ORIGINAL

No. 18-9491

IN THE

SUPREME COURT of the UNITED STATES

UNITED STATES OF AMERICA,

V.

WILLIAM A. TRUDEAU, JR.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONER RAISED SUBSTANTIAL SHOWING OF DENIAL OF CONSTITUTIONAL RIGHT ON ISSUE OF WHETHER THE LOWER COURT'S CORRECTLY CONCLUDED THAT HIS Rosemond v. United States, 572 U.S. 65 (2013) CLAIM WAS PROCEDURALLY DEFAULTED?

II. WHETHER PETITIONER RAISED SUBSTANTIAL SHOWING OF DENIAL OF CONSTITUTIONAL RIGHT ON THE ISSUE OF WHETHER ACQUITTED CONDUCT SENTENCING UNDERMINES DUE PROCESS OF LAW, AND VIOLATES THE UNITED STATES CONSTITUTION ARTICLE III?

III. WHETHER PETITIONER'S SHOWING IS NOT ONLY SUBSTANTIAL, IT IS SUFFICIENT TO FURTHER REVIEW BY THIS COURT?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix "A" to the petition.

The opinion of the United States District Court appears at Appendix "B" to the petition.

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. Art. III §2, cl. 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have committed; but when not committed within any State, the Trial shall be at such Place or Places as Congress may by Law have Directed.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on 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 to the same offence to be twice put in jeopardy of life or limb; 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.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be cofronted with the witnesses against him; to have compulsory process fro obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

(i) The Indictment and Trial

Petitioner was a builder of fine homes in southwestern Connecticut. in 2010, he was charged in a 9-count indictment with one count of Conspiracy to commit Bank Fraud, Wire Fraud and Mail Fraud, and eight substantive counts of those offenses. Seven of the eight substantive counts charged Petitioner with engaging in and leading a broad scheme to defraud federally insured banks and mortgage lenders by submitting false loan documents. These counts alleged that from 2001 to 2008, Petitioner conspired with mortgage brokers, lawyers, and appraisers to obtain millions in fraudulent bank loans.

The ninth count, however, shared no factual overlap with the other substantive counts. It alleged that Petitioner and his wife committed wire fraud in 2010 by misleading a family friend into loaning them $50,000, which they later repaid in full with interest. Notwithstanding a lack of temporal or factual overlap. the ninth count was included as an object of the broad conspiracy count, together with the seven other more serious fraud counts.

At trial consistent with the Indictment, the government tried to prove that Petitioner had been not only an active participant, but the ringleader of the scheme to defraud banks and mortgage lending institutions of millions of dollars through the submission of false loan documents. It offered the testimony of his alleged co-conspirators (by that time, cooperating witnesses), who pinned the blame for the conspiracy and the substantive offenses on Petitioner. By contrast, none of the government witnesses who testified about the alleged mortgage fraud scheme in counts 1 - 8 testified about the allegations in count 9, nor did the government allege their involvement in the transaction. Instead, the government sought to prove Count 9, and the conspiracy to commit it, through the testimony of two witnesses--neither of whom were alleged to be co-conspirators or associated with them.

The evidence as to Count 9 revolved around a separate and distinct core of facts, which transpired more than two tears after the mortgage fraud scheme allegedly ended, and indicated a distinctly different role played by Plaintiff than the evidence supported for the other counts.

(ii) The Jury Verdict and Sentencing

The district judge instructed the jury that the objects of the charged conspiracy were exactly the same as the substantive offenses charged in Counts 2-9 and that if the jury found that Petitioner conspired to commit any of the substantive offenses it must find him guilty of the Count 1 conspiracy. Petitioner was acquitted of all seven substantive counts charging him with Bank Fraud and frauds affecting financial institutions. He was found guilty only of Count Nine--the wire fraud stemming from the $50,000 private loan from a friend -- and of the Count 1 conspiracy.

At sentencing, however, the district court made clear that is disagreed with the jury's verdict, and sentenced Petitioner as if he had been convicted of all counts. The judge expressly found by a preponderance of the evidence that Petitioner had committed all of the "various other acts ... alleged in indictment." In particular, the district court found, contrary to the jury's verdict, that Petitioner conspired to commit Bank Fraud, Wire Fraud affecting financial institutions and related substantive offenses. These judge-found offenses carried 30-year maximum sentences, whereas the jury-found offenses authorized a 20-year maximum. In adopting the PSR, the district court applied the higher, 30-year statutory maximum associated with frauds on banks and other financial institutions.

