

No. _____

In the Supreme Court of the United States

TAMMIE MCCONICO,

Petitioner,

Versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RACHAEL E. REESE, ESQ.
Counsel of Record
Attorney at Law
O'BRIEN HATFIELD, P.A.
511 West Bay Street
Suite 330
Tampa, Florida 33606
(813) 228-6989
rer@markjobrien.com

QUESTION PRESENTED

Whether the Sixth Amendment requires proof beyond a reasonable doubt, even in a circumstantial case? And whether the Equal Protections Clause is violated when there is a conflict amongst the federal circuit courts of appeal dealing with what the standard of review is when reviewing circumstantial evidence cases?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS.....	iii
INDEX TO APPENDICES.....	iv
TABLE OF AUTHORITIES.....	v
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE.....	2
A. Statement of jurisdiction in the lower courts, in accordance with this Court's Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.....	2
B. Factual Background.....	3
C. Procedural History in the District Court.....	10
D. Eleventh Circuit's Consideration of the Matter.....	11
REASONS FOR GRANTING THE PETITION.....	12
A. There is a Conflict Amongst Appellate Courts on When Circumstantial Evidence is Sufficient to Sustain a Conviction.....	12
B. In Light of the First Circuit Precedent, The Eleventh Circuit's Opinion in The Instant Case Would Be Erroneous.....	16
CONCLUSION.....	17

INDEX TO APPENDICES

APPENDIX A	OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (4/9/2019).....	A1
APPENDIX B	JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, Doc. # 92 (3/12/2018).....	A11

TABLE OF AUTHORITIES

CASES

<i>Henry v. Ricks</i> , 578 F.3d 134 (2d Cir.2009).....	14
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	14
<i>Langston v. Smith</i> , 630 F.3d 310 (2d Cir. 2011).....	14
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	16
<i>United States v. Atencio</i> , 435 F.3d 1222 (10th Cir. 2006).....	14
<i>United States v. Brown</i> , 186 F.3d 661, 664 (5th Cir.1999).....	13
<i>United States v. Charles</i> , 313 F.3d 1278 (11th Cir. 2002).....	13
<i>United States v. D'Amato</i> , 39 F.3d 1249 (2d Cir.1994)	14
<i>United States v. Flores-Rivera</i> , 56 F.3d 319 (1st Cir. 1995).....	15, 16
<i>United States v. Hernandez</i> , 433 F.3d 1328 (11th Cir. 2005).....	12
<i>United States v. Jones</i> , 44 F.3d 860 (10th Cir.1995).....	14
<i>United States v. Kim</i> , 435 F.3d 182 (2d Cir. 2006).....	13
<i>United States v. Martinez</i> , 54 F.3d 1040 (2d Cir.1995).....	15
<i>United States v. MacPherson</i> , 424 F.3d 183 (2d Cir.2005).....	14
<i>United States v. McConico</i> , 768 Fed. Appx. 885 (11th Cir. 2019).....	1
<i>United States v. McDowell</i> , 498 F.3d 308 (5th Cir.2007).....	13
<i>United States v. Moreland</i> , 665 F.3d 137 (5th Cir. 2011).....	13
<i>United States v. Percel</i> , 553 F.3d 903 (5th Cir.2008).....	13
<i>United States v. Perez-Tosta</i> , 36 F.3d 1552 (11th Cir. 1994).....	13
<i>United States v. Pettigrew</i> , 77 F.3d 1500 (5th Cir.1996).....	13

<i>United States v. Quattrone</i> , 441 F.3d 153 (2d Cir.2006).....	14
<i>United States v. Rojas Alvarez</i> , 451 F.3d 320 (5th Cir. 2006).....	13

STATUTES

18 U.S.C. § 3231.....	2
18 U.S.C. § 3742.....	2
28 U.S.C. § 1254.....	1
28 U.S.C. § 1291.....	2
U.S. Const., amend. XIV.....	<i>passim</i>
U.S. Const., amend. VI.....	<i>passim</i>

RULES

Supreme Court Rule 14.....	2
----------------------------	---

PETITION FOR WRIT OF CERTIORARI

Tammie McConico respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on April 9, 2019, affirming the judgment of the United States District Court for Middle District of Florida, Orlando Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished and appears at *United States v. McConico*, 768 Fed. Appx. 885 (11th Cir. 2019). It is also attached as **Appendix A**.

The judgment of the United States District Court for the Middle District of Florida, Orlando Division, is unpublished and is attached at **Appendix B**.

