NO. 20-7107

IN THE

SUPREME COURT OF THE UNITED STATES

JIMMY R. HUSBAND,

Petitioner,

V.

J. RAY ORMOND, WARDEN,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether NELSON V. COLORADO, 137 S. Ct. 1249 (2018), announced a new substantive rule, narrowing the language and scope of 18 USC Sect. 3661, that has retroactive effect on collateral review.

2. Whether this retroactive change now presents an error in petitioners conviction and sentence sufficiently grave to be deemed a fundamental defect.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jimmy R. Husband respectfully requests that the Court issue a writ of certiorari to review the judgement of the United States Court of appeals for the Fourth Circuit.

OPINION BELOW

The decision of the United States Court of Appeals for the Fourth Circuit was memorialized in an unpublished per curiam opinion on July 28, 2020, and appears at Appendix page 1a. A petition for rehearing and rehearing en banc was filed, and denied on September 28, 2020.

JURISDICTION

The District Court had jurisdiction under 18 USC Section 3231 and 28 USC section2241, The Fourth Circuit had jurisdiction under 18 USC section 3742 and 28 USC section 1291. This Honorable Court has jurisdiction under 28 USC section 1254(1).

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth amendment to the Constitution provides:

No person shal...be subject for the same offense to be twice put in jeopardy of life or limb...Nor be deprived of life, liberty, or property, without due process of law.

The Sixth amendment to the Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]

18 USC sect. 3661 states:

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 reieve and consider for the purpose of imposing an appropriate sentence.

STATEMENT OF THE CASE

The time has come for the Court to review a sentencing practice that has long troubled jurists: a sentencing courts consideration of uncharged, dismissed, or acquitted conduct without consideration of the constitution quarantees of the Fifth and Sixth amendments. Current and former Justices have questioned the constitutionality of this practice and Judges in the lower courts have called for this Courts review and decried the practice as circumventing the jury's constitutionally protected role as a "liberty protecting bulwark." E.g., UNITED STATES V. BELL, 808 F.3d 926,929 (D.C. Cir. 2015).

The lower courts, however, have interpreted UNITED STATES V. WATTS, 519 U.S. 148(1997), and the relevant conduct provisions of the United States Sentencing Guidelines(USSG), all relying on 18 USC Section 3661(3661), to foreclose any and all constitutional challenges to the use of uncharged, dismissed, or acquitted conduct at sentencing, including under the due process clause of the Fifth amendment, and the jury trial right of the Sixth amendment. Watts, and the relevant conduct statutes of the Sentencing Reform Act of 1984 all glean their authority from 3661. Recently, this Courts decision in NELSON V. COLORADO, 137 S Ct. 1249(2017), concerning the presumption of innocence and an absence of guilt, narrow considerably the broad language of 3661.

Absent guidenance from this Court on these significant questions, the lower courts will continue to view themselves bound by Watts, and the relevant conduct provisions of the USSG's. This is the ideal case in which to decide whether the Fifth and Sixth amendments prohibit this long standing practice.

1. On October 15, 2002 a grand jury returned the following indictments against petitioner: Seventeen counts of sexual exploitation of a minor in violation of 18 USC Section 2251(a); one count of Transportation of Child pornography in violation of 18 USC 2252A(a)(1); and two counts of possesion of child pornography in violation of 18 USC section 2252A(a)(5)(b).

According to an investigation petitioners adopted daughter (Jane Doe) was under the age of eighteen in the summer of 1995 and the spring of 1996, which was when the essential conduct elements were alleged to have occurred. The video tape was found in Virginia

after a family move from West Monroe, New York. None of the depicted conduct or video taping occurred in Virginia.

2. On March 27,2003, the government dismissed counts nine through seventeen based on evidence that Jane Doe was over the age of eighteen at the time the conduct was allegged to have occurred.

3. On April 7, 2003, Petition entered a guilty plea without the benifit of a written plea agreement to counts one through eight. The remaining counts were dismissed at sentencing, with prejudice.

4. On July 15,2003, the district court sentenced petitioner to eighty seven months on each count and ordered same to run consecutively, for a total of 696 months.

5. Petitioner appealed the district courts judgement to the Fourth Circuit Court of Appeals. In this appeal petitioner raised multiple issues, including a claim that the statute of limitations should have barred his prosecution, that his trial counsel was inneffective in failing to consider or raise the statute of limitations argument, and that the district court erred in running his sentences consecutively. The Fourth Circuit affirmed petitioners convictions and sentenence in an unpublished opinion dated January 11th, 2005, and can be found at Appendix page 9a. The court held inter alia, that petitions crimes were inchoate until 2001 when the tape crossed state lines. The panel agreed,however, with petitioners claim of a sentencing error under the mandatory USSG's but held that this did not violate petitioners substantial rights.