For Petitioner, the applicable Guidlines range for a single count of conspiracy to commit Wire Fraud and a substantive count of Wire Fraud involving no loss was 8 to 14 months. The district judge, however, calculated the Guidelines range to be 188 to 235 months, based principally on her own factfinding, and departed upward by one point as to Petitioners criminal history score, resulting in a final

adjusted advisory Guidelines range of 210 to 264 months. Ultimately, the judge imposed a sentence of 188 months. Petitioner has now been incarcerated for nearly 60 months.

(iii) Petitioner's Direct Appeal

On direct appeal from the district court's judgement, Petitioner challenged his sentence of nearly 16 years in prison, where the Federal Sentencing Guidelines for the actual offenses of conviction provided for a sentence of just 8 to 14 months. He argued that the district court had arrived at this sentence after failing to identify properly the crime of conviction and by interposing its own fact-finding in place of the jury's. Additionally, Plaintiff argued that the court found and sentenced him for conspiring to commit object offenses not established by the jury's verdict and that his sentence was substantively unreasonable.

A two-judge panel of the Second Circuit agreed that the district court committed plain error, in that it failed to acknowledge the correct statutory maximum. The panel explained that the jury did not find two facts necessary for the 30-year statutory maximum to apply. First, the jury did not find that the conspiracy to commit wire fraud or the substantive wire fraud affected a financial institution. Second, the jury did not find that bank fraud was an object of conspiracy. As the panel noted, in order to sentence Petitioner for the crimes of Conspiracy to Commit Bank Fraud or Wire Fraud Affecting a Financial Institution, the jury would have needed to find at least one of these additional facts. Yet the district court explicitly did so without these constitutionally required findings.

The court of appeals then remanded to the district court, but only to consider whether the judge would have sentenced Petitioner differently "had it understood the statutory maximum sentence was 20 years for each count."

On remand, the district court determined that it would not have sentenced Petitioner differently had it not made the error that the Second Circuit identified.

That is, the district court concluded it would have sentenced Petitioner to the same term of nearly 16 years in prison, even if it had correctly applied the 20-year statutory maximum for the crimes of which Petitioner was convicted, and not the higher 30-year statutory maximum for crimes he was not. In its Decision, the district court repeated it's earlier error in identifying the crime of conviction, explaining that the jury had convicted Petitioner of "conspiracy to commit bank fraud, mail fraud, and wire fraud," even though the Second Circuit held, and the district court acknowledged, that there was "no basis in the record from which to conclude" that the jury had "found beyond a reasonable doubt' that Petitioner's conviction of wire fraud 'affect[ed] a financial institution,' or ... that the conspiracy's object was to commit wire fraud that 'affect[ed] a financial institution,' or commit bank fraud...."

(iv) Petitioner's Renewed Appeal

Following the district court's Decision, Petitioner filed a renewed appeal with the Second Circuit, arguing that the district court erred in determining that it would have sentenced Petitioner the same, even if it had not erred in determining the applicable statutory limits of punishment. Petitioner argued, the district court had made clear that the sentence it imposed arose from its erroneous determination of the crime of conviction. Specifically, in stating that the jury had convicted Petitioner of conspiracy to commit bank fraud, which it did not, the court repeated and ratified its original error at sentencing. Because the district court's decision is directly contrary to the findings made by the Second Circuit in its Summary Order, and conflicts with this Courts decisions, Petitioner argued that the case should be remanded for resentencing .

In response, the government moved for an order of summary affirmance. On October 14, 2014, a two-judge panel of the Second Circuit granted the government's motion, summarily affirming the district court's decision without discussion.

With the appeal being final, Petitioner reiterated the arguments he had made in his writ of certiorari about multi-object conspiracies and acquitted conduct in a petition to the Supreme Court - the writ had been denied -- choosing to label it a writ of certiorari and not the motion for reconsideration that it was. Not surprisingly, on February 23, 2015, the United States Supreme Court refused to reconsider its earlier decision and denied his self-styled "writ."

On February 23, 2016, Petitioner filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. §2255.

