No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DESHAUN BULLOCK, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct for which a jury has acquitted defendant?

2. Whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct which was charged in a different jurisdiction, tried before a different court, overseen by a different judge, and for which the Defendant was previously acquitted?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Deshaun Bullock is the Petitioner in this case and was represented in the Court below by Kathryn B. Parish.

The United States of America is the Respondent and was represented in the Court below by AUSA Dillan Edwards.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

United States District Court (N.D. Iowa):

United States v. *Bullock*, No. 6:20-cr-02018-CJW-1 (Judgment Imposed on April 16, 2021 and filed on April 19, 2021)

United States Court of Appeals (8th Cir.):

United States v. *Bullock*, No. 21-1987 (Judgment on May 31, 2022, Rehearing Denied on July 13, 2022)

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TABLE OF AUTHORITIES

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Other Authority

Petitioner Deshaun Bullock prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered on November 9, 2021.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a - 8a) is reported at 35 F.4th 666.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2022. App. 1a. A timely filed petition for rehearing or rehearing en banc was denied on July 13, 2022.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a 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 for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, 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 confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Currently pending before this Court is the Petition for Certiorari of Daytona McClinton (Case No. 21-1557), which presents the fundamental question of, "Whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct for which a jury has acquitted the defendant." In Mr. McClinton's case, a jury convicted Mr. McClinton of "being one of a group that robbed an Indianapolis CVS pharmacy," but . . . acquitted [him] of a separate charge of shooting and killing the clerk at the CVS. *Daytona McClinton v. United States*, Petition for Certiorari (Filed: June 10, 2022). But the sentencing judge in that case found by a preponderance of the evidence that he had committed the shooting and killed the clerk, increased his offense level by 20 points, and sentenced him based on the resulting Guideline range, varying downward after considering the other §3553 factors.

Mr. Bullock's case presents a different subset of the same question presented in *McClinton*. In Mr. Bullock's case, the acquitted conduct considered by the Judge at his federal sentencing was conduct of which Mr. Bullock was acquitted in front of a different judge in a different jurisdiction and involved an acquittal that occurred close to a full year before Mr. Bullock was ever charged in his federal case. At sentencing in his federal case, it was used as a basis not for increasing his offense level, but rather as a basis for finding that his criminal history score was understated.

As the petitioner in Mr. McClinton's case and the numerous Amici in support of the petitioner rightly argue, the consideration of acquitted conduct by a

sentencing judge offends the Fifth and Sixth Amendments and has profound negative effects on every aspect of the criminal process. This Court should address the larger question and grant certiorari in Mr. McClinton's case as well as Mr. Bullock's case, in order to consider this larger fundamental question.

However, this Court need not address the larger question presented by McClinton in order to address the narrower question presented by Mr. Bullock's case – that is, whether a sentencing court may base an upward departure for criminal history on conduct that a jury in a different jurisdiction before a different judge in an entirely unrelated case chose to acquit the defendant. Should this Court decline to address the larger question that is also presented by Mr. McClinton's case, this Court should nonetheless grant Certiorari in Mr. Bullock's case in order to address this more narrow question.

Facts:

1. On August 21, 2015, Mr. Bullock was charged in Black Hawk County Court, State of Iowa, with Reckless Use of a Firearm, Resulting in Physical Injury based on a shooting of his friend that occurred in Mr. Bullock's home. Mr. Bullock did not admit the shooting and the victim had told police that he did not see Mr. Bullock shoot him, but that he believed it was Mr. Bullock who had done so because no one else was in the home and he thought it was an accident. On April 27, 2018, Mr. Bullock was found not guilty of this offense by a Black Hawk County jury after a jury trial. DCD 42 (PSR), ¶37.

