19-6065

No. _____

ORIGINAL

IN THE

SUPREME COURT of the UNITED STATES

UNITED STATES OF AMERICA,

V.

FUSCO EMILIO,

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

PETITION FOR A WRIT OF CERTIORARI

Fusco Emilio
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QUESTION PRESENTED

I. 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 ?

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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.

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.

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)).

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

Petitioner was charged in five counts of a superseding indictment, S 4-09-cr-1239 (PKC). A jury found him guilty of count one, racketeering conspiracy in violation of 18 U.S.C. § 1962(d), count three, extortion conspiracy in violation of 18 U.S.C. § 1951, and count five, interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952. Petitioner was acquitted of count two, racketeering in violation of 18 U.S.C. § 1962(c), and count four, extortion in violation of 18 U.S.C. § 1951.

With respect to count two, a conviction required the jury to unanimously find at least two predicate acts of racketeering proved beyond a reasonable doubt. The indictment alleged the following predicate acts: the murders and conspiracies to murder Adolfo Bruno and Gary Westerman, extortion and conspiracy to extort a local business owner, and conspiracy to distribute marijuana. Of the four predicates acts, the jury only found the conspiracy to distribute marijuana proven beyond a reasonable doubt.

At the conclusion of Petitioner's sentencing hearing the Court concluded by a preponderance of the evidence that Petitioner had participated in the murders of Bruno and Westerman. Accordingly, the Court determined that his adjusted offense level under the Guidelines was 45. The resulting Guideline range was life imprisonment, which was reduced to 45 years imprisonment (the stautory maximum). The Court sentenced Petitioner to 300 months imprisonment (25 years).

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

In this appeal, Petitioner argues that §2E1.1, rather than §2A1.1 applies to his conviction for racketeering conspiracy in violation of 18 U.S.C. §1962(d). Section 2E1.1 establishes the base offense level for unlawful conduct relating to racketeer influenced and corrupt organizations, including 18 U.S.C. §1962 and 1963. Section 2A1.1 establishes the base offense level for violations of 18 U.S.C. §1111. The government contends that §2A1.1 provides the correct basis for Petitioner's sentence because his actual conduct involved the murders of Adolfo Bruno and Gary Westerman.

Petitioner was charged in a five-count indictment with: (1) racketeering conspiracy in violation of 18 U.S.C. §1962(d); (2) racketeering in violation of 18 U.S.C. §1962(c); (3) extortion conspiracy in violation of 18 U.S.C. §1951; (4) extortion in violation of 18 U.S.C. §1951 and aiding and abetting extortion in vioaltion of 18 U.S.C. §2; and (5) interstate travel in aid of racketeering in violation of of 18 U.S.C. §1952 and aiding and abetting interstate travel in aid of racketeering in violation of 18 U.S.C. §2. At trial, he was convicted of Count 1 (racketeering conspiracy), Count 3 (extortion conspiracy) and Count 5 (interstate travel in aid of racketeering/aiding and abetting interstate travel in aid of racketeering). He was acquitted on Count 2 (racketeering) and Count (4) (extortion).

Significantly for purposes of this motion, the jury was asked to answer two "Special Sentencing Interrogatories" with respect to Count 1: (1) whether Mr. Fusco conspired to murder, and/or aided and abetted the murder of, Adolfo Bruno in violation of Federal and Massachusetts law; and (2) whether Mr. Fusco conspired to murder, and/or aided and abetted the murder of, Gary Westerman in violation of Massachusetts law. Likewise, the jury was asked to make a findings

with respect to four alleged "Racketeering Acts" associated with Count 2, two of which alleged murder and conspiracy to murder Bruno and Westerman - parallel inquires to the Special Sentencing Interrogatories associated with Count 1.

The jury acquitted Petitioner on Count 2, specifically finding that the government had "not proven" the two Racketeering Acts related to the deaths of Adolfo and Bruno and Gary Westerman. The government thereafter withdrew the Special Sentencing Interrogatory on Count 1 relating to Bruno's death. The jury also answered "no" to the Special Sentencing Interrogatory on Count 1 relating to Westerman's death.