JURISDICTION

The Supreme Court has jurisdiction to review Federal Court of Appeals' denial of Certificate of Appealability concerning concerning Federal District Court's denial of accused's motion under 28 U.S.C. §2255 to vacate federal sentence or conviction. See **Hohn v. United States of America**, 524 U.S. 236 (1998). The Supreme Court has the ultimate authority to redress the denial of Petitioner's Certificate of Apeallability, and humbly requests such review in order to avoid a true miscarriage of justice.

(ii) Standard of Review

It is well settled that "when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to the threshold inquiry into the underlying merit of his claims." **Miller-El v. Cocksell**, 537 U.S. 322, 327 (2003) citing **Slack v. McDaniel**, 529 U.S. 473, 481 (2000). "[A] prisoner seeking a COA need only demonstrate 'a substancial showing of the denial of a constitutional right." Id. (quoting 28 U.S.C.

§2253(c)(2))). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issue presented are adequate to deserve encouragement to proceed further." Id. citing Slack, supra at 484. "[A] COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief... After all, when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.'" Id. at 337 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

ARGUMENT IN SUPPORT OF ISSUANCE OF CERTIFICATE OF APPEALABILITY

I. PETITIONER HAS RAISED SUBSTANTIAL SHOWING OF DENIAL OF CONSTITUTIONAL RIGHT ON ISSUE OF WHETHER THE LOWER COURT'S CORRECTLY CONCLUDED THAT HIS ROSEMOND CLAIM WAS PROCEDURALLY DEFAULTED.

(i) The Court Erroneously Found that Petitioner had Failed to Establish "Cause"

In the district court, Petitioner argued that there was more than sufficient "cause" for his failure to raise, at trial and on direct appeal, the claim that the district court's jury instruction on aiding and abetting had denied him of a fair trial. Petitioner pointed out that the Supreme Court's decision in Rosemond had issued on March 5, 2014 -- more than a year after Petitioner's trial in the district court, and only about one month before his lawyers argued his appeal in the Second Circuit. The district court, however, rejected this argument concluding essentially that a Rosemond-type attack could have been made by Petitioner's defense team at trial in advance of the Rosemond decision; and if unsuccessful, raised subsequently on appeal because, according to the district court at the time of Petitioner's trial and appeal: An advance knowledge requirement for aiding and

abetting had not been conclusively rejected by the courts, and ... the idea of an advance knowledge requirement was not entirely novel.

First, tellingly, at the time the district court characterized Rosemond's "advance knowledge" requirement as "not entirely novel," the only law cited in support of this proposition was a single district court case, Herrera v. United States, 1998 WL 770559 at p.3 (SDNY Nov. 3, 1998).

Second, and more importantly, the district court's statement that Rosemond's "advance knowledge" requirement was not an "entirely novel" concept appears to conflict directly with an express observation made by Judge Alito in his concurring/dissenting opinion in Rosemond on the "advance knowledge" requirment adopted by the majority in that case: The [advance knowledge] rule represents an important and, as far as I am aware, unprecedented alteration of the law of aiding and abetting and of the law of intentionality generally. Rosemond 134 S. CT. at 1253 (emphasis added). Thus, clearly, reasonable minds could well differ on the soundness of the district court's view that, at the time of Petitioner's trial, a jury instruction with an "advance knowledge" requirement was something his lawyers could have considered. Moreover, if, as the court found, there was, in fact, nothing "novel" about the concept of the "advance Knowledge" requirement eventually adopted by the Rosemond court, then why in the world did the trial court, in its decision on April 13, 2017, deny Petitioner's motion to amend based on "futility"? Petitioner's motion made clear that it had been filed in response to the government's eleventh hour assertion of the procedural default defense, and that the evidence Petitioner was seeking to offer, once his motion was granted, would involve a claim of "ineffective assistance of counsel" based upon Petitioner's defense lawyers' failure to raise, at trial and on appeal, the very claim which the court here has held was "not entirely novel." Since, as indicated supra herein at footnote 1, ineffective assistance of counsel can amount to "cause" for a procedural default, it was incumbent upon the court, if it believed the Rosemond claim was not "novel, to grant Plaintiff's motion to amend.

(ii) The Court Erroneously Concluded the the Petitioner had Failed to Establish "Prejudice"

The district court also concluded Petitioner's claim was procedurally defaulted because he had failed to establish "prejudice" arising from any error in the court's jury instruction on aiding and abetting. This was so, the court determined, because there existed in this case "evidence that Plaintiff committed wire fraud directly;" i.e., as a "principal," rather than as an aider and abettor under Rosemond.