6. Petitioner then appealed to this Honorable court, and on

October 3,2005, remanded the matter to the Fourth Circuit for further consideration in light of UNITED STATES V. BOOKER, 543 U.S. 220 (2005). On remand the Fourth Circuit once again affirmed the district courts decision, and re-instated it's opinion vacated by this Court. The Fourth Circuit then issued a corrected opinion affirming in part and vacating in part it's opinion and remanded for re-sentencing to the district court.

7. On November 6, 2006, the district court resentenced petioner using the 2001 version of the USSG's, to a total sentence of 360 months. Petitioner filed an appeal with the Fourth Circuit, and it affirmed the sentence in an opinion dated June 1, 2007.

8. On May 30, 2008, petitioner filed a motion to vacate or set aside his sentence pursuant to 28 USC section 2255. The district court denied the motion in a memorandum opinion entered on October 15, 2008. Petitioner sought, and the Fourth circuit denied, a certificate of appealability on May 6th 2009.

9. Petition filed a writ of certiorari seeking review of the Fourth Circuit's denial of the COA. The petition was denied by this Honorable Court on November 9, 2009. A writ of Mandamus, on other grounds was filed and denied by this Court on November 15, 2010. A second petition for mandamus was filed on October 23, 2014 and was also denied.

10. On April 24, 2018 a motion under 28 USC 2244 was filed in the Fourth Circuit for an order authorizing the district court to consider a second or successive motion for relief under 28 USC section 2255.

The motion was denied May 7, 2018.

11. On April 25, 2018 petitioner filed a petition for a writ of habeas corpus under 28 USC section 2241 in the district court of hi confinement. The district court, after twenty-one months, granted the governments motion to dismiss for lack of jurisdiction. A notice of appeal was timely filed on February 13, 2020.

12. The Fourth Circuit denied the appeal on July 28, 2020, and denied the motion for rehearing on September 28, 2020.

This petition Follows.

REASONS FOR GRANTING THE PETITION

I. Whether NELSON was a substantive decision that applies retroactively to a prisoners case on collateral review?

This case serves as an excellant example of the unconstitutional use of uncharged, dismissed, or acquitted conduct by the lower courts at sentencing and on direct appeal. This Courts holdings in NELSON that the Colorado process violates due process, reasoning that an acquittal without a retrial, demands the restoration of the presumption of innocense, and that a person adjudged guilty of no crime cannot be punished. NELSONS holdings survive the tests put forth for retroactivity in TEAGUE V. LANE, 489 U.S. 288(1989). NELSONS due process holdings create a substantive rule of law as it greatly narrows the broad language of 3661.

Petitioner filed a petition pursuant to 28 USC section 2241 (2241) challenging the constitutionality of his conviction and sentence after NELSON. To be eligable under 2241 petitioner must

meet the savings clause requirements of 28 USC section 2255(e) as announced by the Fourth Circuit in UNITED STATES V. WHEELER, 886 F.3d 415(4th Cir. 2018) Wheeler provides four conditions that must be met:

> (1) At the time of sentencing settled law of this circuit or the Supreme Court established the legality of the sentence;
>
> (2) Subsequent to the prisoners direct appeal and first section 2255 motion the substantive law changed and was deemed to apply retroactively on collateral review;
>
> (3) The prisoner is unable to meet the gate keeping provision of section 2255(h)(2) for second or successive motions;
>
> (4) and due to this retroactive change the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

The district court dismissed the 2241 petition for lack of jurisdiction citing Husbands failure to meet the second and fourth prongs of the wheeler test.

1. In 2017 this Honorable Court decided NELSON, holding that "the states exoneration act scheme did not comport with the fourteenth amendments quarantee of due process, reasoning that the presumption of innocence was restored when the convictions were erased, and Colorado may not presume a person adjudged guilty of no crime, none the less guilty enough for monetary extractions." NELSON, pp617-620.

NELSON changed the substantive reach of 3661, narrowing that

criminal statute by applying the constraints of the Fifth amendments due process clause and the Sixth amendments jury trial right.

The indeterminincy of the wide ranging inquiry allowed in 3661 makes it more unpredictable and arbitrary than the constitution allows. Invoking so shapeless a provision to condem someone to an enhanced sentence using uncharged, dismissed, or acquitted conduct does not fit with the constitutions guarantee of due process or a jury trial.

"Both before, and since the American colonies became a nation courts in this country, and in England practiced a policy under which a sentencing judge could exercise a wide descretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by the law. See WILLIAMS V. NEW YORK,337 U.S. 241, 245-46 (1949).

Section 3661 states:"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 recieve and consider for the purpose of imposing an appropriate sentence". 18 USC section 3661(1985). Prior to the USSG's sentencing courts relied on 3661's predecessor,18 USC section 3557, "in considering virtually any relevant information--without any prescribed burden of proof--in making sentencing decisions". See UNITED STATES V. FREDERICK, 897 F.2d 490(10th Cir. 1990). In SMITH V. UNITED STATES,551 F.2d 1193,1196(10th Cir. 1977) the

Tenth Circuit stated that former section 3557 "was enacted in order to clearly authorize the trial judge to rely upon information of alleged criminal activity for which the defendant has not been prosecuted". "Without a modification of this statute, the continued practice of considering all relevant conduct is presumptively correct." Section 3557 was recodified as 3661 and took effect comensurate with the Sentencing Reform Act of 1984.

