the adjoining jury room." The delay between discharge and recall—fourteen minutes here, six minutes in *Rojas*—was brief. And there is no evidence that the jurors left the deliberation room or had the opportunity to "mingle" with or speak to anyone, other than the judge, after being discharged. Indeed, the judge explained at sidebar that the jurors "ha[d]n't talked to anybody but [him]."

When the jury returned, it was not to deliberate anew, but merely to correct an error in the court's recitation of their written verdict. We have little trouble concluding that this jury "remain[ed] an undispersed unit, within [the] control of the court." *Summers*, 11 F.2d at 586. Applying the common law rule, the district court did not err in recalling the jurors to correct an inadvertent error in the recitation of the jury's written verdict.

The parties focus their attention on *Dietz*. Applying the factors found relevant in that case leads to the same result. There is no evidence that "any juror [was] directly tainted." *Dietz*, 136 S. Ct. at 1894. As mentioned above, only fourteen minutes separated "discharge and recall."[2] *Id.* There is no evidence that the jurors "spoke[] to anyone about the case after the discharge," other than the judge. *Id.* Nor is there any indication of an emotional reaction to the verdict by the defendants or those in the gallery; and the jurors here never made it to the "corridors" to witness any other reaction. *Id.* Finally, nothing on the record reflects any access to "smartphones or the internet." *Id.* at 1895.

Frederick suggests, however, that while at common law the court's control was considered the guardian against improper jury influence, here it might have been the problem. He implies, without substantiation, that the district judge might have exerted influence over the jurors in an effort to get them to change their verdict. The allegation is untenable. We draw once again on *Rojas*. To believe, as Frederick would have us do, that during the first poll:

> the jury agreed with the [court's] mistaken reading of the verdict, rather than the jury's written verdict, requires us to assume that the jurors unanimously changed their minds in a split second . . . . It is unreasonable to expect the jurors to have corrected the [court's] misreading of their verdict and to conclude that by their failure to do so [they had] assented to the misread verdict.

[2] Although we do not know how long the jury had been discharged in *Dietz* (the court described the interval as "a few minutes"), we suspect the interval was longer than here because in *Dietz*, "one juror may have left the courthouse, apparently to retrieve a hotel receipt." *Dietz*, 136 S. Ct. at 1895.

Rojas, 617 F.3d at 679 (last alteration in original) (quoting *United States v. Boone*, 951 F.2d 1526, 1532 (9th Cir. 1991)). "While it is true that a juror has a right, 'when polled, to dissent from a verdict to which he [or she] has agreed in the jury room,' there is no suggestion that any one of the jurors in fact dissented from the written verdict form." *Id.* (internal citation omitted). But Frederick would have us believe not only this, but that, having instantly and unanimously decided to renounce their written verdict in the courtroom, the jurors again quickly, unanimously, and without remark did a second about-face, in response to some unsubstantiated pressure or information delivered in the jury room. The narrative strains credulity.

We do not presume that a jury is tainted. *See United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984) ("[T]he burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed."). *See also Smith v. Phillips*, 455 U.S. 209, 215–16 (1982). Much less will we casually assume that the district judge supplied some unspecified taint. Nothing in *Dietz* changed that rule. *See Dietz*, 136 S. Ct. at 1895 (evaluating potential for prejudice based on the record of the proceedings). Frederick's counsel did not ask, when the jurors were re-polled, that they be questioned about any communications or other outside influence in the jury room and nothing on the record supports the claim. Under these circumstances, we have no grounds to find real or potential prejudice.

Here a district judge misspoke when reading aloud what was clearly written on the jury form. As the Supreme Court noted in *Dietz*, "[a]ll judges make mistakes." *Id.* at 1896. This judge made reasonable efforts to correct that mistake and Frederick can point to no prejudice therefrom. We find no error in recalling the jury here, whether under the common law or under the test set out in *Dietz*.

B. Denial of Motion to Sever

Frederick next challenges the district court's decision not to sever his trial from David's. "The decision to deny a motion for severance and separate trial rests within the wide discretion of the district court and will not be reversed absent an abuse of discretion." *United States v. Long*, 190 F.3d 471, 476 (6th Cir. 1999). The federal system generally favors joint trials for defendants who are indicted together to promote efficiency and avoid "the scandal and inequity of inconsistent verdicts." *Zafiro v. United States*, 506 U.S. 534, 537 (1993). Defendants are not entitled to severance simply because they might have a better chance at acquittal if tried separately. *Id.* at 540. Trials properly joined under Fed. R. Crim. P. 8(b), should be severed under Fed. R. Crim. P. 14 "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539.