In light of the foregoing, Petitioner asserted that, based on the conduct of which he was convicted, he faced a range of 41 to 51 months' imprisonment under the United States Sentencing Guidelines. Similarly, the Probation Department determined that Petitioner faced a Guidelines range of 78 to 97 months' imprisonment based on the conduct of which he was convicted.

The government radically departed from the foregoing. Notwithstanding the jury's findings that Petitioner was not involved in or responsible for the deaths of Adolfo Bruno or Gary Westerman, the government argued that Petitioner should be held accountable at sentencing for those deaths under the lower "preponderance of evidence" standard applicable to the findings at sentencing hearings. It therefore argued that his Guidelines offense level should be 46, which indicates a sentence of life without parole. The District Court, in turn, largely adopted the government's analysis based on that "acquitted conduct," and sentenced Petitioner principally to 300 months (25years) behind bars.

A. SENTENCING METHODOLOGY UNDER THE SENTENCING GUIDELINES

Resolving the question posed by this appeal requires an understanding of the structure of the Sentencing Guidelines. Under the Guidelines, a court arrives at the appropriate offense level employing a two-step process: First determining

which offense guideline section covers the offense conviction, U.S.S.G. §§ 1B1.1(a), 1B1.2(a), next selecting the proper base level from among those contained in that guideline. U.S.S.G. § 1B1.1(b), 1B1.2(b). Because it is the only link between defendant's offense of conviction and his sentence, the offense guideline section is the foundation of the sentence.

Once the court has determined the correct offense guideline section, the court considers the appropriate guideline range within that section based on the defendant's actual conduct, including conduct which did not comprise an element of the offense conviction. U.S.S.G. §§ 1B1.2(b), 1B1.3. Where appropriate, the sentencing court may consider the defendant's relevant conduct if that conduct is established by a preponderance of the evidence, rather than proof beyond a reasonable doubt needed to establish elements of the criminal offense. See United States v. Averi, 922 F.2d 765, 766 (11th Cir. 1991). Because it channels the remainder of the sentencing process, selection of the correct offense guideline section is critically important. The issue raised by this appeal is whether, at step one, the district court selected the correct offense guideline. Here, the district court erred in basing Petitioner's sentence on § 2A1.1, rather than on § 2E1.1.

1. Identifying The Offense Of Conviction

In order to correctly determine the applicable offense guideline, a sentencing court must identify "the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction." U.S.S.G. § 1B1.2(a). The offense of conviction is defined as "the offense conduct charged in the count of the indictment ... of which the defendant was convicted." Id. Here, the verdict is a study in brevity. The count to which Petitioner was convicted merely charges him with a violation of 18 U.S.C. §1962(d). And the verdict does not support a conviction for first degree murder in violation of 18

U.S.C. §1111. Therefore, it follows that Petitioner's offense of conviction is § 1962, rather that §1111, and it was error for the district court to base Petitioner's sentence of an offense guideline applicable to violations of §1111. See United States v. Rivera, 293 F.3d 584 (2nd Cir. 2002)(the initial selection of the offense guideline should be "based only on the statute (or offense) of conviction rather than on judicial findings of actual conduct," not made by the jury).

2. Ascertaining The Applicable Offense Guideline

Having identified §1962(d) as the offense conviction, we turn, as the guidelines direct, to the Statutory Index (Appendix A of the Guidelines) to assist us in determining the applicable offense guideline section of Chapter Two. U.S.S.G. § 1B1.1(a). The introduction of the Statutory Index explains that "this index specifies the guideline section or sections ordinarily applicable to the statute of conviction." The statutory Index lists only § 2E1.1 for violations of §1962(d) and only § 2A1.1 for violations of §1111. The United States urges us to sidestep the Statutory Index in this case, arguing that it merely lists examples of guidelines to apply to various criminal statutes. This characterization significantly understates the authority of the Statutory Index. The preamble of the Statutory Index indicates that in "atypical" cases, the listed guideline provision might not apply to a statutory offense matched with it in the Index, in which case the court may "use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted." The Eleventh Circuit examined this language in United States v. Jackson, 117 F.3d 533 (11th Cir. 1997) and concluded that before a court may sentence a defendant under an offense guideline not listed in the Statutory Index as applicable to the statute of conviction, two conditions must be met. First, the case must be an atypical one, and second, the guideline