In 1984, Congress established the United States Sentencing Commission(commission), by way of the Sentencing Reform Act of 1984, Pub. L. No. 98-473,sect. 217(a), 98 Stat. 1837, 2017-27 (codified as amended at 28 USC Sect. (991-998)). Congress charged the commission, among other things, with promulgating guidelines and policy statements for use in determing and implementing criminal sentences. 28 USC Sect. 994(a). Thereafter, the commission promulgated a comprehensive set of guidelines and policy statements, including the guideline entitled "relevant conduct", USSG section 1b1.3. The relevant conduct guidelines rely almost entirely on 3661 to give them unfettered ability to consider uncharged, dismissed, and acquitted conduct, with references to 3661 in guidelines 1B1.3, 1B1.4, and 6A1.3. The policy statement for 6A1.3 informs the reader that the use of relevant conduct at sentencing in the pre-guidelines era was of little consequence in the sentence, but that will no longer be the case.

There has been much ink spilled over the use of acquitted conduct at sentencing and this Courts decision in WATTS. The

WATTS court upheld the use of acquitted conduct at sentencing [illegible] citing 3661,USSG 1B1.3, and 1B1.4. WATTS was a plurality decision and many would like to see it's arguments fully briefed.

WATTS also relied on McMILLAN V. PENNSYLVANIA, 477 U.S. 79, 91-92(1986, to authorize a preponderance of the evidence standard at sentencing to satisfy due process. McMILLAN has been overruled, so where now does this authority come from? All of the courts of appeal have accepted and rely on WATTS to authorize the use of acquitted conduct at sentencing. The Fourth Circuit in UNITED STATES V. JIMWRIGHT, 683 F.3d 471, 484(4th Cir. 2012) states that "WATTS, by logical extension includes uncharged, and dismissed [illegible] conduct". In the intervening decades "[N]umerous courts of appeals [have] assume[d] that WATTS controls the outcome of both Fifth and Sixth amendment challenges to the use of acquitted conduct." UNITED STATES V. WHITE, 551 F.3d 381,392n.2(6th Cir.2008)(en banc) (Merritt,J.,dissenting, joined by five others.)

2. In it's decision in NELSON, the Court held that a state violated a defendants due process rights by retaining funds paid by the defendants as fees, court costs, and restitution after the defendants convictions were invalidated with no possibility of retrial, since the presumption of innocence was restored.

In the very first paragraph of the Courts opinion it states "absent conviction of a crime, one is presumed innocent". NELSON at 615. This statement envokes the twin pillars of the Sixth amendment right to a jury, and the Fifth amendment right to due

process of law whose " historical foundations...extend down centuries into the common law." APPRENDI V. NEW JERSEY, 530 U.S. 466, 477 (2000). Together these guarantees "indisputably entitle a criminal defendant to a 'jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt'." Id. (quoting UNITED STATES V. GAUDIN, 515 U.S. 506, 510(1995).

The NELSON opinion is based on the fourteenth amendment presumption of innocence, equally applicable to the Fifth amendment. The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused guilty or innocent soley on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of arrest, indictment, or custody, or from other matters not included as proof at trial. See TAYLOR V. KENTUCKY, 436 U.S. 478, 485(1978); ESTELLE V. WILLIAMS, 425 U.S. 501(1976); In re WINSHIP, 397 U.S. 358(1930). Without question, the presumption of innocence plays an important role in our criminal justice system. To the acquitted there is a promise that "after a conviction is reversed, unless and until [the defendant] should be retried he must be presumed innocent of that charge." See JOHNSON V MISSISSIPPI, 486 U.S. 578, 585(1988), and to the accused "the principal that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and it's enforcement lies at the foundation of the administration of our criminal law." COFFIN V. UNITED STATES, 156 U.S. 432, 453(1895).

While NELSON was not a sentencing case, it's holdings and reasoning's are just one more case that can be added to the long line of Fifth and Sixth amendment cases upholding the validity of those amendments during the sentencing process. Even if 3661 could be read to control whether the due process clause and the Sixth amendment jury right permits the use of uncharged, dismissed, or acquitted conduct at sentencing, this courts more recent jurisprudence would call such a holding into question. Stare Decicis is "not an inexorable command", and is "at it's weakest when [the Court] interprets the Constitution." FRANCHISE TAX BOARD OF CAL. V. HYATT, 139 S. Ct. 1485, 1499(2019) (internal quotation marks omitted). This is particularly true "in the Apprendi context", where this court has found that "Stare decisis does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of Constitutional law." HURST V. FLORIDA, 136 S. Ct. 616, 623-24 (2016)(internal quotation marks omitted).

