

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

TERRANCE NATHANIEL BROWN, JR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**PETITION OF
DEFENDANT-PETITIONER TERRANCE NATHANIEL BROWN, JR**

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I. QUESTIONS PRESENTED FOR REVIEW

- A. Whether counsel was ineffective for failing to argue that the general verdict required that the statutory sentence be based on marijuana under 21 U.S.C. § 841(b)(1)(D) and that the sentencing court erred in imposing a sentence above the statutory maximum.
- B. Whether Brown's right to due process and a jury trial was violated when the court increased Brown's sentence based on conduct Brown was acquitted of committing after a jury trial.

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IV. OPINIONS BELOW

The United States District Court for the Western District of Virginia entered a final appealable order on June 1, 2020, dismissing Petitioner's motion under 28 U.S.C. § 2255 and denying certificate of appealability. See, United States v. Brown, 7:16CR30026 (ED Ky 2020). The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's dismissal and declined to issue certificate of appealability United States v Brown, No. 23-6789 (4th Cir. May 23, 2024). Neither decision is reported, but both are attached.

V. STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction, as Petitioner was charged with crimes under the United States Code, including conspiring to distribute and possess with intent to distribute heroin, cocaine, cocaine base and marijuana, in violation of 21 U.S.C. §§ 841(b)(1)(C) and 846. The district court re-obtained jurisdiction when Petitioner filed a motion under 28 U.S.C. § 2255 within a year of the date his conviction became final. R. 1378 § 2255 Motion. See 28 U.S.C. § 2255(f)(1). On July 31, 2023, the district court entered an order and judgment denying Petitioner's § 2255 motion and declining to issue certificate of appealability. R. 1407 Opinion and Order, attached.

The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) because Petitioner filed a timely notice of appeal from that order on August

10, 2023. R. 1410 Notice of Appeal. See Fed. R. App. P. 4(a)(1)(A).

This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Fourth Circuit rendered a final decision on May 23, 2024 and Petitioner is filing this petition within 90 days from that decision. See, United States v Brown, No. 23-6789 (4th Cir. May 23, 2024), attached.

VI. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

No person shall * * * be deprived of life, liberty, or property without due process of law * * *.

U.S. Const. Amend. V.

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 accusations; 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.

U.S. Const. Amend. VI.

VII. STATEMENT OF THE CASE

Following a lengthy jury trial in the United States District Court for the Western District of Virginia, Petitioner was convicted of conspiring to distribute and possess with intent to distribute heroin, cocaine, cocaine base, and marijuana in violation of 21 U.S.C. 841(b)(1)(C) and 846. Judgment 1; see also, United States v.

Brown, 811 Fed. Appx. 818 (4 Cir. 2020). The district court sentenced him to 240 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. United States v. Brown, 811 Fed. Appx. 818, 2020 U.S.App.LEXIS 14071 (4th Cir. 2020).

According to court records, a federal grand jury in the Western District of Virginia returned a superseding indictment charging Petitioner with one count of conspiring to commit racketeering, in violation of 18 U.S.C. § 1962(d); one count of conspiring to distribute and possess with intent to distribute heroin, cocaine, cocaine base, and marijuana, in violation of 21 U.S.C. 841 and 846; two counts of violent crime in aid of racketeering, in violation of 18 U.S.C. 1959(a)(3); and two counts of using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). R. 526 Superseding Indictment 10-23.

The government alleged that Petitioner was a member of the Mad Stone Bloods (MSBs). “The MSBs have a pyramid hierarchy structure with tiers of leadership within various sets. The head of each set is known as a Godfather.” Brown, 811 Fed.Appx at 821. It was alleged that Petitioner was the “acting Godfather” of the MSBs in Virginia. Id.

Prior to the conclusion of trial, the district court dismissed without prejudice, for lack of venue, the two Section 1959(a)(3) and two Section 924(c) counts. See

United States v. Jones, 302 F. Supp. 3d 752, 754 (WD Va. 10/16/17). Eventually, a jury found Brown guilty on the drug-conspiracy count, but did not reach a verdict on the racketeering-conspiracy count. Brown, 811 Fed.Appx at 822.¹

At the sentencing hearing, co-defendant Owens testified that he was not Brown's subordinate and had never seen Brown sell drugs. Brown, 811 Fed.Appx at 827-828. Owens acknowledged that he had admitted during his change of plea hearing that he had conspired with other gang members to distribute 500 grams to two kilograms of cocaine and 80 kilograms to 100 kilograms of marijuana. Id. The government presented testimony from an agent of the Federal Bureau of Investigation (FBI), who testified that he believed Brown and Owens "were dealing narcotics together" based "on the amount of time they spent together; their interactions at the meetings that they had together; [and] the free manner in which they discussed their activity." Brown, 811 Fed.Appx at 828.