section chosen must be applicable to the nature of the offense conduct charged in the count of which the defendant was convicted. 5 117 F.3d at 536. Neither condition is met in this case.

Once the correct offense guideline has been determined, the sentencing court must select the appropriate base offense level from among those specified within that offense guideline. U.S.S.G. §§ 1B1.(b), 1B1.3(a). There is no provision in the guidelines for borrowing base level offense levels from other offense guidelines. The introductory commentary to Chapter Two explains that the chapter "is organized by offenses divided into parts and related sections that may cover one statute or many." By virtue of its location within Chapter Two of the Sentencing Guidelines, § 2A1.1 is a substantive offense guideline section applicable to criminal violations of 18 U.S.C. §1111, rather than a mere sentence enhancer for certain classes of offenses under §1962. Section 1111 itself is a substantive criminal statute, not a mere sentence enhancer for §1962. See e.g., Alleyne v. United States, 570 U.S. 99 (2013), holding; "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 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 finds the facts for larceny, even if the punishment 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." Id.

B. Relevance Of Relevant Conduct And Acquitted Conduct

This Court should not ignore the fact that the concept of relevant conduct and acquitted conduct does not come into play until the correct offense guideline has been selected.

Compare United States v. Chandler, 125 F.3d 892, 897-98 (5th Cir. 1997)("First, utilizing the Statutory Index located in Appendix A, the court determines the offense guideline section 'most applicable to the offense of conviction.'" Once the appropriate guideline is identified, a court can take relevant conduct into account only as it relates to the factors set forth in that guideline). The Chandler Court, noted:[A] court does not enjoy unlimited discretion in determining what constitutes relevant conduct. Instead, pursuant to U.S.S.G. § 1B1.3(a), conduct is relevant only to the extent that it relates to (1) calculating the base offense level, (2) considering the specific offense characteristics set forth in the particular guideline, (3) considering any cross-references contained in the particular guideline, and (4) making any adjustments authorized by Chapter Three. In other words, once the court selects the appropriate guideline under step one, the court can take relevant conduct into account only as it relates to the factors set forth in the guideline. In this case, whether the offense occurred near a protected location is not relevant to any of these factors [set forth in § 2D1.1]. 125 F.3d at 897-98 (internal citation omitted). In determining the applicable offense guideline section, the court considers the defendant's offense conduct. Once the proper guideline section has been selected, relevant conduct is considered in determining various sentencing considerations within that guideline, including the base offense level, specific offense characteristics and any cross-references. U.S.S.G. § 1B1.3(a). In other words, the defendant's "relevant conduct" is actually irrelevant to determining the applicable offense guideline section. See also, United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998)(defendant's uncharged but relevant conduct is actually irrelevant to determining the sentencing guideline applicable to the defendants offense; such conduct is properly considered only after the applicable guideline has been selected when the court is analyzing the various sentencing considerations

within the guideline chosen, such as the base offense level, specific offense characteristics, and any cross references). In this case, it was error for the District Court to consider Petitioner's acquitted conduct before the appropriate guideline was identified.