First of all, the jury verdict in this case did not indicate the theory of criminal liability upon which the jury convicted the petitioner on Count Nine. It is, therefore, impossible to know whether the jury's finding of guilt against Petitioner in this case was based upon its finding that he had acted as a principal or as an aider and abetter, In such cases, "the proper [default] rule to be applied is that which requires [that the] verdict to be set aside..." Yates v. United States, 354 U.S. 312 (1957), rev'd on other grounds Burks v United States, 437 U.S. 1, 12 (1978).

Second, there was extensive evidence heard by the jury at the trial of this case indicating that, at the time Petitioner was convicted, it was as an "aider and abettor" of his wife, Heather Bliss, and not as a principal. The facts, taken directly from the trial record of this case clearly demonstrate a strong likelihood that Petitioner was convicted as an aider and abettor, not as a principal.

(iii) The Court Erred in Concluding that Rosemond Applied Only to Cases Brought Under 18 U.S.C. §924(c).

Having rule[d] that Petitioner's Rosemond claim was procedurally defaulted, the [district] court also rule[d], in the alternate, that the claim fail[ed] on the "merits," because the aiding and abetting instruction given at trial by the court, which lacked any mention of "advance knowledge," was nonetheless sufficient. The court held: (a) that Rosemond's "advance knowledge" requirement is specific

to [cases brought under] section 924(c), and that, accordingly, "an express jury instruction of advance knowledge is unnecessary in the context of aiding and abetting wire fraud;" and (b) that, in any event, the courts instruction to the jury that "an aider and abettor must know that the crime is being committed" sufficed to meet Rosemond's "advance knowledge" requirment.

First, while it appears to be true that, to date, the Second Circuit has not yet applied Rosemond in a case not brought under §924(c), that fact is dispositive of nothing. As the district judge noted in her decision, other circuit courts in the United States have applied Rosemond in cases not brought under §924(c), and, therefore, there is no reason to believe that, presented with a proper claim, the Second Circuit would not do the same. Significantly, in discussing the intent requirement for aiding and abetting, the Supreme Court, in Rosemond, did not limit or restrict its analysis solely to cases arising under §924(c). Indeed, in reaching its conclusions, two cases cited by the Rosemond court happened to be fraud cases. See Rosemond, supra at 1249 citing, inter alia, Pereira v. United States, 347 U.S. 1, 12 (1954)(mail fraud); Bozza v. United States, 330 U.S. 160, 165 (1947)(Tax Fraud).

In short, based upon which the court concluded that the need for a specific Rosemond instruction on "advance knowledge" had been obviated, actually demonstrates a constitutional error. Because, under the circumstances, a Rosemond instruction would have virtually guaranteed an acquittal for Plaintiff, the lack of such instruction severely disadvantaged Plaintiff and denied him of his right to a fair trial, and due process of law.

II. PETITIONER HAS RAISED SUBSTANTIAL SHOWING OF DENIAL OF CONSTITUTIONAL RIGHT ON THE ISSUE OF WHETHER ACQUITTED CONDUCT SENTENCING UNDERMINES DUE PROCESS OF LAW, AND VIOLATES THE UNITED STATES CONSTITUTION ARTICLE III.

(i) Acquited Conduct Sentencing Undermines the Traditional Role of the Jury as a Bulwark Against Abuse of Governmental Power.

Enshrined in both the original Constitution and the Bill of Rights is a guaranteed and absolute right to a trial by jury. See **U.S. Const. Art III, §2, cl. 3; U.S. Const. Amend. 5.** This absolute right was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and the Framers of the Constitution intended the jury to serve as "the great bulwark of their civil and political liberties." United States v. Gaudin, 515 U.S. 506, 510-11 (1995). Early juries exercised their "power to thwart Parliament and [the] Crown," whether by acquitting in the face of guilt or by handing down "what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." Jones, 526 U.S. at 245 (citation omitted). "That this history had had to be in the minds of the [Constitution's] Framers is beyond cavil." Id. at 247.