2. More than a year later, on July 11, 2019, authorities executed a search warrant in Mr. Bullock's home and located in his home an unspecified quantity of marijuana as well as a Taurus TH9c, 9x19mm caliber pistol that was loaded with 17 rounds of 9mm ammunition. DCD 42, ¶12. He had prior convictions for possession of marijuana, and had also been pulled over by police with marijuana in his vehicle in March of that year and stated in an interview at that time that he was a daily marijuana user. DCD 42, ¶7. Based on that evidence, he was charged with (among other things) Possession of a Firearm by a Drug User, in violation of 18 U.S.C. §922(g)(3) and 18 U.S.C. § 924(a)(2).[1]
3. On September 25, 2020, Mr. Bullock pled guilty to that count before a magistrate judge and on October 14, 2020, United States District Court Judge C.J. Williams formally accepted Mr. Bullock's plea. In a section titled "other arrests", the presentence report devoted three pages to discussing the details of the allegations and investigation into the prior state court charges of which the Black Hawk County Jury had acquitted Mr. Bullock in April of 2018. DCD ¶37. Mr. Bullock's counsel objected to the inclusion of that paragraph in the presentence report. DCD 41.

[1] Mr. Bullock was also charged with an additional count of Possession of a Firearm by a Drug User, as well as one Count of Making a False statement. These counts were dismissed at the time of sentencing pursuant to the plea agreement, and are not relevant to the issues being presented to this Court.

4. Prior to sentencing, the Government filed a motion for upward departure pursuant to U.S.S.G. §4A1.3, arguing that because Mr. Bullock was acquitted by a jury of the 2017 shooting, his criminal history was understated and the district court should depart upward. DCD 51. At sentencing, in support of this motion, the Government presented two witnesses. Investigator John Kintz had been the lead investigator on the case and testified generally to information in the police reports regarding the prior alleged offense. STr.:18-19. In addition, the prosecution presented Joseph Saunders, who testified to the contents of multiple text messages retrieved from a phone seized during the July 2019 search of Mr. Bullock's home in which the texter told a female that he had shot his friend him but was acquitted and got away with it. STr.: 28-29; DCD 52-3; 52-4 at 1-2.

5. Mr. Bullock's criminal history category was III due to three prior misdemeanor convictions for possession of marijuana. He had no other criminal history. DCD 42, ¶¶29-33. The court calculated his offense level at 21 for a Guideline range of 46-57 months. STr.:45. But it granted the Government's motion for an upward departure due to an understated criminal history based on the conduct of which Mr. Bullock had been acquitted by the Black Hawk County jury. STr.:65. Acknowledging the differing standards of review in a criminal trial and a federal sentencing, the court found that Mr. Bullock "either intentionally shot his friend or he

recklessly did so", even though the Black Hawk Jury had found him not guilty of exactly that. It nonetheless said it would limit the extent of the variance based on arguments made by counsel that the six-point enhancement for the high-capacity magazine overstated the dangerousness of the offense and also based on changes Mr. Bullock had made in his life based on the birth of his daughter, and sentenced Mr. Bullock to 63 months in prison. STr.:66-68.

6. Mr. Bullock appealed to the Eighth Judicial Circuit Court of Appeals the issue of the Court's consideration of acquitted conduct as well as a separate and unrelated issue involving the calculation of his offense level. The Eighth Circuit affirmed on May 31, 2022. A Petition for Rehearing or Rehearing En Banc Was timely filed and denied by the Eighth Circuit on July 13, 2022.

REASONS FOR GRANTING THE WRIT

I. *United States v. Watts, 519 U.S. 148 (1997)* does not adequately address the issue of enhancing a person's sentencing based on acquitted conduct in light of developments in case-law, and this Court needs to address this issue.

A. *Watts* only addressed whether considering acquitted conduct violates double jeopardy and left open a number of important questions.

