NO. _____

IN THE
UNITED STATES SUPREME COURT

CHARLETON MAXWELL,
Petitioner,

vs.

UNITED STATES,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 22-1379

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

Issue 1.

In the case at bar the sentencing judge refused to a apply a higher standard than a mere preponderance when the issue was, based on a drug quantity estimate, whether the appropriate sentencing guidelines range was 37 to 46 months, as opposed to 210 to 262 months. Under these circumstances, was a higher degree of protection required by the due process clause?

Issue 2.

Under *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990, for a judge to adopt a conservative estimate of drug quantity when calculating the federal sentencing guidelines range, "is … constitutionally required to prevent excessive sentences." The 1st, 9th and 10th Circuits also recognize and apply the "Walton rule." The 8th Circuit once recognized and applied the rule but has not for several decades. The need estimate drug quantity is a common occurrence in federal sentencing proceedings and so this Court's guidance on when the failure to use conservative estimates violates a defendant's right to be sentenced based on accurate information would be very helpful to the bench and bar.

II. LIST OF PARTIES

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

☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

III. LIST OF PROCEEDINGS

United States District Court (N.D. Iowa):
United States v. Charleton Maxwell, No. CR 20-3044 (October 20, 2020)

United States Court of Appeals (8th Cir.):
United States v. Charleton Maxwell, No. 22-1379 (Feb. 2, 2023)

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VI. TABLE OF AUTHORITIES

CASES

RULES

CONSTITUTIONAL PROVISIONS

IN THE
UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

On the authority of Supreme Court Rule 10(a), Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

VII. OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is:

☒ reported at *United States v. Maxwell*, No. 22-1379 (8th Cir. Mar. 1, 2023).

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion or relevant order of the United States district court appears at Appendix B to the petition and is:

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

VIII. JURISDICTION

The date on which the United States Court of Appeals decided my case was April 19, 2022.

☐ No petition for rehearing was timely filed in my case.

☑ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 13, 2022. A copy of the order denying rehearing filed on April 13, 2022, appears in the Appendices at p. 16. Procedendo was also issued on April 13, 2022.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in on Application No. _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

IX. 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.

X. STATEMENT OF THE CASE

On October 20, 2020, Charleton Maxwell and his son Antoine Maxwell were charged as co-defendants in a 10-count Indictment. Count 1 was conspiracy to distribute controlled substances; both Charleton and Antoine were charged with this offense. Charleton Maxwell was also charged in Counts 2 to 4 with distribution of heroin and methamphetamine on three days in early December of 2019. Antoine Maxwell was charged in

Counts 5 to 10 with distribution of controlled substances in April of 2020 and later. [Indictment, R.Doc. 3].

Charleton and Antoine's cases were jointly tried beginning on July 6, 2021, with jury selection. [District Court case R.Doc. 65]. The trial concluded when the jury returned its verdict on July 9, 2021. Charleton was found guilty as charged in Counts 1 to 4; and Antoine was found guilty on Counts 1 and 5 – 8 (and not guilty on Counts 9 and 10). [R.Doc. 75].

Charleton's sentencing hearing was held on February 11, 2022. [R.Doc. 122]. He was sentenced to serve 210 months in prison on Counts 1 to 4, to be served concurrently. [R.Doc. 123; Appendices p. 10]. Notice of appeal was filed on February 18, 2022. [R.Doc. 126].

The evidence against Charleton, with respect to the three distribution counts, was that a confidential informant made three controlled buys outside Charleton's home at 519 Eighth Street, Mason City, Iowa, on December 5, 6 and 13, 2019. The first and last buys involved a fraction of a gram of heroin. The middle buy

was a fraction of a gram of heroin and about 3.5 grams of methamphetamine. [Lab report, Trial Tr. 52:10-13; 175:10-19 (short for page 52, lines 10-13); all such references are to the trial transcript unless otherwise noted]. The quantities involved in the controlled buys were so small that they were, as discussed below, "swallowed up" by the drug quantities involved in the conspiracy count. The drug quantities for the conspiracy count were so-called "ghost dope," i.e., based only on statements of cooperators without any physical counterpart.

Pertaining to the conspiracy count, the trial testimony included evidence that on July 30, 2020, more than eight months after the controlled buys at Charleton's home, his home was searched pursuant to a warrant. [Tr. 151:21-23; 152:15-18]. There was no heroin or methamphetamine in the home. There were several thousand dollars in the residence, which Charleton shared with his son Charles, who manages a local restaurant. None of the money was traced to a drug transaction. [Tr. 179:12-16].

