19-8111

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Todd J. Broxmeyer,

Petitioner

Vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Todd J. Broxmeyer, Prose

P.O Box 1000

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QUESTION PRESENTED

Is the use of the preponderance of evidence standard to enhance at sentencing deemed unconstitutional when the presumption of innocence is restored, i.e. acquitted conduct or never lost, i.e. dismissed and uncharged conduct, carrying with it all the protections of the Fifth and Sixth Amendments until a final sentence is rendered?

LIST OF PARTIES

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

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PETITION FOR WRIT OF CERTIOARI

Petitioner Todd J. Broxmeyer respectfully petitions for a writ of certiorari to review the judgement of the United States Appeal from the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at No. 19-7052. The opinion of the District Court 2:18-CV-00240-MSD-DEM

JURISDICTION

The judgement of the Court of Appeals which had jurisdiction according to 28 U.S.C. §2241 (2012) was entered on November 22, 2019 by unpublished opinion.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides, in relevant part, that "...No person...shall be subject for the same offense to twice put in jeopardy of life or limb;...nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment of the Constitution provides, in relevant part, that "the accused shall enjoy the right to a speedy trial by an impartial jury..."

STATEMENT OF CASE

There has been a lot written in the courts in reference to Broxmeyer's case. Broxmeyer went to trial on September 15, 2008 and a three-day trial commenced where Broxmeyer was found guilty on five counts. Counts one and two were for 18 U.S.C. 2251(a) production of two images of child pornography featuring a then 17-year-old female. Count three was in violation of 18 U.S.C. 2251(a)(e) attempted production of child pornography of a then 17-year-old female. Count four was in violation of 18 U.S.C. 2423(a) transportation for the purpose of engaging in sexual activity. Finally count five was in violation of 18 U.S.C. 2252A(a)(5)(B), possession of child pornography which consisted of individual from Counts 1 and 2). Broxmeyer was sentenced to 40 years imprisonment. Timely appear was conducted arguing the sufficiency of evidence on counts one, two and four. The Second Circuit reversed the convictions on each of these counts. On remand on December 22, 2010 Broxmeyer was sentenced to 30 years imprisonment on the remaining counts. Again, a timely appeal was conducted. In 2012 a split panel affirmed the sentence with Judge Raggi writing for the majority. Judge Jacobs writing for the dissent where he framed his concern that "the offense of federal conviction has become just a peg to hang a comprehensive moral accounting." A petition for en banc was filed on September 25, 2012. On February 3, 2013 the petition was denied. Again, a split panel occurred with Judge Raggi again writing for the majority and Judge Jacobs for the dissent. A writ of certiorari was filed in May 2013. Certiorari was denied. Broxmeyer then moved to a 28 U.S.C. 2255. March 23, 2015 Judge McAvoy denies the motion and denies the certificate of appealability (COA). Broxmeyer proceeded to the Second Circuit where they approve his COA request and appoint counsel. After oral arguments a panel affirms the governments decision on September 29, 2016. Broxmeyer files for en banc, which is denied December 20, 2016.

This current argument stems from the use of uncharged, dismissed and acquitted conduct that was allowed at both sentencing procedures that increased Broxmeyer's sentence. This same information was then used by the majority in **Broxmeyer II** in order to justify the sentence. At the original sentencing

the court justified a 5-point increase by using an anonymous letter, at the second sentencing there were initials attached to the accusations. Broxmeyer questioned this in his statement when his lawyer left him to refute these allegations: "but to try to bring up these things from 20 years ago that aren't true, I don't know what to do." (Resent. Transcript at 17). Then in **Broxmeyer II** the majority writes "The fact that NY agree to this global disposition of its charges against Broxmeyer only after he was sentenced..." Also, "The fact that the attempted production and possession crimes of conviction fell within a larger pattern of sexual exploitation that included numerous assaults expanded the range of substantively reasonable sentences considerably above the statutory minimum." **(Broxmeyer II F.3d 295-296)** There are two basic problems with the sentencing courts use of the above information and appellate reliance. One, a basic reading of the state's sentencing transcripts shows that the individuals changed their story. There is nothing to support the claim that the dismissal of any charges had to do with the Federal sentencing and everything to do with the lack of credibility involved. District Court Judge McAvoy's reliance on discredited information is rampant in Broxmeyer's case. One obvious example from the PSR that allowed a guideline increase was when it was written: "And there were hundreds of pornographic images of children in his possession." (Dec. P. 13) This information although not properly challenged by Broxmeyer's trial attorney has sworn testimony that clearly refuted this. The government displayed individuals in field hockey uniforms, pictures taken by their parents, that would be used for college resumes and proclaimed they were pornography. The prosecutor, Miroslav Louvric, repeatedly manipulated information throughout trial and sentencing. It was so obvious that in **Broxmeyer I)** Chief Judge Dennis Jacobs writes, "As to sequence, the government fudged." (126). In plain terms the government lied. They manipulated the story to fit the narrative. So, the government manipulated facts to get a conviction, which gets overturned, then Broxmeyer is still held accountable because at sentencing the preponderance of evidence standard dictates that its allowed. No lay person would believe this if it was a Hollywood script, yet it is true.