In fact, the approach of the Sentencing Court, which used Petitioner's acquitted conduct to jump § 2E1.1 to § 2A1.1, is foreclosed by Braxton v. United States, 500 U.S. 344 (1991). In Braxton, the defendant plead guilty to assault on a federal marshal, although the facts adduced at his guilty plea proceeding arguably would have supported a conviction for attempted murder. The Supreme Court held that it was error to base the defendant's sentence on the offense guideline applicable to attempted murder because stipulating to a more serious offense is the only limited exception to the general rule that a court must apply the offense guidline section most applicable to the offense of conviction. 500 U.S. at 346 (citing § 1B1.2(a). The Court did not say that there was a second exception permitting a court to apply the guideline section most applicable to the offense established by the defendant's relevant conduct. This Court is bound by the clear implication of Braxton to reject the relevant conduct and acquitted conduct avenue to sentencing a defendant for a more serious crime than the offense of conviction.

In sum, § 2A1.1 is the offense guideline that sets the punishment for violations of 18 U.S.C. §1111. Petitioner was not convicted of this crime, and he may not be sentenced as if he were.

1. Acquitted 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 Parliment and [the] Crown," whether by acquitting in the face of guilt or by handing down "what today 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 punishment, 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 "fundemental 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 306-07. 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 facts 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 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 beyond 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 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.

2. 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 Alleyne 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 requires 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 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 from the District Court conflicts with these decisions. No one disputes or questions that the government did not prove Petitioner's involvement

in the murders of Adolfo Bruno and Gary Westerman beyond a reasonable doubt. Nevertheless and notwithstanding the jury's findings with respect to those two murders, the Court: (1) found "by a preponderance of the evidence that the defendant Emilio Fusco did participate in the conspiracy to murder Adolfo Bruno"; and (2) found "by a preponderance of the evidence that Mr. Fusco's participation, direct participation, in [the murder of Gary Westerman] has been established." (Sent Tr. at 80:7-9 and 83:2-4, respectively.) The Court, however, also found the following:

> I want to point out that Mr. Fusco was not the architect of the murder of Gary Westerman; he was a go along participant.
>
> And even if I may go back to the Bruno murder ... I don't conclude here that Mr. Fusco was the architect of the murder or that Mr. Fusco insisted on the murder. No, it may not have been that his presentence report [Mr. Fusco's case in the District of Massachusetts], and his
>
> pointing out that Bruno was said to have identified him to law enforcement as a member, may have gotten the ball rolling on the final decision by those in New York, but that didn't make him the architect of it. It didn't make him the trigger man of it.

(Id. at 84:9-23.) Likewise, the Court found as follows:

> As I have already said, he was not the architect of any of these murders, he was not even the principal force or motivator behind the murder of Mr. Bruno. That has been something of a strawman before me. I don't think the government argued that that was the case, and certainly the evidence did not support that that was the case.
>
> It was in fact the case that the presentence report of Mr. Fusco in his prior case likely set certain events into motion, but I don't think the evidence supports the proposition that he knew and intended at the moment he raised the line in the presentence report that the one and only outcome be that Mr. Bruno be murdered.

(Id. at 107:15-108:1.)

At sentencing, the Court largely adopted the government's Guidelines analysis (including the government's six proposed "groups"). It concluded that

Petitioner's guidelines offense level was 45, and found that he fell within Criminal History Category III. Because the sentence recommended by the offense level of 45 and Criminal History Category III is life without parole and, thus, exceeded the statutory maximum prison term for Petitioner's convictions (even if run fully consecutive), the Court sentenced Petitioner principally to: (1) 240 months each (20 years - the statutory maximum) on Count 1 and Count 3 to run concurrently; and (2) 60 months (5 years - the statutory maximum) on Count 5 to run consecutive to the sentences imposed on Counts 1 and 3. (Id. at 110:1-9). Thus, in total, the Court sentenced Petitioner to 300 months (25 years) in prison.

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.

3. 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, dispatch 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 law 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 the 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 the 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 (199) --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 (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 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 not 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 2 and 4 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.

4. United States v. Watts, 519 U.S. 148 (1997) Is 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 acquitted 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 innocence to a person acquitted 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 argument 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 22 years since Watts was decided, the Supreme Court has issued a series of opinions emphasizing the importance of the jury's structural role in the 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)(Merrit, 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 (3rd 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 omitted)(alterations omitted).