The lead investigator, Hodak admitted that he never observed Charleton and Antoine jointly engage in any illicit

activity. [Tr. 142:1-5]. No documents, such as phone records, text messages, or other communications linked the two alleged conspirators. Rather than actual drugs, the quantity determination depended on statements by two cooperators. Mullen and Grays.

A. Mullen's statements

CharlyAnn Mullen, whose married name is Kling, testified that she stole hundreds of thousands of dollars from her grandmother to buy drugs. [Tr. 234:11 to 235:2; 263:9-19]. Nonetheless, her grandmother, Mullen claimed, would sometimes drive to her to Mason City, Iowa, where Mullen bought drugs. [Tr. 264:5-9]. Mullen said, at trial, that she bought drugs from Charleton at his residence in Mason City150-200 times. [Tr. 232:15-25]. At the trial, Mullen said she bought from Charleton most every day.

Initially, Mullen testified that the buys were around Christmas and New Year's. [Tr. 259:14-20], When it was pointed out, during cross examination, that 200 buys in 2 months would mean there were multiple trips each day, Mullen changed her

testimony. [Tr. 259:23 to 260:2]. She then testified that the buys were from August of 2019 to April of 2020, [Tr. 261:18-25], and that in the months after the controlled buy at Charleton's residence in December of 2019, she went to his residence pretty much every day. [Tr. 272:6-13]. She said she paid cash and spent $300-500.00 per day on drugs. [Tr. 232:3-14]. Charleton, the person who was supposedly the recipient of all this money, was not shown to have any assets, not even his own car. [Tr. 19:21-24; 177:15-19].

Investigator Hodak testified that Mullen had worked with law enforcement prior to December of 2019. [Tr. 183:24 to 184:6]. Hodak admitted that in all the time that Mullen worked for the police, she made no mention of Charleton until April of 2020.

Mullen's trial testimony was inconsistent with her original statement about how much drug quantity she received from Charleton. Agent Anderson from the Iowa DCI (Department of Criminal Investigation) testified that he interviewed Mullen in 2020, after she called the police to put in a good word for a fellow heroin-addict who was in jail, presumably to try to get her friend

some sort of favorable treatment. [Tr. 364:17 to 365:3]. During this interview Mullen claimed that she had bought drugs from Charleton, but only 50 times (not 200 times, as she said at trial) over the course of four months from December of 2019 through February of 2020. [Tr. 576:22 to 377:6]. But later, at trial, as noted, Mullen's testimony about the range of dates (eight months rather than four months) and the number of purchases (200 rather than 50) doubled and quadrupled, respectively.

B. Grays' statements

Armondo Grays was the other cooperating witness upon whom the drug quantity determination depends. Grays has several federal felony drug convictions. [Tr. 313:16-17]. After he was released from a halfway house, he violated his parole when he was arrested and jailed in Mason City, Iowa, for a new federal drug and firearms offense. [Tr. 313:25 to 314:6]. Grays, who really wanted to be released, [Tr. 164:10-17], immediately obtained officer Hodak's number and repeatedly called him to try to work out some deal [Tr. 91:3-11].

Grays, a/k/a "Mondo," first spoke with Hodak on July 2, 2020, and made no mention of Charleton Maxwell. [Tr. 172:11-20]. In the July 2 interview, Grays said he (Grays) made direct distributions of methamphetamine to Antoine Maxwell. [Tr. 165:19 to 166:5]. A few days later, on July 7, 2020, Mondo said that Charleton sold heroin. [Tr. 343:14-10]. But subsequently, shortly before trial in October of 2022, when meeting with the prosecutor and Hodak, Grays said that he was directed to go to Charleton, not Antoine, for methamphetamine. [Tr. 165:19 to 166:5].

Having decided to link Charleton to the sale of methamphetamine, Mondo claimed that on 3 to 4 occasions, each time he bought 4 ounces of meth from Charleton. [Tr. 320:5-10]. Mondo admitted that there was nothing he could point to, to corroborate his claims about Charleton selling ounces of methamphetamine. [Tr. 344:4-11]. This methamphetamine quantity was the driving factor in the determination of Charleton's sentencing guidelines range.