REASONS FOR GRANTING PETITION

In the Fifth and Sixth Amendment the framers set forth to protect the citizens from our government acting in an arbitrary manner. In **U.S. v. Watts** 519 U.S. 148 (1997)(per curium) a controversial decision was handed down which stated "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct underlying the acquitted charge has been proved by a preponderance of evidence." This bolstered the words used in 18 USCS 3661:

> "No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence. "

And those in 1B1.3 and 1B1.4 of the Sentencing Guidelines:

> "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted the court may consider, without limitations, any information...unless prohibited by law."

The justification for the **Watts** decision leaned on **McMillan v. Pennsylvania** 477 U.S. 79(1986) which upheld the use of the preponderance standard. So, the controversial decision of **Watts** relied on a decision that this court has "expressly overruled"

"finding no basis in the original understanding of the Fifth and Sixth Amendments for McMillan and Harris, the court expressly overruled those and held that "the principle applied in Apprendi applies with equal force to facts increasing the Mandatory Minimum...**Alleyne** 570 U.S. at 112...And under our Constitution, when "a finding of facts alters the legally prescribed punishment so as

to aggravate it "that finding must be made by a jury...beyond a reasonable doubt. Id at 114 (**US v Haymond)** 588 (2019).

We have **Nelson v. Colorado** S. Ct 1249 (2017) which clearly restores the "presumption of innocence" and is at conflict with the **Watts** decision. Opponents of this argument have claimed **Nelson** was decided in the narrow scope in reference to a Colorado monetary issue. **Nelson** relied on criminal cases like **Johnson v. Mississippi** 486 U.S. 578 (1988) where it was held after a "conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge." Also calling on **Coffin v. U.S.** 156 U.S. 432 (453) 15 S. Ct. 395 (1895) "[A]xiomatic and elementary" the presumption of innocence "lies at the foundation of our criminal law." The court wrote these words to strengthen their argument "Once those convictions were erased [for any reason], the presumption of [the defendants] innocence was restored." **Nelson v. Colorado** 137 S. Ct 1249 (2017) and "Absent conviction of a crime, one is presumed innocent."

Therefore, **Nelson** attaches the presumption of innocence to acquitted conduct, dismissed conduct and definitely uncharged conduct. These words have to in turn place a limit on **Watts**, 3661 and the guideline recommendation. In doing that **Watts** et al are not valid and **Nelson** follows apprendi, Alleyne, Ring limiting any "relevant conduct" issues to a beyond a reasonable doubt standard that is in line with our Fifth and Sixth Amendments, when the statements aggravate a person's sentence.

Although Justice Gorsuch and Justice Alito were on different sides of **US. v. Haymond** 588 U.S. (2019) (Justice Alito dissenting) they were in agreement that the Sixth Amendment protections apply at least through when a "final sentence is imposed." Justice Gorsuch writes "criminal prosecution" continues and the defendant remains an "accused" with all the rights provided by the Sixth Amendment until a final sentence is imposed. See Apprendi; 530 U.S. at 481-482" **(US. v Haymond).** Justice Alito's dissent goes even further into the wording and the Sixth Amendment protections, but he also addresses

the above quote on page 17 of his dissent stating "That is exactly right. And the Courts precedents emphatically say that a sentence is imposed at final judgement..." also writing on page 13 "[a] criminal prosecution...ends when sentence has been pronounced on the convicted or a verdict of "not guilty" has cleared the defendant of the charge." F. Heller, Sixth Amendment to the Constitution of the United States 54 (1951).

Justice on this court and judges across the country have recognized the difficulty with a preponderance of evidence issue and are writing about it. Justice Kavanaugh while on the D.C. circuit write in **US v. Bell** (DC 2015):

> "In a constitutional system that relies upon the jury as the great bulwark of our civil and political liberties, allowing courts at sentencing to materially increase the length of imprisonment based on conduct for which the jury acquitted the defendant guts the role in preserving individual liberty and preventing oppression by the government. "

Justice Scalia, Thomas and Ginsburg joined together in a dissent from a denial of certiorari in **Jones v. United States** (Oct 14, 2014):

> "It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable there by exposing the defendant to the longer sentence is an element that must be either admitted by the defendant or found by the jury. It may not be found by a Judge...this has gone on long enough.

Justice Kennedy's dissent in **United States v Watts** 519 148 169-70

> "The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been proved is repugnant to [our constitutional] jurisprudence."

Most recently we have Justice Gorsuch words in **Haymond**:

"A judge's authority to issue a sentence derives from and is limited by the jury's factual findings of criminal conduct."

Judges from across the country have recognized this problem and more write about it every day.