In Booker, the Supreme Court itself took pains to distance itself from Watts, nothing 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 unsuprising that we failed to consider full the issue presented to us ... 543 U.S. at 240 b.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 in Alleyne strongly suggest 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 a 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 distribution 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 Kagen, 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 finding." 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. Unstead, 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.

C. The Presence Of A Judge Who Is Not Impartial At Sentencing Is A Structural Defect

RELEVANT FACTS

At the conclusion of Petitioner's bail hearing, the District Court Judge P. Kevin Castel noted: That he had presided "at the trial of three (3) defendants charged in the same indictment which resulted in convictions of the 3 co-defendants on all but one count." By clear and convincing evidence the Court found that Petitioner "was a made-member of the Genovese crime family and that he participated in the murders of Adolfo Bruno and Gary Westerman." This conclusion was made without giving Petitioner an opportunity to cross-examine

witnesses or otherwise challenge the government's evidence.

After presiding over Two (2) Trials on the same general topics, one being Petitioner's Trial. Notwithstanding and contrary to the jury's verdict with respect to the Bruno and Westerman murders. Judge Castel found that Petitioner was responsible for both deaths, by a preponderance of the evidence. This conclusion was also contrary to the Probation Officer's findings that Petitioner was not responsible for the murders.

In fact, the Probation Officer set Petitioner's base offense level at 26 resulting in a sentencing range of 78 to 97 months (six-one half years to eight and one month). Despite this fact, the District Court determined that Petitioner's base offense level was 45 as a result of the murders (see Sent. Tr. at 90). It then sentenced Petitioner, over his Counsel's objection that a sentence based on such acquitted conduct "would be a paradigm of an unreasonable sentence" (Id. at 93), principally to 300 months (25 years) in prison.

Code Of Conduct For United States Judges

Below are the cannons relevant to the instant petition:

CANON I

A Judge should uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to the justice in our society. A Judge should maintain and enforce high standards of conduct and should personally observe those standards. So that the integrity and independence of the judiciary may be preserved.

Although judges should be independent, they must comply with the law and should comply with this code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violations of this code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances.

CANON II

A Judge should avoid impropriety and the appearance of impropriety in all activities.

(A) Respect for the law.

A Judge should respect and comply with the law and should at all times act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

CANON II-A

An appearance of impropriety occurs when a reasonable mind, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the Judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A Judge must avoid all impropriety and the appearance of impropriety. Actual improprieties under the standard include violations of the law, court rules, or other specific provisions of this code.

CANON III

A Judge should perform the duties of the office impartially and diligently.

(A) Adjudicative responsibilities.

(1) A Judge should be faithful to and maintain professional competence in the law.

(4) A Judge should accord to every person who has a legal interest in the proceeding, and that persons lawyer, the full right to be heard according to the law.

(B) Administrative responsibilities.

(2) A Judge should not direct court personal to engage in conduct on the judge's behalf or as a judge's representative when that conduct would contravene the Code if undertaken by the Judge.

(C) Disqualification.

(1) A Judge shall disqualify himself in a proceeding in which the judge's impartiality might be questioned, including but not limited to instances which

(a) The Judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(d) The Judge ...

(iv) to the judge's knowledge is likely to be a material witness in the proceeding;

(e) The Judge has served in government employment and in that capacity participated as a judge (in a previous proceeding), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

COMMENTARY

"The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all judge's activities, including the discharge of the judges adjudicative responsibilities the duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias. (emphasis added)

CANON IV

A Judge may engage in extrajudicial activities that are consistent with the obligations of the Judicial Office.

(A) Law-related activities.

(4) Arbitration and Mediation. A Judge should not act as an arbiter or mediator ...