As pointed out in Mr. McClinton's briefing and by various Amici in support of that petition in this Court, *United States v. Watts*, 519 U.S. 148 (1997) addressed only the issue of double jeopardy and did not address the jury trial and due process issues raised by Mr. Bullock and Mr. McClinton in their briefing. This Court's majority acknowledged this in *United States v. Booker,* explicitly stating that the decision in *Watts* had been made without full briefing and oral argument and was limited to question of whether consideration of acquitted conduct violated double jeopardy. 543 U.S. 220, 240 n. 4. (2004).

At the time of the *Watts* decision, Justice Kennedy in his dissent expressed concerns about the many questions that were unaddressed by the *Watts* decision - specifically, concerns about undercutting the verdict of acquittal, the effect of the 1984 Sentencing Reform Act on the decision, and the distinction between uncharged and acquitted conduct. As to the latter issue, he commented, "At several points the per curiam opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted. The distinction ought to be confronted by a reasoned course of argument, not by shrugging it off." 519 U.S. at 170 (Kennedy, dissent).

In the aftermath of the decision and in the years since, legal commentators criticized that in additional to the failures of the opinion to address the issues highlighted by Justice Kennedy, it ignored fundamental Constitutional concerns. See Beutler, *A Look at the Use of Acquitted Conduct at Sentencing,* 88 J. Crim. L. & Criminology 809, 809 (1998) ("The use of acquitted conduct in sentencing raises due process and double jeopardy concerns that deserved far more careful analysis than they received.") Specifically, Beutler argued that acquitted conduct is different from other conduct that a judge may consider at sentencing: "In the American criminal justice system, an acquittal carries special weight. It communicates a message about the defendant's legal innocence that cannot be found in the mere absence of a conviction." *Id.* at 835. She continues:

> As one commentator explained, "[t]he Constitution places the jury at the heart of the criminal justice system as the fundamental guarantor of individual liberty." Granting sentencing courts the right to review acquitted conduct enables the government to bypass the trial system with its accompanying constitutional protections. Because it eviscerates the jury's ability to protect the citizen from government overreaching, this approach upsets the jury's crucial balancing role. Furthermore, it "in effect, tells the jury (and the public in general) that the jury's efforts in assessing the evidence and weighing the different charges were of limited importance overridden by the contrary opinion of one judge." In so doing, it not only diminishes the democratic nature of the criminal justice system, it undermines public confidence in the judicial system.

Id. at 835-836. Other scholars have similarly argued that the decision in *Watts* was derelict in its reasoning, fundamentally unfair, and violative of constitutional principles. See e.g. Ngov, *Judicial Nullification of Juries: The Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 261 (2009) ("At the very least, an

acquittal should mean that the defendant is legally innocent-that no legal repercussions should result. Otherwise . . . acquittals are relatively meaningless because a defendant can be sentenced to the same length of imprisonment that would have been imposed had he actually been convicted of the offense."); Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can be Done About It*, 49 Suffolk Univ. L. Rev. 1, 25 (2016) (quoting other sources for the proposition that "[t]he use of acquitted conduct has been characterized as, among other things, 'Kafka-esque, repugnant, uniquely malevolent, and pernicious[,]' 'mak[ing] no sense as a matter of law or logic,' and ... a 'perver[sion] of our system of justice,' as well as 'bizarre' and 'reminiscent of Alice in Wonderland'").

Federal judges too, have opined that the use of acquitted conduct to enhance a sentence in unconstitutional, but, bound by precedent, reluctantly upheld district court's decisions to do so. As 11th Circuit Judge Barkett stated:

> I concur in its sentencing decision only because I am bound by Circuit precedent. Although *United States v. Duncan*, 400 F.3d 1297 (11th. Cir.), cert. denied, —— U.S. 432, 126 S.Ct. 432, 163 L.Ed.2d 329 (2005), expressly authorized the district court to enhance Faust's sentence for conduct of which a jury found him innocent, I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.

United States v. Faust, 456 F.3d 1342, 1349 (11th Cir. 2006)(Barkett, concurring).