"Congress could not have intended such a bizarre and dangerous results which it adopted guideline sentences." **US. v Cordoba-Hincapie** (EDNY 1993). "If the Soviet Union or a third world country had permitted (the practice of punishing people for conduct that had not been the subject of indictment or trial] human rights observers would condemn. **US. v Galloway** (8th cir 1992) "The use of acquitted conduct to punish is wrong as a matter of statutory and constitutional interpretation and violates both our common law heritage and common sense." **US. v White** 551 F 3d 381,387 (6th cir 2008) (Merritt, J dissenting) Appellate Judge Dennis Jacobs in **US. v Broxmeyer** F.3d 265, 281 (2d cir 2012) wrote a sentence that goes to the core of this unconstitutional practice "My objection is this: the offense of conviction has become just a peg on which to hang a comprehensive moral accounting." If none of these are compelling enough then everyone needs to take a few minutes and read the decision in **US. v Scheiblick** 346 F. Supp 3D 1076 (Nov 1 2018) written by Judge Algernon L. Marbley, specifically section C: conduct to be used at sentencing. Judge Marbley lays out a clear, concise argument far better than you will read here. Most importantly he ends with a simple, powerful sentence:

"It is time to call this practice what it is: unconstitutional."

It is believed and written in **Haymond** that the presumption of innocence can only be overcome by a final conviction and remains until a final sentence is rendered. Therefore Broxmeyer cannot have his sentence aggravated for:

1. An anonymous letter only presented at sentencing – uncharged
2. Random pictures presented with nothing to substantiate their conduct, which one witness tested was Brookmeyer's then 28-year-old girlfriend – uncharged

3. State charges where the state admitted they could not win a conviction because of new evidence – dismissed
4. One of the reasons the chief judge used to out charges argued was "the prosecutor fudged", the other reason is conduct did not meet the standard of the charged – Acquitted.

If such information is allowed to decrease a person's liberties (hence any increase in a prison sentence) the government can simply ~~to~~ continue to go around **Nelson**'s declaration of "the presumption of innocence, the Fifth, Sixth Amendments and the Constitution by not charging a defendant with conduct that will eventually be used to penalize that person at sentencing via enhancements and a lower burden of proof. "A defendant cannot be deprived of liberty based upon mere speculation. **US. v. Berry** (3rd Cir) A fundamental promise of our constitution is not what one may have done, or what is perceived to have done that can be punished, only that conduct by which is proven beyond a reasonable doubt may overcome the presumption of innocence to take a person's freedom. The mandate of the U.S. Constitution is simple and direct: If the law identifies a fact that warrants deprivation of a defendant's liberty or increase in that deprivation, such a fact must be proven to a jury beyond reasonable doubt. See Const. Art III section 2, ch 3. **Nelson** has changed the unconstitutional standard that has been allowed to exist and it is past time to correct history. Justice Ginsburg is clear in **Nelson** that the presumption of innocence cannot be lost without a conviction and is restored when a conviction is overturned or acquitted.

It is beyond logic and comprehension to believe that the presumption of innocence can be outweighed by a "maybe" or a "gut instinct", which at the end of the day is what the preponderance of evidence is when it can be defined as 50.1% belief something could be true. "The presumption of innocence, although not articulated in the constitution, is a basic component of a fair trial under our system of criminal justice." **Estelle v. Williams** 425 U.S. 501, 503 96 S. Ct 1691, 48 L. Ed 2d 126 (1976). Since **Nelson** changes the scope of available information and restores the presumption of innocence it

allows the court to deem it retroactive. If sentencing policies conflict with the safeguards enshrined in the Constitution for the protection of the accused, then these policies are by definition unconstitutional.

The facts presented could not be clearer. In Justice Ginsburg's third sentence in **Nelson v Colorado** 137 S. Ct 1249 (2017) she writes "Absent conviction of a crime, one is presumed innocent." The later writes "once these convictions were erased [for any reason] the presumption of [the defendants] innocence was restored." Now if the "presumption of innocence" can be restored, as in acquitted conduct and the "presumption of innocence" applies absent a conviction, as with dismissed and uncharged conduct then **Nelson** overrules **US v. Watts** 519 U.S. 148 (1997) the wording used in 18 USCS 3661 and the guideline recommendations from 1B1.3 and 1B1.4. **Nelson**'s wording makes clear that the use of the "preponderance of evidence" standard used to assess relevant conduct violates the Fifth and Sixth Amendments. Constitutional rights that this brief show is supposed to be adhered to until a final sentence has been rendered as in **US v Haymond**. Justice Ginsburg's words in **Nelson** were not written in some narrow scope in reference to just a monetary case. **Nelson** overrules a preponderance of evidence standard propped up by **Watts**, 18 USCS 3661 and 1B1.3, 1B1.4 that judges across the country and Justices on this Supreme Court at minimum have seen as a vexing issue while ~~may~~ many have written it is unconstitutional.