Frederick's treatment of this claim in his opening brief is so perfunctory that we might consider it forfeited. *See United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) (explaining that an appellant forfeits "issues not raised and argued in its initial brief on appeal" and "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation" (citations omitted)). After reciting the language of Fed. R. Crim. P. 8(b) and Fed. R. Crim. P. 14(a), Frederick states only that, when the trial began, "counsel for co-defendant, David McShan, immediately began to [sic] only logical defense on behalf of this client and that was pointing the finger of guilt at [Frederick]. Once this defense was realized by [Frederick]'s trial counsel, a motion to sever was made." Frederick has failed to develop any meaningful argument, let alone one that shows "compelling, specific, and actual prejudice from [the] court's refusal to

grant the motion to sever." *United States v. Driver*, 535 F.3d 424, 427 (6th Cir. 2008) (alteration in original) (quoting *United States v. Saadey*, 393 F.3d 669, 678 (6th Cir. 2005)).

But even if this argument were not considered forfeited, it would fail on the merits. Before voir dire, counsel for David and Frederick were "satisfied that no antagonistic approach would be taken by [opposing] counsel." According to his severance motion filed in the trial court, Frederick realized during voir dire, that David was pursuing an antagonistic defense. Frederick complained, in particular, that David's having told the jury that David was in custody would cause the jury to believe that Frederick, his allegedly more culpable coconspirator, was also in custody. This, Frederick claimed, deprived him of due process and the presumption of innocence. Frederick also argued that he was prejudiced by David's counsel having made remarks that portrayed the McShans as a crime family.

But following voir dire, the district court instructed the jury that "the fact that [David] may be in custody is not to be considered when you decide whether or not the government has proven the case beyond a reasonable doubt . . . . And, likewise, the length of time has have [sic] no bearing on how you decide this case. Instead, it will be from the facts presented at the trial." When asked whether he would like a further limiting instruction, Frederick's counsel declined, on the ground that "the limiting instruction that came after voir dire was satisfactory to the defense, and [he would] prefer not to remind the jury about it again."

Later, although the district court acknowledged, early in the trial, that "a piece of the defense . . . is antagonistic," the court determined that it was not sufficiently so to warrant severance. And when Frederick renewed this same motion at the close of evidence, he provided no basis to establish that this joint trial subjected him to any legally cognizable prejudice. *See Zafiro*, 506 U.S. at 541. The district court again instructed the jury before deliberation that the

jurors were to "separately consider the evidence against each defendant," and that their "decision on any one defendant or any one charge . . . should not influence [their] decision on any other defendant or any other charge . . . ." We conclude that the district court did not abuse its discretion in denying Frederick's motion to sever.

III. David McShan's Appeal

David argues that the prosecutor engaged in misconduct by making improper statements in his opening remarks and improper "insinuations and assertions" calculated to mislead the jury. He also argues that the district court erred when determining his seventy-four-month sentence.

A. Prosecutorial Misconduct

David first alleges prosecutorial misconduct. "Whether statements made by a prosecutor amount to misconduct and whether such statements render a trial fundamentally unfair are mixed questions of law and fact, which we review *de novo*." *United States v. Carson*, 560 F.3d 566, 574 (6th Cir. 2009). Because David failed to object during trial to the prosecutor's statements which he now claims were improper, he "bears the burden of showing that [any] prosecutorial conduct in the present case was so 'exceptionally flagrant that it constitutes plain error.'" *United States v. Modena*, 302 F.3d 626, 635 (6th Cir. 2002) (quoting *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)). Therefore, he must establish that (1) an error occurred below; (2) the error was obvious or clear; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *Modena*, 302 F.3d at 630 (quoting *United States v. Schulte*, 264 F.3d 656, 660 (6th Cir. 2001)).

When examining a claim of prosecutorial misconduct, we "view the conduct at issue within the context of the trial as a whole." *United States v. Beverly*, 369 F.3d 516, 543 (6th Cir. 2004). We first determine whether the statements at issue were improper. *Carson*, 560 F.3d at 574. If

we determine the statements were improper, we determine whether they were so flagrant as to warrant reversal. *Id.* We consider four factors when determining whether a statement was flagrant: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." *Id.* (quoting *Carter*, 236 F.3d at 783). We evaluate these four "flagrancy factors" to determine prejudice. *Id.* (citing *Carter*, 236 F.3d at 784).

The prosecutor's opening statement. David charges that the prosecutor's opening statement included a number of claims that exaggerated the evidence against David and were "unsupported by direct evidence" or "even by inference." David challenges the following statements:

1. David's "role in this conspiracy was to aid and assist Fred in the distribution of heroin, to carry drug money on behalf of the organization, and to help Fred McShan deal with the heroin supplier in Chicago, Illinois."