ARGUMENT

In the case at bar, there are Two examples of bias and prejudice that would call into question Judge Castel's impartiality:

(i) At Petitioner's bail hearing Judge Castel predetermined that Petitioner was a made member of the Genovese crime family and that he had participated in the murders of Adolf Bruno and Gary Westerman. This conclusion was made without giving Petitioner an opportunity to cross-examine witnesses or otherwise challenge the governments case; and

(ii) contrary to the jury's verdict and the Probation Officer's position with respect to the Bruno and Westerman murders. Judge Castel found that Petitioner was responsible for both deaths.

The Second Circuit, as well as every other Circuit Court have made clear that a trial that is conducted by a biased Judge demands an automatic reversal of the conviction. One would gather from the abundant case law that automatic would mean just that, "automatic" and not "if" a defendant could overcome a procedural barrier that did not take into account structural error when Congress wrote the A.E.D.P.A. See United States v. Felciano, 223 F.3d 102, 111 (2d Cir. 2000)("Structural defects which require reversal of a appealed conviction because they affect the framework within which the trial proceeds ... Errors are

properly categorized as structural only if they so fundamentally undermine that fairness or validity of the trial that they require [voiding] its result regardless of any identifiable prejudice." (emphasis added)).

The Two errors listed above, could be considered Judicial Misconduct in accordance with the Supreme Court's holding in Tumey v. Ohio, 273 U.S. 510 (1927); and In re Murchison, 349 U.S. 133 (1955)("an accused has a right to an impartial Judge regardless of the evidence against him").

A Judge's motivation for bias are often hidden from view, as are the reasons fore his interest in the particular case or controversy, but regardless, "any bias, prejudice, or even an interest in the outcome of a given civil or criminal case will disqualify a judge from presiding over the case." Tumey v. Ohio, Supra, A Judge that is disqualified has no authority or jurisdiction to accept a plea or to pass sentence. "Due Process entitles the defendant to a proceeding in which he may present a case with the assurance that no member of the Court is predisposed to find against him." William v. Pennsylvania, 136 S. Ct. 1899 (2016).

In sum, Judge Castel predetermined that Petitioner had participated in the murders before the trial. And, contrary to the jury's verdict with respect to the Two murders Judge Castel at Petitioner's sentencing hearing devoted most of the time rehashing the events around the murders of which the jury acquitted Petitioner. Nonetheless, Petitioner had a right to an impartial Judge and should have been sentenced only to the crime supported by the jury's verdict.

D. Due Process Of Law:

In Nelson v. Colorado, 137 S. Ct. 1249 (2017), the Supreme Court actually established that the presumption of innocence is restored when a defendant's conviction is overturned. Id. at 1255. As such, Nelson undermines Watts, Supra., which holds that a sentencing court may consider acquitted conduct in

calculating a sentence as long as the conduct has been proven by a preponderance of the evidence. Thus, Nelson precludes the court from considering acquitted conduct when sentencing a defendant.

In Nelson, the Supreme Court held that when a defendant's criminal conviction is subsequently invalidated, the state may not require the defendant to prove her innocence in order to receive a refund of fees, court costs, and restitution paid as a consequence of the conviction. 137 S. Ct. at 1252. The petitioners in Nelson were convicted of various charges in Colorado and paid fees, court costs, and restitution as a result of their convictions. Id. at 1252-53. One petitioner was subsequently acquitted of all charges on retrial, and the other's convictions were either reversed or vacated. Id. at 1253. A Colorado law required a petitioner to "show, by clear and convincing evidence, her actual innocence of the offense of conviction" to be refunded any money paid as a result of the invalid conviction. Id. at 1254. The petitioners challenged this law, and the Supreme Court subsequently found that the law "does not comport with due process." Id. at 1255. Of relevance here, the Court explained that once the petitioners' convictions were invalidated, "the presumption of their innocence was restored." Id. As such, Colorado could not presume a person innocent of a crime and then find her "guilty enough for monetary exactions." 137 S. Ct. at 1256. (emphasis added).

In the case at bar, the jury found that the government failed to prove, beyond a reasonable doubt, that Petitioner was involved in the murders of Bruno and Westerman. During sentencing, the District Court found by a preponderance of the evidence, that Petitioner was involved in these murders. The finding is in conflict with the rule set forth in Nelson.