The Court has not hesitated to revisit it's Sixth amendment precident in light of it's recent sentencing case law, and has overruled prior cases in order to protect the integrity and consistency of the Sixth amendment. See id. at 624(overruling HILDWIN V. FLORIDA, 490 U.S. 638(1989)(per curiam), and SPAZIANO V. FLORIDA, 468 U.S. 447(1984)); RING V. ARIZONA, 536 U.S. 584, 609(2002)(overruling WALTON V. ARIZONA, 497 U.S. 639(1990)); ALLEYNE V. UNITED STATES, 570 U.S. 99, 116 & n.5(2013)(overruling

HARRIS V. UNITED STATES, 536 U.S. 545(2002)) and McMILLAN V. PENNSYLVANIA, 477 U.S. 79(1986) "finding no basis for the original understanding of the Fifth and Sixth amendments for McMILLAN and HARRIS." Moreover, 3661's inconsistency "with related decisions" and subsequent "legal developments" strongly favor this Court's attention. In the three plus decades since 3661 and the USSG's were promulgated the court has issued numerous opinions addressing the Sixth amendments effects on criminal sentencing; See e.g. APPRENDI V. NEW JERSEY, 530 U.S. 466(2000) (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(jury must find aggravating factors permitting death penalty); BLAKELY V. WASHINGTON, 542 U.S. 296(2004)(jury must find all facts legally essential to sentence); 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 guideline sentences to comport 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 death sentence);

UNITED STATES V. HAYMOND, 139 S. Ct. 2369(2019)(judge cannot make findings to increase sentence during periods of supervised release). Many of the above decisions also have cited the due process clause of the Fifth amendment in emphasizing that a courts power to sentence a defendant flows fundamentally from an authorization by the jury. See e.g., HURST at 621; ALLEYNE at 104.

Still these decision leave an important gap. In APPRENDI and ALLEYNE, a "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. This sounds fine until a conviction or a guilty plea is gained by the government, then 3661, WATTS, and the USSG's take over and strip the convicted of the very same rights the APPRENDI line of cases have sought to preserve at sentencing.

Nothing in this Courts precident's has held that a defendant convicted of crime "A", now loses his constitutional protections as applied to other alleged offenses. While it may be true that their liberty interests at sentencing on that crime of conviction may be less, it can't be said that they now lose all constitutional protections as to other allegations, be they uncharged, dismissed, or acquitted. This Court and the courts below place a heavy reliance on WILLIAMS V. NEW YORK for the unquestionable authority of 3661, WATTS, and other court authorities, but closer scrutiny should be paid to the differences in the judicial systems of then and now. First, a case may very well have had separate judges for trial and sentencing, as sentencing was described as

an "art"; Second, courts were just being introduced to a 'Pre-Sentence report' as authorized by rule 32 of the Federal rules of Criminal Proceedure, referred to in WILLIAMS as "a recent manifistation of the historical lattitude allowed sentencing judges", WILLIAMS at 246; Third, there was no statutory authority governing the use of this information at sentencing, only a policy passed along through time,; a last and final difference between then and now is that the WILLIAMS Court recognized there were constitutional limitations at sentencing. See WILLIAMS at 247 (a sentencing judge, however, is not confined to the narrow issue of guilt, his task within **fixed statutory or constitutional limits** is to determine the type and extent of punishment after the issue of guilt is determined."(emphasis added). Quite different from today's 3661 that authorizes the court to find guilt in any aspect of an individuals life to determine an appropriate sentence, with nostandard of proof, and no consideration of the Fifth and Sixth amendments. NELSONS well reasoned holdings appropriatley narrow the language of 3661 to include the requirements of due process and jury trial rights.

3. The Sixth amendment prohibits courts from relying on uncharged, dismissed, or acquitted conduct at sentencing by preserving the "jury's historical role as a bulwark between the state and the accused at trial for an alleged offense." See S. S. UNION CO.,567 U.S. at 350(internal quotation marks removed). It's guarantee of a trial by jury is a Constitutional protection "of surpassing importance". APPRENDI, 530 U.S. at 476-477.

Since the founding, the jury "has occupied a central position in our system of justice by safeguarding a person accused of a crime against the arbitrary exercise of power by prosecutor or judge". BATSON V. KENTUCKY, 476 U.S. 79, 86(1986).

When courts sentence defendants on the basis of uncharged, dismissed, or acquitted conduct, they deminish the rights to trial by jury. "Americans of the [founding] period perfectly well understood the lesson that the jury trial right could be lost not only by gross denial, but by erosion." JONES V. UNITED STATES, 526 U.S. 227,248(1999). Prohibiting consideration of uncharged, dismissed, or acquitted conduct at sentencing would restore this important reservation of power to the people.