JURISDICTION

The court of appeals entered its opinion on April 9, 2019. Ms. McConico did not file a petition for rehearing or rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court’s Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

The Petitioner, Tammie McConico, faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The district court entered judgment on March 12, 2018. Ms. McConico filed a timely notice of appeal on March 20, 2018. The Eleventh Circuit exercised jurisdiction over Ms. McConico’s appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences.

This case concerns an important issue surrounding when circumstantial evidence may be sufficient to support a conviction. Currently, there is a conflict amongst the circuits about when a conviction must stand and when a conviction must be overturned, when said convictions are based on circumstantial evidence of guilt.

This conflict creates an issue as to whether defendants in some circuits are currently serving prison sentences for crimes that defendants in other circuits would not be.

B. Factual Background.

The government's case against Ms. McConico centered around the theory that Ms. McConico falsely sold herself to individuals as being a "tax guru" and then fabricated information within those individual's tax returns in order for them to secure a higher tax return. The government's case was supported mainly by the testimony of the individuals who filed tax returns.

The government presented testimony from Karen Minnick. (Doc. 102 at 134). Ms. Minnick met Ms. McConico through a man who worked as a mailman at the management property she used to work for in 2011. Ms. Minnick was told that Ms. McConico helped individuals at the mailman's congregation to do their taxes and she was very good. As a result of his recommendation, Ms. Minnick contacted Ms. McConico in January of 2012. (Doc. 102 at 136). Ms. Minnick brought all of her tax related documents to Ms. McConico's office and dropped them off. (Doc. 102 at 137). Ms. Minnick recalled that there were two young women working at the desk when she entered the office and they made copies of all her documents. (Doc. 102 at 138). After the copies were made, Ms. Minnick met with Ms. McConico. (Doc. 102 at 139). Ms. Minnick was then shown her tax returns and she identified false information contained within them. (Doc. 102 at 143-65). Ms. Minnick never asked to see the return before it was filed with the IRS. (Doc. 102 at 148). Ms. Minnick was not aware

that there was false information within her tax return until she was contacted by the IRS. (Doc. 102 at 157).

On cross-examination, Ms. Minnick admitted that she didn't ask any questions or contact the IRS when she got two return checks, which were greater than she was used to receiving. Ms. Minnick further admitted that she never saw Ms. McConico put any information into a computer. She further admitted that she never saw Ms. McConico submit her taxes. The only time that Ms. Minnick actually saw anything or asked any follow-up questions was when she got audited by the IRS. (Doc. 102 at 179). The government also called Stacey Wofford (Doc. 104 at 49-101) and Tonya Malik (Doc. 104 at 102-120), who provided testimony similar in nature to Ms. Minnick.

Arnita Johnson was the next witness called to testify for the government. (Doc. 102 at 180). Ms. Johnson met Ms. McConico through a referral from her co-worker, Janice Green. Ms. Johnson then made an appointment with Ms. McConico and went to her office to drop off paperwork. (Doc. 102 at 184). Ms. Johnson testified that there were other women working in the office, making copies of the documents and taking paperwork from clients. (Doc. 102 at 185). Thereafter, Ms. Johnson sat down with Ms. McConico and discussed particular facts relevant to her taxes. (Doc. 102 at 186). Ms. Johnson was then shown her tax returns and she identified false information contained within them. (Doc. 102 at 192-94; 196-205). One area of contention was whether Ms. Johnson owned her own business. Ms. Johnson admitted that the first refund she was received, for \$8,123, was higher than normal but didn't ask any

questions of Ms. McConico. Instead, she became friends with Ms. McConico and continued to have her file her taxes in the years to follow. She further admitted that Ms. McConico never told her who would be preparing her taxes. (Doc. 102 at 195). Ms. Johnson testified that she didn't know there was anything wrong with the returns until she was audited by the IRS. (Doc. 102 at 206).

On cross-examination, Ms. Johnson admitted that she actually was involved with assisting Ms. McConico to a certain extent. Essentially, she acted as to messenger between people getting their taxes prepared and Ms. McConico in terms of making sure information was transferred from one party to another. (Doc. 104 at 9). Ms. Johnson worked as Ms. McConico's assistant at her nonprofit organization, Telina's. (Doc. 104 at 9). Ms. Johnson would call individuals on Ms. McConico's behalf and as a result, individuals started to call her cell phone and may have listed her cell phone number on documents. (Doc. 104 at 10, 31).