The Framers could not have intended to erect the "great bulwark" of the criminal jury, empowered to confirm or reject the truth of every accusation, and indeed to acquit even in the face of guilt or to guard against unduly harsh punisment, only to yield that very power to a probation officer, a prosecutor, and a judge capable of nullifying the jury's verdict. Doing so would render the right to a criminal jury a mere procedural formality, eviscerating this "fundamental reservation of power in our constitutional structure." Blakely v Washington, 542 U.S. 296, 305-06 (2004). The jury's function was never intended to be so minor as simply rendering "a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." Id. at 306-307. Rather, "the judge's authority to sentence derives wholly from the jury's verdict." Id at 306.

A fundamental premise of our Constitution is that it is not what one "really" does that can be punished, but only that conduct which is proven at trial. The mandate of the United States Constitution is simple and direct: If the law Identifies a fact that warrants deprivation of defendant's liberty or an increase in that deprivation, such fact must be proven by a jury beyond a reasonable doubt. See U.S. Const. art. III §2, cl. 3. This rule has been articulated by the Supreme Court in essentially the same formula for over a century. See Davis v. United States, 160 U.S. 469, 493 (1985)("No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them ... is sufficient to show beyhond a reasonable doubt the existence of every fact necessary to constitute the crime charged." (Harlan, J., for unanimous Court)); In re Winship, 397 U.S. 358, 364 (1970)("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Apprendi, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.); Ring, 536 U.S. 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt.").

The rule has three essential components: (1) every fact necessary to punishment; (2) proved to a jury; (3) beyond a reasonable doubt.

(ii) The Lower Courts' decision(s) Conflict With The decision of The United States Supreme Court.

The Court should grant certiorari because the decision below conflicts with its Fifth and Sixth Amendment jurisprudence. Beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court issued a series of decisions defining and

clarifying the constitutional bounds of judicial factfinding in sentencing. In Apprendi, the Court established the now-basic principal that a defendant's sentence is unconstitutionally enhanced when a judge, rather than a jury, finds a fact that increases the statutory maximum term of imprisonment. See Apprendi, 530 U.S. at __.

Four years later, in Blakely v. Washington, the Court held consistent with its holding in Apprendi -- that "the judge's authority to sentence derives wholly from the jury's verdict." The Court explained; When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority. Blakely, 542 U.S. at 303-04, 306 (2004).

Most recently, in Alleyene v. United States, the Court reinforced the rule of Apprendi and its progeny, holding that "[t]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." Alleyne, 133 S. Ct. at 2158. For the purposes of the Sixth Amendment, the "essential inquiry" is "whether a fact is an element of a crime." Id. at 2162.

Accordingly, in Alleyne, the Court overruled its earlier decision in Harris v. United States, 536 U.S. 545 (2002), and held that any fact that increases the mandatory minimum sentence, like a fact increasing the statutory maximum, constitutes an element and must be found by the jury.

But these decisions did not hold that a fact **must** increase the legally prescribed punishment to constitute an element of an offense and thus require a jury finding. To the contrary, writing for the Court in Alleyne, Justice Thomas explained: It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. Alleyne, 133 S. Ct. at 2162. Thus it is constitutional error for a district court to sentence a defendant for a crime of which he has not been convicted, whether or not it affects the maximum sentence to which the defendant is exposed.

The decision below conflicts with these decisions. The jury acquitted Petitioner of seven counts of Bank Fraud, Mail Fraud and Wire Fraud affecting a financial institution. It convicted him of Wire Fraud and conspiring to commit that offense. The judge, however, explicitly found that he had committed every offense alleged in the Indictment, and sentenced him accordingly. In doing so, the court adopted the presentence report, and failed to acknowledge that the applicable statutory maximum was 20, not 30 years.

The court of appeals remanded only for consideration of "whether [the district court] would have sentenced Petitioner differently if it had understood the statutory maximum sentence was 20 years for each count." In so-limiting its remand, the panel ignored the necessary implication of its finding, which is that the district court sentenced Petitioner for conspiracy to commit bank fraud -- a crime of which Petitioner was not convicted.

To be sure, the district court's application of an aggravated statutory Maximum, unsupported by the jury's verdict, plainly offends the core principle espoused in the **Apprendi-Alleyne** line of cases. More fundamentally, though, the entire sentencing below was flawed for the very same reasons articulated in **Alleyne**: the court could not sentence Petitioner for a crime other than the one the jury found he committed. **Alleyne** 133 S. Ct. at 2162.