Judge Bright of the 8th Circuit similarly concurred "reluctantly" in *U.S. v. Canania,* writing separately in order to express his, "strongly held view that the consideration of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional." 523 F.3d 764, 776 (8th Cir. 2008) (Bright, concurring).Judge

Among other things, Judge Bright pointed out that punishment based on acquitted conduct violates the notice requirement of the due process clause, urging that when consideration of acquitted conduct is permitted, "a defendant can never reasonably know what his possible punishment will be." 532 F.3d at 777. A number of other federal judges have expressed similar views, reluctantly concurring or enhancing sentences despite serious constitutional concerns, simply because precedent binds them to do so. *See* Ngov, *supra,* at 861-862, note 163 (citing cases).

At the heart of all of these concerns is the idea that conduct of which a person has been acquitted is different from any other prior conduct of a person which may be presented at sentencing. This is because it has already been through the rigorous process our Constitution designed for the purpose of discovering the truth of allegations. And, having gone through that test, it failed. This fact of law must have some effect in subsequent proceedings, as recently acknowledged by this Court in *Nelson v. Colorado*, 137 S. Ct. 1249, 1256, 197 L. Ed. 2d 611 (2017)(holding that the State of Colorado violated petitioners' due process rights by retaining funds paid by petitioners upon conviction after the petitioners' convictions were invalidated with no possibility of retrial).

Despite this, and without this Court having further addressed the issue since the time of the *Watts* decision, federal courts as a whole, including the Eighth Circuit, have relied on *Watts* to find that there is no Constitutional barrier to relying on acquitted conduct for purposes of applying the guidelines. *United States v. Madrid*, 224 F.3d 757, 762 (8th Cir. 2000); *United States v. Swartz*, 758 F. Appx.

108, 111-112 (2nd Cir. 2018); *United States v. Horne*, 474 F.3d 1004, 1006 (7th Cir. 2007); *United States v. Jamerson*, 674 F. Appx. 696, 699 (9th Cir. 2017); *United States v. Maddox*, 803 F.3d 1215, 1220-1222 (11th Cir. 2015); *United States v. Settles*, 530 F.3d 920 (D.C.Cir. 2008).

As this Court recently made clear in *Dobbs v. Jackson Women's Health Org.*, stare decisis "does not compel unending adherence" to precedent in certain situations, for example, where the original decision was, "egregiously wrong from the start", suffered from, "exceptionally weak" reasoning and "has had damaging consequences." 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2243 (2022). It is time for this Court to revisit its decision in *Watts.*

B. *Apprendi* and its progeny call into question the decision in *Watts*, to the extent it decided this issue.

Other cases decided by this Court suggest that it violates due process to use acquitted conduct to enhance one's sentence beyond what would otherwise be considered a reasonable sentence under 18 U.S.C. §3553. The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, "requires that each element of a crime" be either admitted by the defendant, or "proved to the jury beyond a reasonable doubt." *Alleyne v. United States,* 570 U.S. 99 (2013). Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, *Apprendi v. New Jersey*, 530 U.S. 466, 483, n. 10 (2000), and "must be found by a jury, not a judge," *Cunningham v. California*, 549 U.S. 270, 281 (2007). The Court has also held have held that a substantively unreasonable sentences are proscribed by statute and must be set aside. *Gall v. United States*, 552 U.S. 38, 51

(2007). At least three justices of this Court have now concluded that from the sea-change in sentencing law prompted by *Alleyne*, *Apprendi,* and others, "It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby 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." *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, Thomas, and Ginsburg, dissenting from the denial of certiorari.)

As Judge Bright stated in his *Canania* concurrence: "Rather than pretending as if these cases were never decided, we federal judges should acknowledge their clear implication: A judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance the defendant's sentence." 532 F.3d at 776.

C. The use of acquitted conduct at sentencing violates the presumption of innocence, as acknowledged by a number of state courts which have decided this issue.