Ms. Johnson then admitted that during her first meeting with Ms. McConico, she may have advised her that she was a licensed cosmetologist. (Doc. 104 at 14). Thereafter, Ms. Johnson provided Ms. McConico with receipts for materials that she had purchased in relation to her cosmetology license. (Doc. 104 at 14). Ms. Johnson admitted that although she did not own a salon anymore, she was still doing hair at the time her tax return was prepared by Ms. McConico. Specifically, Ms. Johnson was still charging individuals to do their hair. (Doc. 104 at 25).

Ms. Johnson then testified about the fact that there was one laptop used in the Telina's office that she had access. Ms. Johnson did not know if the laptop was also

used at the tax office, but she did know that the laptop was never left at the Telina's office when they closed. (Doc. 104 at 17). Ms. Johnson spent a considerable amount of time with Ms. McConico, as both her friend and personal assistant. However, she never once saw Ms. McConico sit down, log in and actually do taxes. Ms. Johnson never saw Ms. McConico prepare a single tax return. (Doc. 104 at 21). Ms. Johnson claimed that she did not work in the tax office and as a result, would not know who was putting the information into the computer and preparing the tax forms. (Doc. 104 at 30). However, Ms. Johnson did admit to knowing that there was a girl named Danielle working at the tax office. (Doc. 104 at 29).

The government presented testimony from several agents, including IRS Special Agent Troy Diggs (Doc. 104 at 140), IRS Special Agent Rita Adam (Doc. 104 at 152), and IRS Special Agent Cynthia Tejada (Doc. 104 at 200). Agent Adam was responsible for reviewing the tax returns and identifying which ones included false information. However, she did not look back at prior returns to see if the individuals had included the same false information prior to having the Appellant help them file. (Doc. 104 at 174). Agent Adam was further responsible for tracing the money given through the tax returns, which led her to a bank account with Ms. McConico as an authorized user. However, again, Agent Adam admitted that she did not check with the bank to determine if there was any online access to Ms. McConico's accounts. (Doc. 104 at 178). Agent Adam further admitted that although the refunds were being deposited in the identified accounts, the money that was due to the taxpayers was never kept by Ms. McConico but was distributed appropriately. (Doc. 104 at 180).

Agent Adam confirmed that she never saw anything that would lead her to believe that a refund that was intended for a taxpayer was taken or kept by Ms. McConico. (Doc. 104 at 182).

Agent Tejada testified about the various IP addresses from where the tax returns came from. However, it could not be said how many computers used the IP address at the time that the returns were submitted. Agent Tejada also testified about a search warrant conducted on Ms. McConico's residence, wherein tax-related documents and a laptop were found. Dylan Curatolo, an employee with the IRS Criminal Division, performed an examination on the laptop that was seized and found several tax related documents. However, Mr. Curatolo admitted that there is no possible way for him to determine whether or not a specific user was behind a specific computer during the period of time in question. (Doc. 106 at 49). Mr. Curatolo did not even take steps to try to determine, based on circumstantial evidence on the laptop, who was using the laptop at the time.

In an effort to refute the government's theory of events, Ms. McConico presented testimony from two witnesses. Carolyn Haney was the first witness called to testify. (Doc. 106 at 59). Ms. Haney met Ms. McConico in 2011 and was aware that Ms. McConico had set up an office where people could get help with preparing their taxes. (Doc. 106 at 59-60). Ms. Haney was involved with the office, but never prepared taxes. Ms. Haney assisted with prepping and compiling the files for the clients. (Doc. 106 at 60). Ms. Haney described the office at Silver Star. The office was on the second floor and when you entered, there was an area where people could sit down and wait.

The next part of the office was set up for training. There were laptops on the tables for the clients that came in to get training or assistance with resumes and filling out job applications. (Doc. 106 at 61). Ms. Haney estimated that there were anywhere between 8 and 10 computers at the office. (Doc. 106 at 62). Ms. Haney then described her involvement.

“My job was to prepare the documents for data entry. Monica, Danielle, and Arnita did the inputting of. So whatever came through email, whatever was faxed or copied by the clients when they came in, I would compile that information. And if anything was missing, I would call them and say, we’re missing, you know, social security card; we’re missing your, you know, IDs, or whatever was required on the intake sheet. And then once that was done, I would pass it to Arnita or Monica or Danielle for input.”