The government did not present any evidence – phone records, social media posts, drug notes – that linked Charleton and Antoine in drug related activities. Hodak admitted that it was only what Grays said that linked the two in illicit conduct. [Tr. 142:1-5].

C. Impact of estimating drug quantity based on the highest amounts of drugs in Mullen and Grays various statements.

Neither Mullen nor Gray originally said anything about Charleton selling methamphetamine, let alone in large quantities and on a regular basis. Based on their original statements, the drug quantity would be based on a fraction of a gram of heroin and 3.5 grams of methamphetamine; but using their testimony and estimates, it is 737 grams of pure methamphetamine and 23 grams of heroin. [PSIR, R. Doc. 101, at paragraph 28].

Mr. Maxwell's criminal history category was II. For a fraction of a gram of heroin and 3.5 grams of methamphetamine, even assuming the meth is pure, the corresponding guideline range is 37 to 46 months, as opposed to 210 to 262 months, the latter being the range used to sentence Mr. Maxwell based on the

statements that Grays and Mullen eventually adopted about sales of methamphetamine by Charleton, after neither one originally claimed that he sold them any methamphetamine.

XI. REASONS FOR GRANTING THE WRIT

Thankfully, presentence investigators and judges will often adopt the low end of drug quantity estimates for purposes of sentencing. But what happens when they don't, particularly when, as in the case at bar, it makes a dramatic difference in the sentencing guidelines range?

A. On the facts of this case, under Matthews v. Eldridge and McMillian v. Pennsylvania, the use of a mere preponderance of the evidence standard to determine drug quantity was unconstitutional.

Charleton asked the trial court judge to apply at his sentencing hearing a more stringent standard of proof than a mere preponderance of the evidence due to Grays and Mullen giving wildly different statements about his purported sales of methamphetamine to them. The judge declined to do so. [Tr. Sentencing Hearing, 17:3-6].

In support of his argument, Charleton cites *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), which held that as a general matter that the degree of protection required by the due process clause depends, among other things, on balancing the nature of the private interest affected against the government's interest in avoiding the fiscal or administrative burdens entailed by heightened procedural requirements. In the context of sentencing a person convicted of a crime, in the run-of-the-mill sentencing hearing proceeding due process is afforded by use of a mere preponderance of the evidence. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) (holding that the preponderance standard is generally constitutional). Where, however, as in the case at bar, there is a drastic increase in the offense level, applying a higher standard or proof is appropriate.

A case applying *McMillan* to this situation was *United States v. Kikumura*, 918 F. 2d 1084, 1100-01 (3rd Cir. 1990), where the Court wrote that,

> Here, however, we are dealing with findings that would increase Kikumura's sentence from about 30 months to 30 years — the equivalent of a 22-level increase in his offense level, see id. Ch. 5,

Pt. A. This is perhaps the most dramatic example imaginable of a sentencing hearing that functions as "a tail which wags the dog of the substantive offense." McMillan, 477 U.S. at 88, 106 S.Ct. at 2417. In this extreme context, we believe, a court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations.

But, after this Court held in *United States v. Booker*, 543 U.S. 220, 229 (2005), that the federal sentencing guidelines are not mandatory, *Kikumura* was overruled by the 3rd Circuit in *United States v. Fisher*, 502 F.3d 293 305 (3d Cir. 2007). The reasoning, as later adopted by the 8th Circuit in *United States v. Villareal-Amarillas*, 562 F.3d 892, 898 (8th Cir. 2009), was that,

> As the Third Circuit explained in overruling Kikumura, "concerns about the `tail wagging the dog' . . . were put to rest when Booker rendered the Guidelines advisory.

However, a contrary holding was maintained, post-*Booker*, by the 9th Circuit in *United States v. Staten*, 466 F.3d 708, 718 (9th Cir. 2006). The Court in *Staten* found that a clear and convincing standard of proof was required where a guidelines enhancement based on disputed facts would have an extreme effect, to wit:

> "We agree with the suggestion in our post-*Booker* cases and with the government's position in this case that the clear and convincing standard still pertains post-*Booker* for an enhancement applied by the district court that has an extremely disproportionate effect on the sentence imposed."