2. "[T]here were times when David McShan carried money up to Chicago to deal with Landon Jones . . . ."

3. A "confidential informant [Demetrius Brandon] was purchasing heroin directly from Fred McShan, directly from David McShan, and directly from the other members of the organization."

4. "[I]t ended up being about 187 grams of heroin that law enforcement bought off Mr. McShan, David McShan, and the members of the organization."

5. "Twelve times Demetrius Brandon went and made hand-to-hand drug deals at the direction of law enforcement with Fred, David McShan, and other members of the organization. You're going to hear the testimony from Mr. Brandon about that, hear the recorded phone calls, and see the audio and videos of those deals."

As to these statements, we reject David's claim of misconduct because the statements were supported by the evidence presented at trial or were reasonable inferences drawn therefrom. *See*

United States v. Cosgrove, 637 F.3d 646, 663–64 (6th Cir. 2011) (stating that "[a] prosecutor has leeway to argue reasonable inferences from the evidence" (internal quotes omitted)).

First, Demetrius Brandon, the confidential informant, testified regarding his interactions with the McShan brothers and other members of their organization. He testified that he wore a camera or "little audio keys" when going to purchase heroin from "Fred and company." Audio and video recordings of most of these transactions were played for the jury. The transactions, some which were not recorded, included Brandon, Donae Grier (one of Frederick's associates), and the McShan brothers. Brandon testified that during one transaction, David handed him a small bag of heroin, which was wrapped in a white handkerchief or paper towel, after which Frederick accepted payment.

Second, several investigators testified about the confidential informant's heroin purchases from the McShans. FBI Special Agent Drew McConaghy testified that a confidential informant was able to make buys directly from David and Frederick. Michael White, of the DEA, testified that between April and September of 2015, a confidential informant purchased approximately 187 grams of heroin from the McShan drug organization. And Matthew Beatty, a narcotics investigator from the Brook County Sherriff's Office, testified that "prerecorded money was given to [the confidential informant] to purchase heroin off Fred McShan," and this money was later found on David and Frederick.

Third, Landon Jones, a Chicago-based heroin supplier, testified about his interactions with the McShans. Jones, who had grown up with David but had not known Frederick at the time, testified that it was important to his decision to accept Frederick as a client that he knew David and knew he was "a credible person"—"somebody that [he] didn't have to worry about." He testified that he sold Frederick between 300–500 grams of heroin on approximately twelve

occasions. Jones testified that he had met with both McShans in Ohio to recover a debt owed by Frederick and that David had vouched for his brother. Another time, Jones testified that he had delayed a planned drug sale to Frederick in Chicago because he was worried that Frederick might be working with the police. Jones testified that David, who was with Frederick in Chicago, expressed his dissatisfaction with the delay, complaining that Jones was causing the McShans to "miss money." In other words, Jones explained, the McShans had come to Chicago to buy heroin to sell in Ohio and were upset that their plans had been thwarted. Taken as a whole, this evidence amply supports the prosecutor's statements, set forth above, regarding David's role in the conspiracy.

David challenges one further statement made by the prosecutor in his opening remarks: "[Y]ou're going to have the eyewitness testimony of Mr. Brandon as to what happened during those deals, and you're going to have testimony from law enforcement officers who were actually on surveillance and saw those deals during that time."

Although part of this statement was born out by the evidence presented at trial (Brandon did testify "as to what happened during those deals,") both Agent McConaghy and Detective Ellis testified that they did not personally witness David engaging in a narcotics transaction that had taken place on April 30, 2015,[3] and no other testimony in the record suggests that the officers personally witnessed David engaging in any other drug deal.

But not every variance between a prosecutor's description of the evidence during an opening statement and the actual presentation of the evidence to the jury constitutes reversible error. *Frazier v. Cupp*, 394 U.S. 731, 736 (1969). As the Supreme Court has cautioned, "[m]any

[3] A previous statement by Agent McConaghy that April 30 "was the first time we had seen David participate in any type of sale of heroin" was stricken from the record.

things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance." *Id.* And here, the trial court gave multiple "proper limiting instruction[s]," *id.*, instructing the jury that the statements, questions and arguments of counsel were not to be considered as evidence in the case. These instructions mitigated any harm that might have flowed from the discrepancy between this remark in the opening statement and the evidence presented at trial. *See id.*; *United States v. Campbell*, 317 F.3d 597, 607 (6th Cir. 2003); *United States v. Burns*, 298 F.3d 523, 543 (6th Cir. 2002).