The Sixth amendment right to a jury trial is one of two "Fundamental reservations of power in our Constitutional structure." BLAKELY, 542 U.S. at 305-306. The first is the right to vote, which guaranties that the people have a voice in the halls of the legislative and executive houses and that they can impose their will on the politicians populating them. It's companion is the right to trial by jury, which guaranties that the citizenry exercise not only a voice in the court room but also "control in the judiciary". ID.

"Thus, just as the right to vote sought to preserve the peoples authority over their governments executive and legislative functions, the right to a jury trial sought to preserve the peoples authority over it's judicial function". HAYMOND,139 S. Ct. at 2375.

To restore the jury's role as the ultimate check on the otherwise unbridled power, the Court should bar consideration of uncharged, dismissed, or acquitted conduct at sentencing. Doing so would not limit a Judges sentencing discretion to find facts generally; rather it simply places beyond a courts reach, the power to punish the defendant for conduct a prosecutor never took to the grand jury, conduct dismissed by the government and the court, or conduct previously submitted to, and rejected by a jury of his peers.

4. The Fifth amendment prohibits courts from relying on uncharged, dismissed, or acquitted conduct at sentencing, as it offends the due process clause. Both before and after the adoption of the USSG's, this Court emphasized that sentencing proceedures are not "immune from scrutiny" under the due process clause. WILLIAMS, 337 U.S. at 252 n.18(1949); see BECKLES V. UNITED STATES, 137 S. Ct. 886,896(2017)(Same,while holding guidelines not subject to vaugueness challenge). The APPRENDI line of cases acknowledges that "the due process clause of the Fifth amendment" works hand in hand with the Sixth amendment in this realm. JONES, 526 U.S. at243 n.6; see also ALLEYNE, 750 U.S. at 104(same).

Due process principles already limit the type of information courts may consider at sentencing. "Due process of law" makes it "Constitutionally impermisable" for a court to enhance a sentence based on "race, religion, or political affiliation of

the defendant", see ZANT V. STEPHENS, 462 U.S. 862, 885 (1983). It likewise forbids sentencing courts from relying on the defendants right to appeal, e.g.UNITED STATES V. PEARCE, 395 U.S. 711, 723-725(1969), or his right to a jury trial, UNITED STATES V. JACKSON, 390 U.S. 570, 581-583(1968), and forbids a court from resting a sentence upon a prior conviction that has been found unconstitutionally infirm,e.g. UNITED STATES V. TUCKER, 404 U.S. 443, 447(1972)(conviction secured in violation to right to counsel).

Due process quarantees to every individual the "[a]xiomatic and elementary" presumption of innocence that "lies at the foundation of our criminal law." NELSON, 137 S.Ct. 1249, 1255-1256 (2017)(quoting COFFIN V. UNITED STATES, 156 U.S. 432, 453 (1895)). It also "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." In re WINSHIP, 397 U.S. 358, 364(1970). This standard provides "concrete substance for the presumption of innocence", and averts the "lack of fundamental fairness" that would arise if a defendant "could be adjudged guilty and imprisioned for years on the strength of the same evidence that would suffice in a civil case." Id at 363, (internal quotation marks omitted). 3661 allows the prosecutor and the court to avoid these Constitutional standards by bringing forward uncharged, and dismissed allegations that one convicted of another crime, has not had his day in court, no notice, or the opportunity to confront witnesses against him. 3661 allows

the prosecutor and Judge to perform an end run around the constitution at sentencing. "When a sentencing Judge finds facts that could, in themselves, constitute entirely free standing offenses under the applicable law - that is when an enhancement factor could have been named in the indictment as a complete criminal charge - the due process clause of the Fifth amendment requires that those facts be proved beyond a reasonable doubt." see UNITED STATES V. FAUST, 456 F.3d 1342, 1352(11th Cir. 2006) (Barkett, J.,Specially concurring).

5. NELSON is a substantive decision that is retroactive on collateral review. Justice Ginsburg answered the question before the Court, "When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the state obligated to refund fees, court costs, and restitution extracted from the defendants upon, and as a consequence of, the conviction? The answer was yes. Absent a conviction of a crime, one is presumed innocent. The Court held that the states Exoneration Act's scheme did not comport with the fourteenth amendments guarantee of due process. For the purpose of the analysis of TEAGUE V. LANE, this Court has "homed in on a rule that would apply not just to the specific statute at hand, but in future simular circumstances." see WELCH V UNITED STATES, 578 U.S. ___, 136 S. Ct. ___, 194 L Ed 2d 387, 410(2016)(Thomas, J., dissenting). Perhaps, using the rule of decision Justice Thomas spoke of, a more descriptive