The district court found Owens's testimony at the sentencing hearing not to be credible and "explained at some length why federal sentencing law allowed Brown to be held responsible for any drugs sold that were related to the underlying drug conspiracy and reasonably foreseeable to the defendant." Id. Brown was held

¹Petitioner was later acquitted in the Eastern District of Virginia of racketeering, murder in aid of racketeering, and use of a firearm in furtherance of a crime of violence. See, United States v. Brown, 17-cr-00150 (ED Va.).

accountable for 180 kilograms of marijuana. Id.

The court then explained that the drug amount did not matter because Brown had engaged in “a drug conspiracy like I’ve never seen before in the 14 years that I’ve been on the bench.” The court explained that it was “varying upwards” to the “statutory maximum penalty” of 240 months’ imprisonment in light of the Section 3553(a) factors. The district court made clear that, regardless of whether it had found Brown responsible for all the drug weight attributed to him in the presentence report or instead had found him responsible for only “3 kilograms of marijuana,” which is “what he thinks he should be responsible for,” it would have imposed the same sentence, “because this is the most dangerous conduct involved with drug dealing” the court had ever seen. Brown, 811 Fed.Appx at 829.²

Petitioner filed a notice of appeal and appealed his conviction and sentence to the Fourth Circuit Court of Appeals. United States v. Brown, 811 Fed. Appx. at 818-830 (4th Cir 2020). He argued that the district court erred in holding him responsible for the additional controlled substances sold by Owens. The court of

²After Petitioner was sentenced in the Western District of Virginia, he was charged in the Eastern District of Virginia with this same violent conduct alleged in the PSR and relied by the court in this case. See United States v. Brown, 17-cr-00150 (ED Va.). Following a jury trial in that court, he was acquitted on all charges based on the violent conduct attributed to him at sentencing in this case. See United States v. Brown, 811 Fed.Appx at 825-826.

appeals affirmed his conviction and sentence in an unpublished decision. United States v. Brown, 811 Fed. Appx. at 818-830 (4th Cir 2020). The court of appeals affirmed, finding that even if it was clearly erroneous to include Owens' sales as relevant conduct, it was unnecessary to resolve the issue because the court would have imposed a 240 month sentence regardless of the guideline calculations and "any error was ultimately harmless." Id at 829. The court found that "the district court gave a detailed explanation of why it was imposing the sentence." 811 Fed. Appx. at 829.

On January 28, 2022, Petitioner filed a motion under 28 U.S.C. § 2255 attacking his conviction and sentence. R. 1378 § 2255 Motion. He argued that appellate counsel was ineffective for (1) failing to confer with him concerning the appeal and raise appropriate claims; (2) failing to argue that in the absence of a special verdict finding drug type, Petitioner should have been sentenced to no more than 60- months imprisonment under § 841(b)(1)(d); (3) failing to argue that the sentencing court erred in relying on disputed information in the PSR; (4) failing to argue that the § 3B1.1 leadership enhancement was erroneously applied; (5) failing to argue that the court misapplied an Allen charge; (6) failing to argue that marijuana is legal in Virginia; (7) failing to argue the government created the conspiracy with a confidential informant; and (8) failing to argue that his case should have been tried in Norfolk instead of Roanoke. Id.

On July 31, 2023, the district court issued a 32-page opinion denying Petitioner's § 2255 motion. Doc. 1407 Order. The court addressed the issue of a general verdict and defended the application of a 20-year sentence under § 841(b)(1)(C). The court reasoned that the jury was instructed to find that the conspiracy involved four different drug types, including cocaine, crack, heroin and marijuana. Therefore, there was "no basis for Brown to argue that he could be sentenced only for the marijuana part of the conspiracy." Id. at p 11. The court also reviewed the testimony from the trial and found, "the court is confident that the jury was convinced beyond a reasonable doubt that Brown was convicted of a 'single multi-drug conspiracy' [] involving heroin, cocaine, and marijuana." Id. at 15.