But even if we were to consider any of the statements David challenges to be improper, we could not find them "so exceptionally flagrant" as to constitute plain error. *Modena*, 302 F. 3d at 635. Indeed, David makes no real attempt to explain how the prosecutor's conduct in this case would rise to that level under this court's caselaw, s*ee Carter*, 236 F.3d at 783 (setting forth four factors used to guide the flagrancy inquiry), except to repeatedly assert that the case against him was "extremely weak." With this we disagree. There was testimony from Brandon, Jones, and multiple investigators indicating that David was involved in the heroin transactions. Brandon testified that David personally handed him heroin on at least one occasion. The prosecutor's remarks in his opening statement did not amount to misconduct, and the district court did not err, plainly or otherwise.

The prosecutor's questions throughout the trial. David next argues that on "more than 20" occasions, the prosecutor "elicited improper insinuations and assertions, either in witness' answers to his questions or contained in his questions" by implying that there was an abundance of evidence of David's involvement in the drug operation when, in David's view, there was not.

David first argues that the prosecutor and its witnesses misled the jurors when they "constantly referred to the 'McShan organization,' implying it was both Fred and David McShan's

organization, without evidence of such an arrangement." But much of David's argument is directed at statements made by witnesses, not the prosecutor. For example, David takes issue with Agent McConaghy's reference to the "McShan organization" in response to a question posed by Frederick's counsel on cross-examination. David also points to testimony of Detective Ellis,[4] who stated that David's sale of heroin "links [the heroin] to the organization that Fred and David McShan are working together." We are unaware of any authority that would support a finding of prosecutorial misconduct based on witness statements alone. *See Lutze v. Sherry*, 392 F. App'x 455, 461 (6th Cir. 2010) ("[W]e have independently found, no case where seemingly neutral questions by a prosecutor have been found to constitute prosecutorial misconduct based on the answers provided by a witness . . . ."). David does also criticize the prosecutor for referring to the "McShan organization." We are skeptical of any impropriety, but certain that such a reference could not properly be characterized as "exceptionally flagrant" conduct constituting plain error. *See Modena*, 302 F.3d at 635. And, as before, David does not meaningfully attempt to make that case.

David argues next that the prosecutor asked questions that "exaggerated the importance" of Jones's opinion of David's honesty, thereby, "implying that this opinion was a key factor" in Jones's decision to sell drugs to Frederick. For example, he points to this exchange: The prosecutor asked, "Was it important that you knew David before you went into business with Fred?" Jones responded, "I mean, he was a credible person, his word, you know." The prosecutor then asked, "When you say he, you've got to be more specific" to which Jones responded, "Oh, Dave's word was credible. He was known as a credible person so, yeah, that meant something."

[4] Although David's brief references "Agent McConaghy," the record citations refer to the testimony of Detective Ellis.

The prosecutor asked, "And what did it mean to you?" Jones answered, "I guess that he was, you know, he was somebody that I didn't have to worry about." David does not cite any caselaw or otherwise explain why this line of questioning amounted to prosecutorial misconduct, and he registered no objection to that effect below. As stated above, we are unaware of caselaw from our circuit or any other authority that supports a conclusion that eliciting testimony through neutral questions constitutes prosecutorial misconduct. *See Lutze*, 392 F. App'x at 461.

David also claims that the prosecutor asked "vague" questions regarding the significance of events, which led to "blurted statements by law enforcement witness[es] which were not supported by evidence." He also asserts that the prosecutor's colloquy with Agent McConaghy was riddled with "improper insinuations and assertions." David's appellate briefing fails to identify which questions he believes were impermissibly "vague," but it does describe these "[v]ague direct examination questions," as "not in themselves improper." That is sufficient to answer the charge. And as before, most of David's complaints of "vagueness" or "improper insinuations" are directed toward the testimony of government *witnesses*, not at the questioning of the prosecutor. That is insufficient to establish prosecutorial misconduct. *See Lutze*, 392 F. App'x at 461.

Finally, David challenges a statement made by the prosecutor at sentencing. The prosecutor stated that David's possession of prerecorded money, together with Jones's testimony, indicated that both brothers were actively soliciting drugs from Jones; David claims there was "no testimony to that effect." Again, we disagree. First, Officer Beatty testified that he was aware of a September 2015 traffic stop of David and Frederick, which resulted in the seizure of approximately $23,000, $800 of which matched the prerecorded bills that were given to Brandon. Second, Jones testified that David had complained that Jones was causing them to "miss money" because Frederick and David "didn't have the product to serve their customers." David has failed to meet his burden to

show prosecutorial misconduct.[5]