In *Nelson v. Colorado*, this Court specifically rejected the argument that the presumption of innocence only applies at criminal trials, decrying it as a misreading of prior Supreme Court precedent. 137 S. Ct. 1249, 1256, 197 L. Ed. 2d 611 (2017). It also specifically acknowledged that the presumption of innocence was "unquestionably", "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.,* at n. 9 (citing *Medina v. California*,

505 U.S. 437, 445 (1992)(further citations omitted). In Justice Stevens' dissent to the *Watts* decision written close to twenty years prior, he had similarly observed:

> In my opinion the [sentencing statute] should be construed in the light of the traditional requirement that criminal charges must be sustained by proof beyond a reasonable doubt. Whether an allegation of criminal conduct is the sole basis for punishment or merely one of several bases for punishment, we should presume that Congress intended the new sentencing Guidelines that it authorized in 1984 to ***adhere to longstanding procedural requirements enshrined in our constitutional jurisprudence.***

Watts, 519 U.S. 148, 169 (1997)(Stevens, dissent).

A number of state courts have found that the presumption of innocence, together with the due process clause prohibit a court from considering acquitted conduct in rendering sentencing decisions. *People v. Beck*, 504 Mich. 605, 627, 939 N.W.2d 213, 225 (2019), cert. denied sub nom. *Michigan v. Beck*, 140 S. Ct. 1243, 206 L. Ed. 2d 240 (2020); *State v. Cote*, 129 N.H. 358, 375, 530 A.2d 775 (1987) (concluding that "[T]he presumption of innocence is as much ensconced in our due process as the right to counsel."); *State v. Marley*, 321 N.C. 415, 425, 364 S.E.2d 133 (1988) ("[D]ue process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder after the jury had acquitted defendant of first degree murder").

In *People v. Beck*, the Michigan Supreme Court specifically found that, "Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime." 504 Mich. at 609, 939 N.W.2d at 216. In its ruling, the court specifically distinguished cases of acquitted conduct from those in

which a case was merely dismissed or never charged, finding that such a practice was, "fundamentally inconsistent with the presumption of innocence itself." *Id.* at 627 (citing *Marley*, 321 N.C. at 425, 364 S.E.2d 133. In *Marley,* the North Carolina court explained further why:

> A jury in a criminal case may acquit simply because the state has failed to prove a defendant's guilt beyond a reasonable doubt. However, we cannot enter the inner sanctum of the jury to determine whether it might have convicted a defendant had the burden of proof been lower. "requires proof beyond a reasonable doubt in criminal cases as the standard of proof commensurate with the presumption of innocence; a presumption not to be forgotten after the acquitting jury has left and sentencing has begun."

321 N.C. at 424–25, 364 S.E.2d at 138 (citing *Cote*, 129 N.H. 358)

These state court decisions, combined with the reluctant concurrences of various federal judges, suggest a split of authority on the issue of whether the Constitution permits the consideration of acquitted conduct at sentencing. This Court should grant certiorari in order to address this issue.

II. The use of conduct acquitted in an entirely sperate judicial proceeding to enhance a sentence presents additional issues that should be addressed by this Court.

A. The *Watts* decision was based partly on the fact that the conduct at issue was relevant to the crime of conviction and therefore is distinguishable on its facts.

United States v. Watts, 519 U.S. 148 involved a decision by judge who had presided over the entire trial and had the same evidence before him as was presented to the acquitting jury. The sentencing judge then was in a position to evaluate whether, based on all of the evidence put forth of the crime to the jury during a trial that was governed by the Federal Rules of Evidence and Criminal

Procedure and which safeguarded the defendant's constitutional rights, the crime had been proven by a preponderance of the evidence, even if not beyond a reasonable doubt. In Mr. Bullock's case and others like it, the acquitted conduct in question involved a completely different crime that had occurred more than a year before the crime that was actually before the sentencing court and was tried by an entirely different court. At the sentencing in Mr. Bullock's case, the Government presented two police witnesses who testified to a significant amount of hearsay and had not seen the evidence that had been placed before the jury. The record was not clear as to whether, and certainly did not establish, that Mr. Bullock's counsel had received discovery with regard to that crime or conducted an adequate investigation into available defenses. The Court was thus not in a position to determine whether it believed that Mr. Bullock had committed the crime despite the jury's acquittal, by a preponderance of evidence or otherwise, because the judge did not see the entirety of the evidence or witness the jury trial.