Petitioner, proceeding pro se, appealed and filed an informal brief in the Fourth Circuit Court of Appeals requesting certificate of appealability. Brown v. United States, 23-6789, App. Doc. 8 Informal Brief. Undersigned counsel appeared for Petitioner and filed an "Amended Informal Brief in Support of Certificate of Appealability." See App. Doc. 11 Amended Informal Brief.

Petitioner noted that he was charged in the Eastern District of Virginia with the violent conduct alleged in the PSR. See United States v. Brown, 17-cr-00150 (ED Va.). He was acquitted in the Eastern District of Virginia on all charges based on the violent conduct attributed to him at sentencing in this case. See United States v.

Brown, 811 Fed.Appx at 825-826. Petitioner argued that his rights to due process and a jury trial was violated when the court increased Petitioner's sentence based on conduct Petitioner was acquitted of committing after a jury trial.

Petitioner also argued that his sentence of 240 months' imprisonment exceeds the statutory maximum under 21 U.S.C. § 841(b)(1)(D) based on the general verdict returned in this case. Therefore, appellate counsel was ineffective for failing to argue that the general verdict required that the statutory sentence be based on marijuana under 21 U.S.C. § 841(b)(1)(D).

On May 23, 2024, the Fourth Circuit issued a final decision declining the grant certificate of appealability and dismissing the appeal. United States v Brown, No. 23-6789 (4th Cir. May 23, 2024).

VIII. STATEMENT OF FACTS

The following facts are taken directly from the Fourth Circuit's decision affirming Petitioner's convictions on direct appeal:

The Defendants-Appellants are members of the Mad Stone Bloods ("MSBs"), a gang founded in Rikers Island prison that still is centrally run out of New York City. The MSBs have a pyramid hierarchy structure with tiers of leadership within various sets. The head of each set is known as a Godfather. Jones was a Godfather of one New York set, the Mad Stone Henchmen. The New York MSBs oversee sets and members in other states, including Virginia.

While less tightly run as the New York MSBs, the Virginia MSBs have

a similar pyramid structure with tiers of leadership within similarly named sets. [Petitioner] was an acting Godfather of one Virginia set until the New York MSBs demoted him, and Jennings was also a Godfather of a Virginia set.

In 2012, law enforcement began using Adrienne Williams-a member of a female set of MSB in Virginia-as a confidential informant. She continued in that role, for which she was paid, for four years. Throughout that time, law enforcement had Williams coordinate controlled buys of illegal drugs, and she wore a wire for hundreds of recorded conversations with both New York and Virginia MSB members, including conversations with Jones, [Petitioner], and Jennings.

In 2016, twelve MSB members were named in an indictment, which was later superseded, in the U.S. District Court for the Western District of Virginia, alleging violations of federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and drug laws, as well as related underlying substantive offenses. The Defendants-Appellants exercised their right to a jury trial and were tried together. At the close of the Government's case, [Petitioner] moved for a judgment of acquittal on the four underlying substantive counts, arguing the Government failed to prove venue was proper in the Western District of Virginia. The district court agreed and dismissed the four firearms charges without prejudice. As a result, the court charged the jury with deciding only two counts for each of the Defendants-Appellants: conspiracy to violate RICO and drug conspiracy. The jury found each one not guilty of the RICO conspiracy and guilty of the drug conspiracy.

Thereafter, the district court conducted individualized sentencing hearings for the Defendants-Appellants. It sentenced Jones to 41 months' imprisonment, [Petitioner] to 240 months' imprisonment, and Jennings to 144 months' imprisonment.

Brown, 811 F. App'x at 821-22.

IX. REASONS FOR GRANTING THE WRIT

Under Supreme Court Rule 10, the Court will review a United States Court of Appeals decision for compelling reasons. A compelling reason exists when “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power.” S.Ct.R. 10(a).