B. Sentence Based on Acquitted Conduct

David's final claim on appeal relates to his within-Guidelines sentence of seventy-four months' imprisonment. He argues that his sentence is procedurally unreasonable because, despite being convicted by a jury of conspiracy to possess with the intent to distribute *less than* 100 grams of heroin, the district court used 230 grams of heroin as relevant conduct to calculate his sentencing range pursuant to U.S.S.G. § 1B1.3. As to the accuracy of the district court's drug quantity determination, we cannot conclude that the district court clearly erred when it determined that David was responsible for 230 grams of heroin. *See United States v. Henley*, 360 F.3d 509, 514–15 (6th Cir. 2004) ("The district court's drug quantity determination 'must stand unless it is clearly erroneous'") (quoting *United States v. Ward*, 69 F.3d 146, 149 (6th Cir. 1995)). The court attributed to David the seven grams of heroin that he was convicted of distributing on April 30, 2015, which was supported by the testimony of the confidential informant. The district court then converted the approximately $23,000 in cash seized from David and Frederick on a return trip from Chicago into equivalent quantities of heroin, after finding that the two were traveling together and had both met with the heroin supplier in Chicago. The district court concluded that "by a preponderance, at least, this amount of money should be treated as relevant conduct." This determination was not clearly erroneous.

[5] David also alludes to "false testimony" that he believes Agent McConaghy gave before the grand jury and at a bond hearing regarding whether an April 30 drug transaction had been recorded and observed. But, even if this testimony was false, rather than simply mistaken, David concedes that Agent McConaghy's *trial* testimony was accurate, and the trial testimony on this point was favorable to David.

David does not seriously contest the drug quantity calculation, instead arguing that the Constitution forbade the district court from sentencing him based on acquitted conduct and thereby depriving him of the "right to the presumption of innocence." Binding precedent from our circuit establishes the contrary. *See United States v. White*, 551 F.3d 381, 385 (6th Cir. 2008) (en banc) (concluding that "the district court does not abridge the defendant's right to a jury trial by looking to other facts, including acquitted conduct, when selecting a sentence within that statutory range"). *See also United States v. Rayyan*, 885 F.3d 436, 441 (6th Cir. 2018) (explaining that "the Supreme Court has confirmed that sentencing courts may look to uncharged criminal conduct, indeed even acquitted conduct, to enhance a sentence within the statutorily authorized range").

David acknowledges that precedent permits this result. He claims, however, that the Supreme Court abrogated that rule in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). We disagree.

In *Nelson*, the Supreme Court invalidated a Colorado statute that required a person whose conviction had been overturned to prove her innocence by clear and convincing evidence in order to receive a refund of costs, fees, and restitution paid pursuant to the invalid conviction. *Id.* at 1254–55. The Court determined that this statute violated due process and explained that "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary executions." *Id.* at 1255–56. But *Nelson* did not implicate the Guidelines. Nor did it overrule, or even mention, prior Supreme Court precedent holding that courts can consider acquitted conduct for sentencing purposes. *See, e.g.*, *United States v. Watts*, 519 U.S. 148, 157 (1997) ("We therefore hold 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 preponderance of the evidence."). And David has made no argument that the *Matthews v. Eldridge*, three-part balancing test, which the Court applied in *Nelson*, would balance out the same

way in his case, even if that test applies.[6] *See Nelson*, 137 S. Ct. at 1255. In short, *Nelson* is not an "inconsistent decision of the United States Supreme Court" that would permit or require modification of our controlling precedent. *Salmi* v. *Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

This court's decision in *White* held that a "district court does not abridge the defendant's right to a jury trial by looking to other facts, including acquitted conduct, when selecting a sentence within that statutory range." 551 F.3d at 385. David's within-Guidelines sentence of seventy-four months' imprisonment was neither unconstitutional nor procedurally unreasonable.

* * *

We AFFIRM the judgment of the district court in both cases.

[6] The Court in *Nelson* explained that its ruling in that case was governed by the "familiar procedural due process inspection instructed by *Mathews v. Eldridge*," which governs when "no further criminal process is implicated." *Nelson*, 137 S. Ct. at 1255. Here, David argues that his criminal sentence—an integral part of the criminal process—is unconstitutional. One might argue, therefore, that to the extent his claim sounds in due process, it should be evaluated under the test set forth in *Medina v. California*, 505 U.S. 437 (1995), which *Nelson* reminds us "'provide[s] the appropriate framework for assessing the validity of state procedural rules' that 'are part of the criminal process.'" *Nelson*, 137 S. Ct. at 1255 (alteration in original). Whether it matters that David tests a federal, rather than state, criminal sentence remains an open question, *see Kaley v. United States*, 571 U.S. 320, 334 (2014). But for present purposes, the result is the same. David has made no argument under either *Matthews* or *Medina*.