A sentencing judge simply cannot conclude that her error in identifying the crime of conviction would not have affected the sentencing decision. This is true irrespective of the impact on the applicable statutory range of penalties. Accordingly, this Court should grant certiorari to consider whether a sentence imposed for one crime. when the jury only finds facts for another crime, violates the Fifth and Sixth Amendments as it indicated in **Alleyne**.

(iii) Petitioner's Sentence Effectively Nullifies the Jury's Verdict in This Case.

Throughout the Supreme Court's Apprendi jurisprudence, the most dominant theme is the overarching purpose of the Sixth Amendment: ensuring that the jury trial is not "a mere preliminary to a judicial inquisition into the facts of the crime the State **actually** seeks to punish." Blakely v. Washington, 542 U.S. 296, 306-07 (2004). As even the dissenting opinion acknowledged in Alleyne, "the framers clearly envisioned a more robust role for the jury. They appreciated the danger inherent in allowing justices named by the crown to imprison, dipatch or exile any many that was obnoxious to the government, by an instant declaration, that such is their will and their pleasure." Alleyne v. United States, 133 S. Ct. 2151, 2169 (2013)(Roberts, C.J., dissenting)(quoting in part, 4 W. Blackstone, **Commentaries on the Laws of England** 343 (1769)).

This case presents a scenario that stands these notions on their head - one in which the jury trial was indisputably a "mere preliminary" to a judicial inquisition of the facts that State actually sought to punish. The Framers who adopted the Sixth Amendment could not have intended to guard against Governmental oppression through criminal juries with ultimate power to confirm or reject the truth of every accusation, and to partially acquit to lessen unduly harsh punishment, see Jones v. United States, 526 U.S. 227, 247 (1999)--only to allow a judge to then effectively nullify the jury's acquittal. Doing so eviscerates the "fundamental reservation of power" in the jury and prevents it from "exercis[ing] the control that the Framers intended." Blakely, 542 U.S. at 306. Like other "'inroads upon this sacred bulwark of the nation,'" the use of acquitted crimes to calculate the guideline range is "' fundamentally opposite to the spirit of our constitution.'" Booker, 543 U.S. at 244 (quoting 4 W. Blackstone, **Commentaries on the Laws of England** 343-44 (1769)).

Such a disconnect breeds disrespect for our legal system as a whole. The Sixth Amendment on its face, and as construed by the Apprendi cases, envision jurors serving as a critical protection against judicial overreaching. But cases like this one give lie to such a notion, and at the same time disrespect the jurors' service to their community.

"It would only confirm the public's darkest suspicions to sentence a man to an extra ten years in prison for a crime that a jury found he did not commit." United States v. Ibanga, 454 Supp. 2d 532, 539 (E.D. Va. 2006)("[M]ost people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted"), vacated, 271 F. App'x 298 (4th Cir. 2008). See also United States v. Canania, 532 F.3d 764, 768 & n.4 (8th Cir. 2008)(Bright, J., concurring)(quoting a letter from a juror as evidence that the use of acquitted conduct is perceived as unfair and "wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); United States v. Coleman, 370 F. Supp. 2d 661, 671 n.14 (S.D. Ohio 2005), aff'd in part vacated in part, and remanded on other grounds, United States v. Kaminski, 501 F.3d 655 (6th Cir. 2007)(quoting United States v. Frias, 39 F.3d 391, 393 (2d Cir. 1994)("A layperson would undoubtedly be revolted by the idea that, for example, a 'person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.'"). Such verdicts also vastly increase the power of the prosecutor versus the individual, giving prosecutors substantial incentives to take even weaker cases to trial, while at the same time inducing defendants to accept unjust plea bargains because the stakes of fighting unjust charges are just to high when a conviction on any count (and even a far lesser one, as occurred here) will allow a court to sentence on all counts. In short, important public policy interests attach to any judicial decision to effectively nullify a jury's verdict. Because

those interests are at the zenith in this case, where the sentence is calculated in a way that nullifies the jury's acquittals on 7 of 9 of the counts, it provides an excellent vehicle for this court to revisit the question of whether such a practice comports with the Sixth Amendment as informed by intervening Supreme Court precedent in Alleyne.

(iv) United States v. Watts, 519 U.S. 148 (1997) in No Longer Good Law.

The lower court denied relief based on this court's decision in Watts. The court stated in its order: "there is no indication in Nelson that the Supreme Court intended to overrule Watts, which permits sentencing Courts to consider acquited conduct so long as the conduct is proved by preponderance of the evidence." Id.