(Doc. 106 at 62). Ms. Haney explained that Danielle was the manager of the office and implemented the training for the computers. (Doc. 106 at 63). Ms. Haney then testified about Arnita Johnson. Ms. Haney described Ms. Johnson as Ms. McConico’s personal assistant and not her “armor bearer”. (Doc. 106 at 64). She described Ms. Johnson as being Ms. McConico’s right hand because she made calls, “would do taxes”, would do input, and would follow up with clients. (Doc. 106 at 64). Ms. Haney saw Ms. Johnson working with taxpayers to help prepare their tax forms. She physically saw Ms. Johnson sitting at computers preparing and filing tax returns. (Doc. 106 at 65). Ms. Haney then testified about Ms. McConico’s duties in the office.

“I didn’t see her doing anything as far as preparing the taxes. Most of the things that I would hear her saying is, you know, about confidentiality and making sure that they were following the training that was implemented as far as documents that, you know, the customers need – I call them customers, but clients – documents to make sure that no identity thefts or nothing was left out on the, you know, table tops, you know, so that someone else could get their information.

Want to make sure that everything – the office was in chaos, because sometimes it would get chaos with Arnita and Danielle. They would be at each other's throats. So she would try to make sure that that stayed clean.”

(Doc. 106 at 65-66). Ms. Haney testified that she never saw Ms. McConico prepare a customer's tax return on a computer. (Doc. 106 at 66). Ms. Haney testified that everyone had access to the loffi6 e-mail address. (Doc. 106 at 76).

Andre Johnson was the final witness called to testify. (Doc. 106 at 78). Mr. Johnson met Ms. McConico in 2009 through community service. At that point, he started working with her doing campaign work. (Doc. 106 at 80). Mr. Johnson was aware of the Silver Star office that was referred to as the “tax office”. (Doc. 106 at 81). Mr. Johnson testified that Ms. McConico did not do tax preparations at all. However, the office on Silver Star was an office where people would get tax preparation services. (Doc. 106 at 81). Mr. Johnson explained that when you go in the office, there are individuals there copying material and paperwork. (Doc. 106 at 81). There were other people there for data input. Mr. Johnson had personally set up opportunities for the community to come in and learn how to do their taxes. (Doc. 106 at 82). Mr. Johnson explained that individuals were taught to do their taxes by Ms. Arnita, Danielle and Monica Brown. (Doc. 106 at 82). Ms. McConico never did any of the taxes at the Silver Star office. Mr. Johnson explained that there was ultimately a fight between Danielle and Arnita because Arnita wanted to run the office, but Danielle was the officer supervisor. (Doc. 106 at 83).

C. Procedural History in the District Court.

On April 12, 2017, a federal grand jury returned in the Middle District of Florida, Orlando Division, a seventeen-count indictment charging Ms. McConico with Aiding or Assisting in Preparation of False Documents Under Internal Revenue Service Laws. (Doc. 1).

The matter originally went to trial on August 14, 2017, and lasted two (2) days. (Doc. 38-40). The matter ended after Ms. McConico moved for an ore tenus motion for mistrial and said motion was granted. (Doc. 42, 45).

On October 24, 2017, Ms. McConico proceeded to her second trial. The trial lasted three (3) days. After the government rested its case-in-chief, Ms. McConico moved for a judgment of acquittal:

Pursuant to Federal Rule of Criminal Procedure 29, at this time I make a motion for judgment of acquittal. Specifically, we feel that the Government has failed to introduce sufficient evidence on all the elements in order to support a conviction. I would ask the Court to focus in particular on the Government's theory here in this particular case.

The Government has charged my client with aiding and abetting or procuring or assisting in the preparation of a false tax return. We don't believe that the Government has specifically proven the necessary state of mind that this was willful or knowing. Even viewing the evidence in the light most favorable to the United States, the Government has failed to establish the prima facie case and, as a result, the motion for judgment of acquittal on all counts should be granted.

(Doc. 106 at 56). The district court denied the motion. The jury ultimately returned a verdict on October 26, 2017, finding Ms. McConico guilty as to all counts. (Doc. 68).

D. Eleventh Circuit's Consideration of the Matter.

On appeal, a three-judge panel of the Eleventh Circuit held that Ms. McConico was not entitled to relief because “the evidence against McConico was more than sufficient to support the jury’s guilty verdicts.” Pet. App. A5. The panel explained that the government was required to prove three things in order to obtain a guilty verdict: that Ms. McConico (1) willfully and knowingly aided or assisted (2) in preparing federal income tax returns (3) containing material statements that she knew were false. Pet. App. A5. The panel then summarized its view of the “evidence” against Ms. McConico.