STATEMENT OF THE CASE

The FBI case agent admitted lying in his testimony before a grand jury when indicting Petitioner, David McShan, claiming that the drug transaction in which Petitioner was purportedly implicated had been audio and video recorded, that he (the agent) had listened to the recordings, and that there were other recorded drug transactions involving Petitioner. None of these claims were true. The FBI case agent also admitted that he testified to the same lies again when the government obtained a superseding indictment. The FBI case agent also admitted that he testified again to these lies when Petitioner sought a bond pending trial.

Petitioner's brother did deal drugs. Petitioner's brother was tried with Petitioner.

At trial, however, the FBI case agent admitted that the only drug transaction in which Petitioner purportedly was implicated was not recorded, was not observed by law enforcement, and was not corroborated by telephone recordings, DNA, or fingerprints, and that Petitioner was not implicated in any other drug transactions.

Petitioner was charged with Conspiracy to Possess with Intent to Distribute more than one kilogram of Heroin.

The investigation employed wiretaps, pen registers, pole cameras, constant surveillance, airplane surveillance, helicopter surveillance, and a confidential informant who made recorded phone calls. None of these techniques implicated Petitioner in the drug operation. Petitioner was not mentioned in wiretaps,

Petitioner's telephone number was not used in the conspiracy, Petitioner was not observed by law enforcement to participate in the conspiracy, no marked bills were in Petitioner's possession, and Petitioner never initiated a meeting with his brother's drug supplier; one brief meeting with the drug supplier occurred by chance, and the drug operation and drugs were not mentioned.

The investigation was conducted by the Chief of the Drug Task Force in the Southern District of Ohio. The FBI case-agent was assisted by two state/local/federal task forces, local prosecutors and police, a task force in Ohio, a High Intensity Drug Trafficking Area task force in West Virginia, the Ohio Highway Patrol, West Virginia State Police, the DEA, and the FBI.

The only evidence that connected Petitioner to the drug operation was testimony from a long-standing enemy of Petitioner (who was a cooperating witness with the FBI in the investigation) averring that, on one occasion Petitioner's drug dealing brother passed a baggie containing a small amount of drugs to Petitioner, to hand to the cooperating witness. Payment was handed directly from the cooperating witnesses to Petitioner's brother, demonstrating that it was unnecessary for the drugs to have been passed through a middleman, i.e., Petitioner. The baggie containing a small amount of drugs supposedly was wrapped in a white handkerchief or paper towel. Thus, fingerprint and/or DNA could not have been recovered from the baggie.

The FBI case agent testified that none of the evidence in the investigation was

submitted for DNA or fingerprint analysis because "we already knew the identity of the person[s]."

Though the government claimed in opening that law enforcement had surveilled and/or audio or video recorded every drug transaction, the transaction implicating Petitioner was not surveilled and not recorded.

Petitioner's purported drug transaction was one of only three transactions out of twenty-seven controlled purchases which was neither audio or video recorded. It was the only transaction in the investigation which: 1) utilized a middleman to pass the drugs; 2) was without law enforcement involvement in either surveillance or "control" of the buy (searching the informant before and then after the transaction); and 3) did not have recorded telephone calls "setting up" the buy.

On one occasion, Petitioner and his brother were stopped at a gas station and Petitioner "looked up" from the gas pump. The government witness testified that Petitioner was engaging in "countersurveillance" without presentation of the observations disclosing how Petitioner's criminal "looking up" differed from an innocent "looking up."

On another occasion, Petitioner and his brother were stopped by law enforcement. Both had cash on their persons. Petitioner's brother had bills of currency which had been marked as part of the investigation. Petitioner did not.

At trial the government (i.e., the prosecutor and law enforcement personnel) conflated the actions of the brothers so that the prosecutor's questions again and

again insinuated to the jury that Petitioner was involved in the drug operation's actions. For example, the AUSA asked if marked money was found on the brothers receiving an affirmative response. This conflated the actions of the brothers and implied that marked bills were found in the possession of Petitioner.

In preambles to questions, the prosecution implied equal involvement by Petitioner with his brother in Petitioner's brother's drug operation. These questions often were quickly withdrawn before the witness could answer. For example, the AUSA said, "Yesterday, I believe where we left off is, I was talking with you about the period of time between March of 2014 to September 2015 and about your supply of heroin to [Petitioner] and [Petitioner's brother]." Then before the witness could answer that Petitioner's brother was the only individual to whom he supplied drugs, the AUSA quickly rephrased the question into did the supplier supply drugs to Petitioner's brother.

The AUSA propounded vague questions which implied involvement which did not exist by Petitioner in the drug operation. For example, asking if Petitioner had been "linked up" to his brother (not focusing upon actions in furtherance of the drug operation) but in any way during the time of the investigation. Of course, Petitioner was "linked up" to his brother at birth and probably rode together with his brother to buy groceries, to visit their parents etc.