While it is true that Nelson v. Colorado, 137 S. Ct. 1249 (2017) did not directly address the decision in United States v. Watts, it is clear that the Nelson Court restored the "presumption of innocence" to a person acquitted of a crime. This principle of law, the restoration of the presumption of innocence after an acquittal or overturning of a conviction, was neither recognized nor applied by the Watts Court. So the question is: did Nelson restore the presumption of inocence to a person acquited of a crime? And if so, what effect does this restoration have on the decision in Watts?

Watts was a **per curiam** decision - with two dissenters - that simultaneously granted certiorari, vacated and remanded the case without full briefing or any oral arguement on the acquitted conduct issue. Foreshadowing later critiques, Justice Kennedy expressed his view that sentencing based on acquitted conduct raises concerns about undercutting the jury's verdict of acquittal. 519 U.S. at 170. (Kennedy, J., dissenting). The other dissenter, Justice Stevens, also pointed out that, under the Guidelines, the consideration of acquitted conduct means that

a defendant's sentence can end up being the same whether most of the charges against him/her result in conviction or acquittal. Id. at 163. The practical upshot of this is that acquittals are, for all intents and purposes, simply erased.

In the 16 years since Watts was decided, the Supreme Court has issued a series of opinions emphasizing the importance of the jury's structural role in our Constitutional system. At the same time, Watts has been roundly criticized by the bench, the bar, and legal scholars alike. See, e.g., United States v. White, 551 F.3d 381, 392-94 (6th Cir. 2008)(en banc)(Merritt, J., dissenting)(acquitted conduct sentencing "eviscerates the jury's longstanding power of mitigation"); United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2007)(Bright, J., concurring) ("permitting a judge to impose a sentence that reflects conduct a jury expressly disavowed through a finding of 'not guilty' amounts to more than mere second-guessing the jury - it entirely trivializes its principal factfinding function."); United States v. Grier, 475 F.3d 556, 600 (3d Cir. 2007)(en banc)(Mckee, J., dissenting)(acquitted conduct sentencing "represents a regrettable erosion of a criminal defendant's constitutional right to due process"); United States v. Mercado, 474 F.3d 654, 658 (9th Cir. 2007)(Fletcher, J., dissenting)(similar); United States v. Faust, 456 F.3d 1342, 1350 (11th Cir. 2006)(Barkett, J., concurring)("[I]t 'perverts our system of justice to allow a defendant to suffer punishment for a criminal charge for which he or she was acquitted.'")(citation imitted)(alterations omitted)).

In Booker, the Supreme Court itself took pains to distance itself from Watts, noting that: Watts in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider full the issue presented to us.... 543 U.S. at 240 n.4. The Court also acknowledged that it had not yet addressed whether the use of acquitted conduct in calculating the Guidelines range violates the Sixth Amendment. Id at 240.

Most recently, the Supreme Court's decision in Alleyne strongly suggests that Watts was wrongly decided. In Alleyne, a jury convicted the defendant of using or carrying a firearm during a crime of violence, but acquitted him of having brandished. The Fourth Circuit affirmed. Alleyne, 133 S. Ct. at 2155-56. On review, the Supreme Court held that the resulting increase in the mandatory minimum sentence from five to seven years based on judicial fact-finding violated the Sixth Amendment right to a jury trial. Id. at 2163-64.

Beyond holding that consideration of acquitted conduct was improper in the context of a mandatory minimum sentence, Alleyne provided two indications that the high court no longer considers Watts to be tenable. First Watts relied heavily on the authority of McMillan, and specifically on the import McMillan placed on the distinction between offense elements and sentencing factors. As discussed above, Alleyne both explicitly overruled the holding in McMillan as to mandatory minimum sentences and put the final nail in the coffin of the notion that sentencing findings enjoy blanket immunity from Sixth Amendment protections.

Second, Justice Thomas's plurality opinion in Alleyne makes clear that when a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. **It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only find the fact for larceny, even if the punishments prescribed for each crime are identical.** One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction. (Thomas, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Furthermore, this Court in Blakely v. Washington, 542 U.S. 296 (2004), rejected the State's claim the statutory maximum for Sixth Amendment purposes was 10 years - i.e., the maximum penalty imposed for a so-called Class B felonies under Washington

law. 542 U.S. at 303. Rather, the Court explained that for Apprendi purposes "the relevant 'statutory maximum' is not the maximum sentence a judge can impose after finding additional facts, but the maximum he may impose **without** any additional findings." Id. at 303-04 (quoting Apprendi v. New Jersey, 530 U.S. 466, 488 (2000)) (emphasis in original).