The jury heard an undercover phone call in which McConico admitted to offering tax preparation services (which she later denied) and boasted about her qualifications (which were nonexistent). Multiple witnesses testified at trial that McConico was their point of contact, that they went to her to have their taxes done, and that certain information included on their returns was false. Bank records showed tax refund money going into accounts that McConico controlled. Tax documents (including documents relating to the individuals listed in the indictment) were found throughout McConico’s home, and more tax documents, including returns that corresponded with the counts in the indictment, were stored in a computer (along with McConico’s resume and photos of herself) found in McConico’s bedroom. The list goes on. A reasonable juror could have relied on this evidence to find McConico guilty.

Pet. App. A5-A6. The panel then pointed out to several pieces of evidence that presented an alternate theory of events.

It is, of course, *possible* that McConico’s lies about her tax expertise were mere boasting, unconnected to any underhanded schemes; that the witnesses who testified that they went to McConico to have their taxes done wrongly assumed that she actually did them; that other people had access to the bank accounts where the refunds went; that the tax documents in McConico’s home belonged to someone else; and that the computer on McConico’s bed was not hers.

Pet. App. A6. The panel then found that because the jury did make the inference that Ms. McConico was guilty, that cannot simply be undone by pointing to an alternative interpretation of the evidence. The panel cited to *United States v. Hernandez*, 433 F.3d 1328 (11th Cir. 2005) as its only legal authority or basis for affirming this point of Ms. McConico's appeal. In citing to it, the panel summarized its relevant holding as "noting that the evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion exception that of guilt" (internal quotation marks omitted). Pet. App. A6-A7.

REASONS FOR GRANTING THE PETITION

A. There is a Conflict Amongst Appellate Courts on When Circumstantial Evidence is Sufficient to Sustain a Conviction.

One of the foundations of our nation is that no individual will be denied the right to a fair and impartial trial, before an unbiased jury. The Due Process Clause of the Fourteenth Amendment requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof, defined as evidence necessary to convince a trier of fact beyond reasonable doubt of the existence of *every* element of the offense. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)(emphasis added). How the trier of fact is convinced, is a question that this Court should decide. Over time, it has become known and unarguable that a defendant's guilt will not always be proven with direct evidence. Instead, in arguably a majority of cases, a defendant is convicted based on circumstantial evidence of his guilt.

Pursuant to the 11th Circuit Court of Appeal's jury instruction on "circumstantial evidence", it is defined as proof of a chain of facts and circumstances that tend to prove or disprove a fact. The precedent of that court has consistently been that in a circumstantial evidence case, the government's case need not exclude every possible hypothesis of innocence to support a conviction beyond a reasonable doubt, but a conviction cannot be based on speculation and surmise alone. *United States v. Kim*, 435 F.3d 182 (2d Cir. 2006). Where the government's case is based on circumstantial evidence, "reasonable inferences, and not mere speculation, must support the jury's verdict". *United States v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002) (quoting *United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994)).

The 5th Circuit, 10th Circuit, and 2nd Circuit have all come to similar conclusions of law. In *United States v. Moreland*, 665 F.3d 137 (5th Cir. 2011), the court found that

in viewing the evidence in the light most favorable to the prosecution, we "consider the countervailing evidence as well as the evidence that supports the verdict in assessing sufficiency of the evidence." *United States v. Brown*, 186 F.3d 661, 664 (5th Cir.1999) (internal quotation marks omitted). We also will draw upon only "reasonable inferences from the evidence to support the verdict." *United States v. Percel*, 553 F.3d 903, 910 (5th Cir.2008) (quoting *United States v. McDowell*, 498 F.3d 308, 312 (5th Cir.2007)) (internal quotation marks omitted). "[A] verdict may not rest on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference." *United States v. Rojas Alvarez*, 451 F.3d 320, 333 (5th Cir.2006) (alteration in original) (quoting *United States v. Pettigrew*, 77 F.3d 1500, 1521 (5th Cir.1996)) (internal quotation marks omitted).

Id. at 149. In *United States v. Atencio*, 435 F.3d 1222 (10th Cir. 2006), the court similarly found that when reviewing the record for sufficiency of the evidence, they determine whether

[t]he jury “may draw reasonable inferences from direct or circumstantial evidence,” but may not convict based on mere “speculation or conjecture.” *United States v. Jones*, 44 F.3d 860, 865 (10th Cir.1995). We therefore uphold convictions based on inferences that “flow[] from logical and probabilistic reasoning.” *Id.*

Id. at 1232. In *Langston v. Smith*, 630 F.3d 310 (2d Cir. 2011), the 2nd Circuit found that

[a] conviction based on speculation and surmise alone cannot stand.