holding could have been that the Fifth and Sixth amendments preclude the use of conduct where absent a finding of guilt the accused is presumed innocent, to be considered for punishment. 3661 authorizes a court, in formulating a sentence for one convicted of any crime, to consider literally any information from any source, concerning the background, character, and conduct of the convicted person. The due process holdings of NELSON absolutley restrict the language found in 3661 and bring it within Constitutional limits. The text of 3661 provides little guidence on how to determine whether a given offense or conduct is within the reach of the statute. This Court has sought to develope boundries of sentence enhancement in a more precise manner in it's APPRENDI line of cases. As long as 3661 is a n open ended statute, those opinions still fail to bring sufficient clarity to the scope of 3661 and the courts will remain mired in disagreement over how the statute should be interpreted. Currently there is no way to assess whether an allegation, a dismissal, or an acquittal qualifies as an enhancement to a sentence based on a conviction of a separate crime. The Courts annalysis in NELSON cast no doubt on the fact that the Fifth and Sixth amendments provide for the presumption of innocence when there is no finding of guilt. Applying that standard to 3661 would require courts to regard the Constitutional rights of those at sentencing when determining what enhancements may apply.

Petitioner appeals the denial of his 2241 petition by the United States district court, and his appeal thereof in the Fourth Circuit Court of Appeals. He brings two questions to this Honorable Court. The first being Whether NELSON announced a substantive rule that has retroactive effect to cases on collateral review.

The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in TEAGUE. As a general matter under TEAGUE "new constitutional rules of criminal proceedure will not be applicable to those cases which have become final before the new rules are announced." TEAGUE, 489 U.S. at 310. TEAGUE and it's progeny recognize two categories of decisions that fall outside this general bar on retroactivity for proceedural rules. First,"new substantive rules generally apply retroactively". see SHIRIRO V. SUMMERLIN, 542 U.S. 348,351(2004); see MONTGOMERY V. LOUISIANA, 136 S. Ct. 718, 193 L Ed 2d 599(2016); TEAGUE Supra at 307,311. Second, new "Watershed rules of criminal proceedure" which are rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. See SAFFLE V. PARKS, 494 U.S. 484,495(1990),See TEAGUE Supra, at 311-313. NELSON announced a new substantive rule. See TEAGUE Supra, at 301([a] case announces a new rule if the result was not dictated by precident existing at the time the defendants conviction became final). "A rule is substantive rather than proceedural if

it alters the range of conduct or the class of persons that the law punishes." See SHIRIRO, 542 U.S. at 353. "This includes decisions that narrow the scope of a criminal statute by interpreting it's terms, as well as constitutional determinations that place particular conduct or persons beyond the states power to punish." Id. at 351-352. Proceedural rules by contrast, "regulate only the manner of determining the defendants culpability." SHIRIRO, 542 U.S. at353. Under this framework the rule in NELSON is substantive. By declaring that "absent a conviction of a crime, one is presumed innocent", NELSON reduced the substantive reach of 3661, altering "the range of conduct or class of personsons that the statute punishes." SHIRIRO, Supra, at 353. Before NELSON, 3661 allowed any and all conduct to be used to enhance a sentence of one convicted of a crime. After NELSON, conduct protected by the Fifth and Sixth amendments may not be used to enhance a sentence. NELSON establishes that "even the use of empeccable fact finding proceedures could not legitimate" a sentence based on the use of uncharged, dismissed, or acquitted conduct. See UNITED STATES V. UNITED STATES COIN AND CURRENCY, 401 U.S. 715, 724(1971).

The TEAGUE balance depends not on whether the underlying constitutional guarantee is proceedural or substantive, but rather on whether the new rule itself has a proceedural or substantive function. Whether it alters only the proceedures used to obtain the conviction, or instead alters the range of conduct or class

of persons the law punishes. See SHIRIRO,Supra, at 353. Dicisions from this Court show that a rule that is proceedural for TEAGUE purposes still can be grounded in a substantive Constitutional gaurantee. See BEARD V. BANKS, 542 U.S. 406, 408(2004); SAWYER V. SMITH, 497 U.S. 227, 233(1990). Conversly, there can be substantive rules based on Constitutional protections that would be described as proceedural. c.f. COATES V. CINCINATI, 402 U.S. 611,612(1971). Cases in which the Constitution deprives the government of the power to impose the challenged punishment, "represent the clearest instance" of substantive rules for which retroactive application is appropriate, See MACKEY V. UNITED STATES, 401 U.S. 667, 693(1971)(opinion of Harlan, J.) Time and again this Court has articulated the test for defining a substantive rule as follows: The rule must "place particular conduct or persons covered by the statute beyond the states power to punish." SHIRIRO, 542 U.S. at 352, BEARD, 542 U.S. at 416, and see PENRY V. LYNAUGH, 492 U.S. 302, 330(1989)(rule is substantive if "the constitution itself deprives the state of the power to impose a certain penalty."). NELSON, as applied to 3661 is such a case, and should be granted retroactive application to petitioners case.