Moreover, the Court in *Watts* was not faced with the issue here of using acquitted conduct to enhance a sentence under § 4A1.3 or even § 3553. Rather, it was deciding the question of whether enhancements to the applicable base offense level applied based on conduct that was relevant offense conduct under U.S.S.G. § 1B1.3. 519 U.S. at 150-151. Central to its holding that there was no violation the double jeopardy clause was the idea that when doing so, "Defendant is 'punished only for the fact that the present offense was carried out in a manner that warrants increased punishment.' " *Id.* at 155 (citing *Witte v. United States*, 515 U.S. 389, 400,

(1995)). Using acquitted conduct to enhance based on criminal history as opposed to offense level does not punish the *manner* in which the crime actually before the court was carried out, but rather punishes a person for the crime of which he was already acquitted when the full facts of the case were placed before a different court, and one of jurisdiction. The scenario presented by Mr. Bullock's case thus presents a different set of issues, and one unaddressed in *Watts.*

B. The standards of proof and evidentiary rules applicable at a sentencing hearing are insufficient to overcome the presumption of innocence.

A person is presumed innocent of a crime unless and until proven guilty. This is a matter of constitutional law at any criminal proceeding and, as this Court has now acknowledged, the right to be presumed innocent in the absence of a conviction extends beyond the context of a criminal trial. *Nelson*, at 1256. At a sentencing hearing, as occurred in this case, not only is the government excused from the rigors of proof beyond a reasonable doubt in favor of the much more lenient preponderance of the evidence standard, but the government is also excused from the rules of evidence applicable at a criminal trial. Specifically, the federal rules of evidence do not apply at a sentencing hearing. See Fed.R.Evid. 1101(d)(3). This Court has deemed cross-examination as, "the 'greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149 (1970). But at a sentencing proceeding, as occurred in Mr. Bulllock's sentencing, evidence is admissible so long as there is a "sufficient indicia of reliability" and a hearsay testimony may be admitted without concern for the confrontation clause. See *Williams v. New York*, 337 U.S. 241 (1949); *United States v. Evans*, 891 F.2d 686, 688 (8th Cir.1989)

("Uncorroborated hearsay evidence contained in a presentence report may be considered by the sentencer provided the persons sentenced are given an opportunity to explain or rebut the evidence.")

Moreover, certain procedures that do apply at a sentencing hearing are incompatible with the presumption of innocence. Fed.R.Crim.Pro.R. 32 outlines the general process which governs sentencing hearings, and provides that, among other things, a presentence report will be prepared. Rule 32(i)(3)(A) specifically provides that the sentencing court, "may accept any undisputed portion of the presentence report as a finding of fact." In other words, the rules place the burden on the defendant to contest anything in the presentence report as untrue. Where the information in the presentence report at issue is information about conduct of which a defendant has previously been acquitted, the procedures in place at sentencing contradict the presumption of innocence.

Centuries of jurisprudence establish that the presumption of innocence may only be overcome by proof beyond a reasonable doubt in the context of a criminal trial. In the context of sentencing, not only is that standard far less than that attendant at a criminal trial, the standards of what may count as "evidence" are also greatly diminished due to the lack of confrontation rights and the non-applicability of the federal rules of evidence.

This Court should grant certiorari in order to decide whether the evidentiary rules attendant at a sentencing hearing afforded at sentencing are legally sufficient to overcome the presumption of innocence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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