Charleton Maxwell asserts that the 9th Circuit's position is the better reasoned. Whether a sentence is reasonable depends in large part on what standard of proof is employed, and as *McMillan* teaches, in some circumstances a mere preponderance standard is inadequate. In other words, as the 9th Circuit found in *Staten*,

> [W]e have continued, after *Booker*, to impose the preponderance of the evidence standard, as a general baseline, "[to] resolve factual disputes at sentencing." [citation omitted]. This continued practice confirms that, as one would expect, due process continues to play a critical role with regard to the factual determinations inherent in criminal sentencing; otherwise, no standard of proof whatever would be necessary. And because facts found by the district court may still have an *actual* disproportionate impact on the sentence ultimately imposed, the due process concerns which animated our adoption of the clear and convincing standard in such limited instances have not evaporated.

Staten, 466 F.3d at 720.

Charleton Maxwell asserts that the minimum standard of proof that should be applied is clear and convincing evidence

where, as in his case, a judge is presented with facts that disproportionately impact the guidelines range. Because of the many inconsistencies and contradictions in Grays and Mullen's testimony, that standard is far from being met in the case at bar.

B. The district court's reliance on informants' higher drug quantity claims, which were no more likely to be accurate than their original lower quantity claims, requires resentencing.

The Government argued in the Appellee's brief that the district court did not error by relying on Mullen and Grays' later rather than earlier statements to determine drug quantity, even though their trial statements attributed much greater quantities than their pretrial statements. In his Reply brief, at page 6 et. seq., Defendant pointed out that in many circuits, where a drug quantity must be estimated, "an estimate will suffice," but only "so long as it errs on the side of caution and likely underestimates the quantity of drugs actually attributable to the defendant." *United States v. Anderson*, 526 F.3d 319, 326 (6th Cir. 1998), cited in *United States v. Bland*, 441 F. App'x 324, 4-5 (6th Cir. 2011). *Accord*, *United States v. Ortiz*, 993 F.2d 204, 208 (10th Cir. 1993)

(quoting *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990)) "[W]hen choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution.'"; *United States* v. *Sklar*, 920 F.2d 107, 113 (1st Cir. 1990) (same);*United States v. Flores*, 725 F.3d 1028, 1036 (9th Cir. 2013) (quoting *Walton* at 1302).

The reason for caution in estimating quantity is if, when choosing between a number of plausible estimates of drug quantity, none is more likely than not the correct quantity, then logically all that can be said is that it is more likely than not that the quantity is not lower than the lowest credible estimate, i.e. it is only the lower estimate that has been proved by a preponderance of the evidence. *United States v. Walton*, 908 F.2d at 1302.

Walton relied on *Townsend v. Burke*, 334 U.S. 736, 741 (1948), which held that sentences may not be based on "materially false" information. While adopting a conservative estimate may result in an underestimation of the quantity of drugs involved in

some cases, "it is nonetheless constitutionally required to prevent excessive sentences." *Walton*, 908 F.2d 1289, 1302. The constitutional requirement in force is the guaranty of due process of law under the Fifth Amendment, United States Constitution.

In a Rule 28(j) letter filed prior to oral argument, Defendant cited several Eighth Circuit cases applying the "*Walton* rule," including *United States v. Simmons*, 964 F.2d 763, 771-72 (8th Cir. 1992), *United States v. Williams*, 109 F.3d 502, 509 (8th Cir. 1997), and *United States v. Granados*, 202 F.3d 1025, 1028 (8th Cir. 2000).

Simmons, *Williams* and *Granados* appear to still be good law in 8th Circuit. The application of these cases to the facts of his case was not addressed in the 8th Circuit's opinion in Charleton's case, and accordingly, he sought rehearing citing the failure of the district court to adopt the conservative estimate of drug quantity based on Walton and Gray's contradictory statements. His rehearing request was summarily denied. [Order denying rehearing, Appendices p. 17].

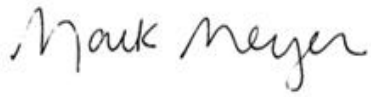
Use of drug quantity estimates are a staple of the federal sentencing process. Under *Townsend v. Burke,* a defendant has due process right to be sentenced based on accurate information. The case at bar provides a vehicle for this Court to help establish the parameters by clarifying whether judges should or must be guided by the "Walton rule" when estimating drug quantity for purposes of imposing sentence.

XII. CONCLUSION

For the reasons and upon the authority set forth above, Charleton Maxwell requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

Charleton Maxwell, by counsel:



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