The government remains free to enhance sentences for federal crimes based on previous convictions as it was before NELSON. The only constraint in finding NELSON retroactive would impose is on the manner in which the government can punish offenders

using uncharged, dismissed, or acquitted conduct. Congress must be more clear in describing what conduct may be used as a sentence enhancement. 3661 must be narrowed by NELSONS holdings to insure an accuseds Constitutional protections, while maintaining a Judges Constitutionally guaranteed power to sentence within the law, and protect both from the arbitrary and unpredictable wishes of the legislature.

II. Whether the retroactive change now presents an error in petitioners conviction and sentence sufficiently grave to be deemed a fundamental defect.

1. Petitioner was indicted by a grand jury on October 15, 2002, charging 17 counts in violation of 18 USC sect. 2251(a), one count of 18 USC 2252A(a)(1), and two counts of 18 USC 2252A(a)(5)(b). Counts nine through seventeen were dismissed pre trial when it was discovered the victim was not a minor, and counts eighteen through twenty were dismissed at sentencing by the court, with prejudice, on motion of the government. On January 11, 2005, on direct appeal, the Fourth Circuit Court of Appeals constructively amended the indictment by finding the petitioner guilty of dismissed count eighteen.

Petitioner believes his fundamentaldue process rights under the Fifth amendment and Sixth Amendment were violated denying him the right to a grand jury, to notice, the opportunity to be heard, the opportunity to confront witnesses, to claim double jeopardy, and his jury trial rights.

Following sentencing, the petitiioner filed a direct appeal by counsel raising a number of issues. The Fourth Circuit Court of Appeals provided an unpublished opinion that is found on page 9a of the Appendix and at UNITED STATES V. HUSBAND, 119 F. APPX. 475(4th Cir. 2005). At the original sentencing hearing it was determined that the 1995 version of the USSG's manual were the correct version based on USSG 1B1.11. The date of the offenses in the indictment are 1995 and 1996. Use of the current(2003) version would have violated the Ex post facto clause of the Constitutuion. See U.S. Constitution, Art. 1,Sect. 9,Cl. 3.

One of the issues raised by counsel was that the statute of limitations had expired and trial counsel had provided ineffective assistance as guaranteed by the Sixth amendment for not raising this affirmative defense pre-trial. The appelate panel ruled that circuit precidence dictated that all non jurisdictional issues not raised pre-trial were waived.

The panel went on to say "that because the statute of limitations argument becomes relevant to subsequent arguments, we note that Husband's statute of limitations claim is meritless for a number of reasons, not the least of which is that the final element of the offense was not complete until 2001 when the tape crossed state lines. The statute of limitations does not begin to run until all elements for the crime are completed." "Thus the clock did not begin to run until 2001, when the tape was transported accross state lines, not 1995, when actions that

were filmed took place." See HUSBAND, 119 F. Appx. at 480-481. At footnote 4 of it's opinion the panel attempts to pursuade the reader that 1B1.11 actually allows for this, when in fact note 2 of that section explicitly identifies the date in the count of indictment is controlling and forecloses the use of "relevant conduct" to be used to establish the date.

It is the accepted opinion of the Fourth Circuit and others, that the essential conduct elements of 2251(a) are complete upon the "use" of a minor to produce a visual depiction. In UNITED STATES V. BUCULEI, 262 F.3d 322,328(4th Cir. 2001) the panel held that "However, 2251(a) criminalizes "employing, using, persuading, inducing, or coercing" a minor to engage in"sexually explicit conduct for the purpose of producing" any visual depiction of such conduct(emphasis original). The Ninth Circuit in UNITED STATES V. THOMAS, 893 F.2d 1066, 1071(9th Cir. 2000) stated ("a rational jury could have found that Thomas "shot" the pictures between 1984 and 1986...), and again in UNITED STATES V. SMITH, 795 F.2d 841 n.4(9th Cir. 1986) the Ninth Circuit held "the statute clearly forbids the condition precedent of the film, the actual inducement of minors into sexually explicit conduct to be photographed." As the Fourth Circuit also explains in BUCULEI at 328, that "assuming the jurisdictional commerce clause requirement was satisfied, the federal crime charged in count 2 was complete when Buculei induced Megan into sexually explicit conduct for the purpose of producing a visual depiction thereof."

The panel went on to explain that 2251(a) contains an explicit jurisdictional element. It mandates in pertinent part, that such visual depiction will be transported in interstate commerce or mailed. The Court of Appeals determination that the jurisdictional element of 2251(a) is an essential conduct element triggering the statute of limitations is in direct conflict with it's own circuit precident on the subject.

Each count of Husband's indictment(1 -8) included a description of the offens that tracks the language of the statute, the date of the offense, the type of conduct involved, and that the jurisdictional nexus was complete. None of these counts reference any other count of the indictment, and at the plea hearing the governments proffer contained no mention of the required jurisdictional nexus.