It is a legal premise that all defendants are presumed to be innocent until proved guilty. Therefore, an individual who is acquitted remains innocent because the Government has failed to prove him guilty.

To allow acquitted conduct to be used to increase an individual's sentence flies in the face of Justice for it means a person can be sentenced to spend years of his or her life in prison for something he or she absolutely did not do but which the Judge, second-guessing a Jury, finds the person guilty of, as this did with Petitioner, giving the Government a second bite at the apple. That is unconstitutional. Repeating those words from Helvering, Supra, "where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was acquittal or a conviction." See Helvering v. Mitchell, 303 U.S. 391, 392 (1938).

The question is, then, what was the intent behind the attention given to the murders of Adolfo Bruno and Gary Westerman, of which Petitioner was acquitted, by the Judge in the Sentencing Hearing and by the Government in its "Government's Sentencing Memorandum,"

The intent becomes quite obvious. Both the Court and the Government sought to justify their significant increase in the sentence that was recommended by the Probation Office. The Government requested 45 years and argued that the other defendants received life sentences for the murders of Bruno and Westerman to which they were convicted (Sent. Tr. 103:21). The Court used the acquittals to increase the guideline level to 43 for each murder, thus assuring that the guideline level would reach a higher sentencing level.

In sun, predicate acts of murder or conspiracy to commit murder in furtherance of RICO conspiracy are not sentencing factors which can be adjudicated by a Judge based on the preponderance of the evidence standard. See Owens v. United States, 236 F. Supp. 2d 122, 140 (D. Mass 2002), stating, "Owens far more compelling argument is that he was sentenced incorrectly pursuant to [§2A1.1], rather than [§2E1.1], which directs that the base offense be

established of either level 19 or the level prescribed for the underlying RICO offense." Id. at 140. In this case the underlying RICO offense was conspiracy to distribute marijuana.

APPEALABILITY

The Petitioner has made more then a good-faith effort to conform this application to all 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 additional materials or argument that it deems necessary for prompt resolution of this application.

CONCLUSION

As explained in People v. Beck, supra., Watts, supra., is not binding on this Court, and do not require this Court to reject the Petitioner's argument that the use of acquitted conduct to sentence him more harshly violates due process. In light of People v. Beck this Honorable Court should grant COA.

Respectfully Submitted,

Dated: 09/18/2019

Emilio Fusco

Emilio Fusco, pro-se

REASONS FOR GRANTING THE PETITION

This case presents a fundamental question: Whether a sentencing judge may punish an individual for crimes that the jury acquitted him of committing. That is what happened here. The jury was given an opportunity to authorize punishment for specific conduct and explicitly refused to do so. Nonetheless, finding by a preponderance of the evidence that Petitioner had committed the specific conduct for which the jury acquitted him, the District Court increased Petitioner's adjusted offense level, thus raising his sentence by nearly 22 years. This same sentencing practice is countenanced by every Court of Appeals in mistaken reliance on this Court's decision in United States v. Watts, 519 U.S. 148 (1997). That decision does not support the enhancement here.

The use of acquitted conduct at sentencing is an important question that only this Court can resolve. Notably, this Court has never squarely considered whether the Due Process Clause of the Fifth Amendment or the Sixth Amendment's jury-trial guarantee forbid the use of acquitted condut at sentencing. In Watts, supra., the Court considered only whether the practice offended the Double Jeopardy Clause. In the two decades since, numerous Justices and Judges have questioned whether use of acquitted conduct at sentencing comports with the Sixth Amendment's jury-trial guarantee and Due Process principles and have urged this Court to "take up this important, frequently recurring, and troubling contradiction in sentencing law." See e.g, United States v. Bell, 808 F.3d 926, 932 (D.C. Cir. 2015)(Millett, J., concurring in denial of rehearing en banc).