Nor did Booker hold that under the admittedly "advisory" Guidelines, judicial fact-finding to impose a sentence within the statutory maximum set forth in the United States Code does not violate the Sixth Amendment. Instead, in Booker, the Court held that "when a trial judge exercises his discretion to select a specific sentence **within a defined range**, the defendant has no right to a jury determination of the facts that the judge deems relevant." 543 U.S. at 233 (emphasis added). Thus, if the jury's fact-finding supports imposition of a sentence within the defined range, then the Sixth Amendment will not stand as an obstacle to the imposition of the sentence within the "defined range." But "[w]hen a judge inflicts punishment that the jury's verdict **alone** does not allow, the jury has not found all the facts which the law makes essential to the punishment and the judge exceeds his proper authority." Blakely, 542 U.S. at 304 (internal quotations and citation omitted; emphasis added). The focus, then, is on whether the jury's verdict authorized the sentencing range, and here it plainly did not.

III. PETITIONER'S SHOWING IS NOT ONLY SUBSTANTIAL, IT IS SUFFICIENT TO MOUNT FURTHER REVIEW BY THIS COURT.

This case presents recurring questions of exceptional importance warranting the Supreme Court's immediate resolution. It raises questions of vital importance to defendant's in criminal cases and presents an appropriate vehicle for this Court to further define and clarify the bounds of judicial fact-finding in sentencing. In the short time since this Court decided Alleyne, questions concerning a judge's authority to sentence based on judge-found facts have arisen in the

district and circuit courts with great frequence In a number of these post-Alleyne cases, courts have been asked to determine whether judicial fact-finding has impermissibly aggravated a sentence, even though neither the statutory maximum nor the minimum was increased.

Furthermore, a sentence based on acquitted conduct enhancements undermines the firmly established public expectation that offenders are punished only for crimes of which they are convicted, and not for charges on which they are acquitted. Indeed, the very idea that a defendant can be acquitted of serious charges against him and still be punished just as if the jury had returned a conviction on those counts offends prevailing notions of fairness and undermines confidence in the justice system. See, e.g., United States v. Lombard, 102 F.3d 1, 5 (1st Cir. 1996) (acknowledging that "as a matter of public perception and acceptance, [the use of acquitted conduct sentencing] can often invite disrespect for the sentencing process"); United States v. Coleman, 370 F. Supp. 2d 661, 671-73, n.14(S.D. Ohio 2005)(nothing that "consideration of acquitted conduct has a deleterious effect on the public's view of the criminal justice system [because a] layperson would undoubtedly be revolted by the idea"); United States v. Reuter, 463 F.3d 792, 793 (7th Cir. 2006)(Posner, J.)(similar); see also United States v. Frias, 39 F.3d 391, 393 (2d. Cir. 1994)(Oakes, J., concurring)(acquitted conduct sentencing is a "jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards'").

Where the operation of the Sentencing Guidelines treats acquitted conduct exactly the same as convicted conduct, acquittals are rendered, in essence, legally meaningless. The unavoidable result is to cast doubt on the right to a fair trial, andto devalue the historic and esteemed role of the juries in the American legal system. As Judge Newman has observed, a "just system of criminal sentencing cannot failto distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal.) United States v. Concepcion, 983 F.2d 369, 396 (2d. Cir. 1992).

IV. APPEALABILITY

The Petitioner has made more then a good-faith effort to conform this application to all of the requirements set out in Hohn v. United States, 524 U.S. 236 (1998) and the Supreme Court's Rules. The Petitioner promptly applied for a certificate from the district court and the court of appeals prior to applying for a certificate from this Court.

The Petitioner has served all parties to this action with a copy of this application and supporting papers, as shown in the attached Certificate of Service. Petitioner has also supplied this Court with the complete record of the district court's and appeals court's action on the application and will supply this Court with any additional materials or argument that it deems necessary for prompt resolution of this application.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Honorable Court issue the requested Certificate of Appealability on all the issues set forth in this Application.

Respectfully Submitted,

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