The panels use of the essential conduct elements of the dismissed count eighteen amended the indictment by altering the elements of the offense to change the date of the offense in count's one through eight. As indicated Supra, each count of an indictment must stand alone, unless another count is expressly incorporated by reference. See DUNN V. UNITED STATES, 284 U.S. 390, 393 (1932); UNITED STATES V. ROBERTS, 465 F.2d 1373, 1375 (6th Cir. 1972). By altering the date of the offense from 1996 to 2001 the panel altered the possible punishment by statute from zero to ten years in the 1996 version, to ten years to 20 years in the 2002 version, as well as completley altering the evidentiary issues. By finding petitioner guilty on count eighteen his

ability to claim double jeopardy was gone. When a defendant is ultimatley convicted of charges not included in the indictment an amendment has occured which is per se reversible error. See UNITED STATES V. FLETCHER, 74 F.3d 49, 53(4th Cir. 1996) citing UNITED STATES V. KELLER, 916 F.2d 628, 633(11th Cir. 1990). When evidence at trial differs from what is alleged in the indictment, then a variance occurs. What if this happens on direct appeal? Such a variance violates a defendants rights and requires reversal only if it prejudices him. Id., Either by surprising him at trial or hindering the preperation of his defense. e.g. UNITED STATES V. HORTON, 526 F.2d 884, 887(5th Cir. 1976), or by exposing him to the danger of a second prosecution for the same offense.

The panels amendment modifies, or adds an element of the offense. The first essential conduct element of 2251(a) is that the victim is a minor, and this element must be shown in the indictment. The dates shown in counts one through eight are all between the summer of 1995 and the spring of 1996. These dates prove the age of the victim and allows the defendant to claim statute of limitations. The lack of any reference in these counts to any other count indicates that the indictment was based on the first jurisdictional hook of the statute, That the defendant knew, or had reason to know that they visual depiction would be transported in interstate or foreign commerce, or mailed. The court below tries to alter this by claiming the jurisdictional nexus relied on "was or has been transported...", allowing it to claim an inchoate offense as described in UNITED STATES V. SIROIS, 87 F.3d 34, 38-39(2d Cir.1996). SIROIS also states that an

offense under 2251(a) that relies on the first jurisdictional element is complete upon use of the minor. The appeals court attempts to validate the district courts sentencing error by suggesting a mere mistake in the version of the USSG manual used and that the correct version is the 2002 version. When that version of the USSG's are used and coupled with the applicable version of the statute from title 18 United States Code, it completley alters the range of punishments and the facts of the indictment that the grand jury presented, which the defendant pled guilty to. If the appeals court amendment were to be accepted, then the victim would no longer be a minor, therefore the time variance proposed by the court below constitutes a modification of the elements, requiring application of the per se rule announced in STIRONE V. UNITED STATES, 361 U.S. 212(1960); UNITED STATES V. RANDALL, 171 F.3d 195, 203(4th Cir. 1998).

Following the Fourth Circuits opinion, a petition for a writ of certiorari was filed in this Honorable Court. The petition was granted, and the judgement vacated and the case remanded back to the Fourth Circuit. See HUSBAND V. UNITED STATES, 126 S. Ct. 322(2005). The fourth circuit initially denied to remand to the district court. see UNITED STATES V. HUSBAND, NO. 03-4630, (4th Cir. 2006) located at Appendix page 57a. The panel held that "because the Supreme Court remand order does not effect our rejection in our prior opinionof Husband's claims that the statuteof limitations had expired, that his plea was not knowing

and voluntary, that there was no basis for accepting his plea, and that he recieved innefective assistance of counsel, we continue to affirm Husband's convictions for the reasons set forth in our prior opinion." Id. On June 1, 2006 the panel filed a corrected opinion(App. pg. 64a), vacating Husband's sentence but affirming his convictions, again holding that the remand in light of BOOKER did not affect it's prior opinion. On November 8, 2006, petitioner was resentenced by the district court, using the 2002 version of the USSG manual, to 30 years(360 months). In the resentencing Judgement in a criminal case the end date of all eight counts were changed to relect a 2001 date, not the end dates reflected in the indictment or the initial Judgement in a criminal case. An appeal was filed claiming error in use of the 2002 USSG manual. The Fourth Circuit affirmed in an unpublished opinion, UNITED STATES V. HUSBAND, 235 F. Appx. 55 (4th Cir. 2007)(Appendix pg 69a).

For fifteen years the constructive amendment of the petitioners indictment on direct appeal using dismissed conduct has been an error, surely this is an error in the conviction and sentence sufficiently grave to be deemed a fundamental defect.

In sum, this case presents an ideal opportunity for the Court to answer the growing chorus of calls for the Courts review of the use of uncharged, dismissed, and acquitted conduct at sentencing. It is an opportunity for the Court to determine for "We, the people", whether or not our constitution allows those that populate the houses of the legislature to legislate guilt,

without the protections of the Fifth and Sixth amendment. When our courts can interpret a statute like 3661 to allow them to consider at sentencing, conduct that has been dismissed, or acquitted as long as they stay within a statutory maximum for the crime of conviction, We, the people are not being provided the rights as provided in the Constitution.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted

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