On one instance, Petitioner's brother's drug supplier drove to Ohio to Petitioner's brother's bar to meet with Petitioner's brother because Petitioner's

brother owed payment for drugs. By chance Petitioner's brother was not immediately available so Petitioner spoke to the supplier. Petitioner engaged in small talk with the supplier while the supplier waited to meet with Petitioner's brother, telling the supplier that his brother was "cool" and "good people."

The prosecution asked "did there … come a time when you traveled from Chicago to Bellaire, Ohio, to meet with [Petitioner] and [Petitioner's brother]?" thus, implying that the drug supplier had travelled to meet with both Petitioner and his brother whereas the purpose of the trip was to meet only with Petitioner's brother. The prosecutor exaggerated the importance of the chance encounter between the drug supplier and Petitioner, portraying it as critical to the drug operation, whereas the supplier described the conversation as just chitter-chatting, i.e., polite small talk. Likewise, the prosecution switched the initiation of the conversation from the supplier to Petitioner, creating the appearance that Petitioner deliberately was present to actively promote the conspiracy and to vouch for his brother.

The prosecution continually referred to the drug organization as the "McShan organization," implying that the drug organization belonged to both brothers, whereas there was evidence only of Petitioner's brother.

There were other innuendos. For example, the FBI agent claimed that on a date when a drug deal was purportedly to occur he observed Petitioner's brother's car drive past. The AUSA inquired as to the identity of the driver and the agent responded that it was driven "at that point" by Petitioner's brother, implying that Petitioner drove it

later. This, despite the fact that there was no testimony that Petitioner ever drove that car and that it was not possible to see inside the car because of the dark tint on the windows.

Petitioner was charged with conspiracy to possess with intent to distribute one kilogram of heroin, but the jury convicted him of less than 100 grams of heroin, i.e., less than 10% of the charged amount of drugs. This verdict was an acquittal of possessing 100 grams or more of heroin. However, the court computed Petitioner's guideline sentencing range by attribution of more than 200 grams of heroin to Petitioner.

REASONS FOR GRANTING THE WRIT

1. **The studied denial of a fair trial by the Chief of the United States Drug Taskforce for the Southern District of Ohio and by the FBI, if not corrected, will encourage similar denials of a defendant's right to a fair trial, weakening the Due Process guarantee of the Fifth Amendment to the Constitution of the United States that trials will be fair, at a time when many of our citizens are being sentenced to long terms of incarceration for drug offenses.**

2. **Where Petitioner was charged with conspiracy to possess with intent to distribute one kilogram of heroin, but was convicted of conspiracy to possess less than 100 grams of heroin, this verdict was an acquittal of attribution to Petitioner of more than 100 grams of heroin. Therefore, computing Petitioner's sentence by attribution of more than 200 grams of heroin denied to Petitioner his right to the presumption of innocence.**

This Court established eighty-three years ago that where the government's case against the defendant is weak, a prosecutor's pronounced and persistent misconduct

in making improper insinuations and assertions prejudice the cause of the accused to the extent that a new trial is necessary. Berger v. United States, 295 U.S. 78 (1935).

The elements to this rule are a weak prosecution case and improper insinuations and assertions. In this case, the prosecution's improper insinuations and assertions are flagrant, as determined by the following factors: "1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused." United States v. Monus, 128 F.3d 376, 394 (6th Cir.1997) (citing United States v. Cobleigh, 75 F.3d 242, 247 (6th Cir.1996)); United States v. Carroll, 26 F.3d 1380, at 1385 (6th Cir.1994) (citing United States v. Leon), 534 F.2d 667, 679 (6th Cir.1976)); United States v. Francis, 170 F.3d 546, at 549-50 (6th Cir.1999). Because the prosecutorial misconduct was flagrant, it amounted to plain error.

The weakness of the prosecution case

It is an understatement to view the prosecution's case as weak. It was almost nonexistent. Without lies and smears, Petitioner would not have been indicted, let along convicted.

Petitioner was implicated in an extremely minor way in only one unique drug transaction. The scenario of that transaction is strange and not credible and appears to be designed to excuse a lack of corroboration by DNA and/or fingerprints.

Supposedly, Petitioner's brother directed Petitioner to act as a middleman by handing a baggie containing a small quantity of drugs wrapped in a cloth to the informant. Why it would have been necessary for the exchange to take place with a middleman and a wrapped baggie is unclear as the informant handed the money for the drugs directly to Petitioner's brother without need for a middleman. No other transaction in this investigation occurred in such a fashion.

The testimony implicating Petitioner came from someone who was Petitioner's "enemy." Petitioner's enemy's testimony was completely uncorroborated. No recordings, no "set up" telephone calls, no surveillance by law enforcement personnel, no finger prints, no DNA, appeared regarding this encounter.