Accordingly, only this Court can clarify Watts. The practice of sentencing defendants based on acquitted conduct weakens the twin pillars of the Sixth Amendment right to a jury and the Fifth Amendment right to due process of law, whose "historical foundation[s] ... extend [] down centuries into the common law." Apprendi v. New Jersey, 530 U.S. 466, 477 (2000). Together these guarantees "indisputably en-

title a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a resonable doubt." Id. Sentencing based on acquitted conduct violates that "indisputabl[e]" principle.

Watts did not decide whether the Due Process Clause and jury-trial rights prohibit the use of acquitted conduct at sentencing. Watts's inconsistency "with related decisions" and subsequent "legal developments" strongly favor this Court's attention. In the two decades since Watts, the Court has issued over a dozen opinions addressing the Sixth and Fifth Amendment's effect on crinimal sentencing: see, Apprendi, supra., (jury must find all facts affecting statutory maximum); Harris v. United States, 536 U.S. 545 (2002) sentencing factors could be considered by judge); Ring v. Arizona, 536 U.S. 584 (2002)(jusy must find aggravating factors permitting death penalty); Blakely v. Washington, 542 U.S. 296 (2004)(jury must find all facts legally essentail to sentencing); United States v. Booker, 543 U.S. 220 (2005)(Sentencing Guidelines subject to Sixth Amendment); Rita v. United States, 551 U.S. 338 (2007)(presumption of reasonableness for Guidelines sentence comports with Sixth Amendment); Cunningham v. California, 549 U.S. 270 (2007)(jury must find facts exposing defendant to longer sentence); Southern Union Co., v. United States, 567 U.S. 343 (2012)(jury must find facts permitting imposition of criminal fine); Alleyne v. United States, 570 U.S. 99 (2013)(jury must find facts increasing mandatory minimum, overruling Harris); Hurst v. Florida, 136 S. Ct. 616 (2016)(jury must make critical findings needed for imposition of daeth sentence); and United States v. Haymond, 139 S. Ct. 2369 (2019)(judge cannot make findings to increase sentence during period of supervised release).

Many of the above decisions also have cited the Due Process Clause in emphasizing that a court's power to sentence a defendant flows fundamentally from an authorization by the jury. See e.g., Hurst, 136 S. Ct. at 621; Alleyne, 570 U.S. at 104. All these cases, taken collectively, have "emphasized the central role of the jury

in the criminal justice system." They provide a compelling reason to examine whether the Constitution permits consideration of acquitted conduct at sentencing---and, at a minimum, to give the question the full hearing in this Court that is has not yet received.

In sum, very recently this Court held that "[a]bsent conviction of a crime, one is presumed innocent." Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2019). This holding in Nelson is exactly opposite the holding in Watts. (See Amicus Curia Brief in support of People v. Beck, supra., filed by CDAM at 2018 WL 6435371, * 10-11).

In Beck was convicted as a fourth offense habitual offender of being a felon in possession of a firearm and carrying a firearm during the commission of a felony, second offense, after a jury trial. He was acquitted of open murder, carrying a firearm with intent, and two additional counts of felony-firearm attendant to those charges. The applicable guidelines minimum sentence range for the felon-in-possession conviction was 22 to 76 months in priosn, but the court imposed a sentence of 240 to 400 months (20 to 33 years), to run consecutively to the mandatory five years term for second-offense felony-firearm. The Court explained that it had imposed this sentence in part on the basis of its finding by a preponderance of the evidence that the defendant had committed the murder of which the jury acquitted him. The Michigan State Supreme Court vacated the sentence and held that Due Process bars a sentencing court from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted, and basing a sentence on that finding. **"Reliance on acquitted conduct at sentencing violates due process based on the guarantees of fundamental fairness and the presumption of innocence, as several state courts and many judges and commentators have concluded."** Beck, supra. Because the sentencing court punished Petitioner more severely on the basis of the judge's finding by a preponderance of the evidence that he committed the murder of which the jury had acquitted him, it violated his due process protections.