Where a fact to be proved is also an element of the offense, it is not enough that the inferences in the government's favor are permissible; rather, the inferences must be sufficiently supported to permit a rational juror to find that the element is established beyond a reasonable doubt.

Despite the importance of this constitutional principle, judges must be highly deferential to the jury's verdict of conviction: courts “view [] the evidence in the light most favorable to the prosecution,” *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781, and will uphold the jury's verdict unless “the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury [could convict],” *United States v. MacPherson*, 424 F.3d 183, 187 (2d Cir.2005) (internal quotation marks omitted). That said, “a conviction based on speculation and surmise alone cannot stand,” *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir.1994), and courts cannot “credit inferences within the realm of possibility when those inferences are unreasonable,” *United States v. Quattrone*, 441 F.3d 153, 169 (2d Cir.2006).

This “standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.” *Jackson*, 443 U.S. at 324 n. 16, 99 S.Ct. 2781; *Henry v. Ricks*, 578 F.3d 134, 138 (2d Cir.2009). “[W]here a fact to be proved is also an element of the offense ... it is not enough that the inferences in the government's favor are permissible.... [T]he inferences [must be] *315 sufficiently supported to permit a rational juror to find that

the element ... is established beyond a reasonable doubt.” *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir.1995).

Id.

Pursuant to these circuits’ understanding of the circumstantial evidence standards, there is a commonality about which inferences should be considered and which should not. However, the 1st Circuit has identified a different standard. In *United States v. Flores-Rivera*, 56 F.3d 319 (1st Cir. 1995), the court discussed that

[i]f the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, this court must reverse the conviction. This is so because ... where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury *must necessarily entertain* a reasonable doubt.

Id. at 323 (alterations, ellipses, and emphasis in original) (internal quotation marks omitted).

The First Circuit’s interpretation and analysis of circumstantial cases provides defendants sitting in that circuit a benefit that is not provided to other defendants. Further, it forces defendants sitting in other circuits, such as the Eleventh Circuit in the instant case, to bear a heavier burden or alternatively, remain incarcerated for a crime that has not been fully proven as required under the Constitution. Although the difference in standards of review appear minimal on their face, the application of those standards creates not only a conflict, but a violation of equal protection amongst all defendants.

Only this Court’s review can establish a national rule that eliminates inconsistent views about what the circumstantial evidence standard should be. Until

this Court establishes said rule, defendants in different circuits will not only continue to receive inconsistent and unequal holdings, but will also remain incarcerated for crimes that have not been proven beyond a reasonable doubt.

B. In Light of the First Circuit Precedent, The Eleventh Circuit's Opinion in The Instant Case Would Be Erroneous.

The Eleventh Circuit opinion held that Ms. McConico was not entitled to relief because the jury inferred her guilt based on the evidence, even though there was evidence establishing a different theory of events. The panel admitted there was an alternative theory that the jury could have considered, and that theory under Ms. McConico's brief arguments would have acquitted her. However, because the jury did not agree with that theory and inferred guilt, the panel found that it could not "undo its verdict." Pet. App. A6. If Ms. McConico's case were to be heard in the First Circuit, her conviction would have been reversed because there is "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, [and therefore,] this court must reverse the conviction." *See, Flores-Rivera, supra*.

Ms. McConico is entitled to the same proof beyond a reasonable doubt that all other defendants are given. The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982). Pursuant to the Equal Protection Clause, all defendants who are convicted based on circumstantial evidence, and then file an

appeal, should be entitled to the same standard of review and possibility of reversal. This means that a defendant in one circuit should not be held to a higher burden than a defendant in another circuit. This is precisely what is happening right now, and why the Eleventh Circuit's opinion in the instant case is erroneous.

The number of circumstantially proven cases, in comparison to direct evidence cases, is growing by the day. As a result, the appeal of those convictions will also continue to grow. The circuits should all have a uniform standard of review, that satisfies the Sixth Amendment of the Constitution, as well as the Equal Protections Clause. Without that uniformity, defendants will continue to suffer. Therefore, it is imperative that this Court determine this likely recurring and important legal issue. This is the ideal opportunity to resolve said issue.

CONCLUSION

For the reasons stated above, the Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Tammie McConico, Petitioner

Date: July 8, 2019



RACHAEL E. REESE, ESQ.

Counsel of Record

Attorney at Law

O'BRIEN HATFIELD, P.A.

511 West Bay Street

Suite 330

Tampa, Florida 33606

(813) 228-6989

rer@markjobrien.com