The Grand Jury was concerned about the paucity of evidence against Petitioner. Even without knowing that the informant was Petitioner's enemy, the Grand Jury sought additional corroboration that Petitioner was implicated in the drug operation beyond the solitary odd transaction. Their concerns were allayed by the FBI agent's lies, i.e., that there were other deals where Petitioner was captured on video recordings making drug deals and that the agent had viewed them.

The implications of this conduct by an experienced FBI agent lying repeatedly during multiple hearings with the AUSA present lays bare the mindset of the AUSA and the FBI agent. This prosecution was a vile scheme to use all of the time-honored credibility of the prosecution with judges and juries to deny due process to someone who could not fight back. The petite jury must have had concerns similar to the

Grand Jury as they only convicted on as small a lesser charge as was available to them.

The only other purportedly inculpatory conduct by Petitioner was flimsy at best; it involved Petitioner's looking up from a gas pump, taking a ride with his brother, and, later, possession of currency but no marked "buy money," and telling a former friend that his brother was "cool" and "good people" in the context of making small talk.

Improper insinuations and assertions, including statements of items of evidence which did not exist were deliberately intended to mislead the jury and to prejudice the defendant

Such a wide variety and number of improper insinuations and assertions constituting a pattern of conflation of the actions of the two brothers demonstrates a conspiracy between the AUSA and the FBI agent. It strains credulity to view all of the unfounded insinuations and assertions in which Petitioner was prejudiced as a series of random mistakes. In truth, a variety of tactics were utilized to generate improper insinuations and assertions:

First, consistent reference to the drug organization as the "McShan organization," which implied the organization was run by both Petitioner and Petitioner's brother;

Second, preambles to questions continuously asserted statements of Petitioner's

purported involvement in his brother's drug operation when the evidence only implicated Petitioner's brother which questions were quickly withdrawn before the witness could clarify that the referenced conduct did not involve Petitioner, for example, "Your supply of heroin to [Petitioner] and [Petitioner's brother] …;"

Third, insinuations that law enforcement observed Petitioner performing tasks for the drug conspiracy, when there was no evidence to that effect;

Fourth, questions framed to imply a link to the drug dealing on Petitioner's part unsupported by evidence, for example: asking if there were marked bills in the cash seized from the brothers whereas marked bills were found only in the possession of Petitioner's brother;

Fifth, vague questions implying Petitioner's participation in the drug operation, for example: asking if there came a time when Petitioner was found to be "linked up" to his brother (presumably that happened at birth);

Sixth, statements by law enforcement witnesses, based upon speculation drawn from ambiguous circumstances but presented as fact regarding incidents, such as, "looking up" from a gas pump as evidence of "counter-surveillance;"

Seventh, similar bald faced lies and insinuations in the AUSA's opening statement (e.g., claiming there were times [plural] that Petitioner took money to Chicago to deal with his brother's drug supplier when the AUSA knew there were no such incidents) and in the AUSA's sentencing remarks (e.g., the AUSA argued that all

of the cash seized from both brothers should be converted into drugs and attributed to Petitioner because Petitioner actively solicited drugs from the supplier and argued with the supplier about "ponying up the 300 grams of drugs" that the brothers came to purchase) even though there was no demonstrable connection between the cash possessed by Petitioner and the drug operation.

This was a major investigation employing wiretaps, pen registers, pole cameras, a confidential informant making recorded phone calls, constant surveillance, airplane surveillance, and helicopter surveillance, and state and local task forces. This was the kind of case in which it is unlikely that the AUSA and FBI case agent were sloppy or made numerous mistakes. This studied denial of a fair trial coupled with the "polished" way in which it was executed argues that this was not the first time this tactic had been performed by the prosecution.

Prosecutorial misconduct violated Petitioner's right to the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

The circumstances surrounding the insinuations and assertions demonstrate that they were deliberate. Petitioner was entitled to a fair trial. He did not receive one.

Petitioner's sentence was procedurally unreasonable because it was fashioned based upon the use of an amount of drugs for which he had been acquitted by a jury.

Where Petitioner was charged with conspiracy to possess with intent to

distribute one kilogram of heroin, but was convicted of less than 100 grams of heroin, this verdict was an acquittal of attribution to Petitioner of more than 100 grams of heroin. Therefore, computing Petitioner's sentence by attribution of more than 200 grams of heroin denied to Petitioner his right to the presumption of innocence. Nelson v. Colorado, ____ U.S. ____, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017).

CONCLUSION

McShan requests that this Court grant certiorari, reverse the Sixth Circuit's affirmance, and remand for further proceedings.

Respectfully submitted,

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