In the instant case, Petitioner made two arguments demonstrating, at minimum, a substantial showing of the denial of his constitutional rights. Petitioner’s right to effective assistance of counsel was violated during sentencing and appeal when counsel failed to object to Petitioner receiving a sentence in excess of the statutory maximum. The jury returned a general verdict that did not specify drug type or amount. Therefore, Petitioner’s punishment should have been 0 to 10 years imprisonment under 21 U.S.C. § 841(b)(1)(D). However, the court sentenced Petitioner to 240 months’ imprisonment under § 841(b)(1)(C). Petitioner’s right to effective assistance of counsel was violated when counsel failed to object to a sentence that exceeds the statutory maximum.

Additionally, Petitioner’s right to due process and a jury trial was violated

when the court increased Petitioner's sentence to the statutory maximum penalty based on conduct he was acquitted of committing following a jury trial. This case raises the recurring issue of whether the Constitution and federal sentencing law limits reliance on facts rejected by the jury in order to dramatically increase a defendant's sentencing range and term of imprisonment under the Guidelines.

Because of these violations of the Fifth and Sixth Amendments to the United States Constitution, Petitioner's conviction and sentence should have been vacated. Those arguments are briefed below. In refusing to issue certificate of appealability on these claims, the Fourth Circuit incorrectly applied Supreme Court precedent and sanctioned the district court's decision to dismiss Petitioner's § 2255 motion despite the obvious and apparent violations of Petitioner's right to the assistance of counsel and right to due process. The Fourth Circuit's failure to correct these errors on appeal sanctioned a decision of the district court to impose an unlawful sentence and calls for an exercise of this Honorable Court's supervisory power under S.Ct.R. 10(a). Therefore, Petitioner asks that certiorari be granted with respect to the following claims.

A. Whether counsel was ineffective for failing to argue that Petitioner's sentence of 240 months' imprisonment exceeded the statutory maximum under 21 U.S.C. § 841(b)(1)(D).

The Sixth Amendment to the United States Constitution guarantees that

criminal defendants are entitled to the assistance of counsel in presenting their defense. U.S. Const., amend. VI. The High Court has stated, “[t]he right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.” Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). Further, the Court has recognized that “the right to counsel is the right to effective assistance of counsel.” McMann v. Richardson, 397 U.S. 759, 771 (1970).

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his “counsel’s conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2055, 2063 (1984). In order for a defendant to prevail on an ineffective assistance of counsel claim, he must demonstrate that the representation he received (1) “fell below an objective standard of reasonableness” and (2) “a reasonable probability that but for counsel’s unprofessional errors, the results of the proceedings would have been different.” Strickland, 466 U.S. at 688, 694.

A court reviewing a claim of ineffective assistance must determine whether a reasonable probability exists that, but for counsel’s unprofessional errors, the results of the proceedings would have been different or whether the result was fundamentally unfair or unreliable. Id., *citing* Lockhart v. Fretwell, 113 S.Ct. 838 (1993). Ultimately,

the Strickland test requires courts to focus upon whether counsel's performance was sufficient to ensure the fundamental fairness of the proceeding. Id. However, the prejudice that must be shown need not be anything more than something as small as one additional day in jail. See Glover v. United States, 531 U.S. 198 (2001).

The ABA Standards Relating to the Administration of Criminal Justice provide in part:

- (a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.
- (b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.
- (c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

Standard 4-4.1.

Further:

(b) Defense counsel should keep the client reasonably and regularly informed about the status of the case. Before significant decision-points, and at other times if requested, defense counsel should advise the client with candor concerning all aspects of the case, including an assessment of possible strategies and likely as well as possible outcomes. Such advisement should take place after counsel is as fully informed as is reasonably possible in the time available about the relevant facts and law. Counsel should act diligently and, unless time does not permit, advise the client of what more needs to be done or considered before final decisions are made.

* * *

(e) Defense counsel should provide the client with advice sufficiently in advance of decisions to allow the client to consider available options, and avoid unnecessarily rushing the accused into decisions.

(f) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case or exert undue influence on the client's decisions regarding a plea.

It is well established that the Sixth Amendment right to effective assistance of counsel extends through the direct appeal. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830 (1985). To establish deficient performance of counsel in the context of an

appeal, a defendant must demonstrate his appellate counsel made an objectively unreasonable decision by choosing not to raise and issues that “was clearly stronger than issues that counsel did present.” Smith v. Robbins, 528 U.S. 259, 285, 288, 120 S. Ct. 746 (2000). In other words, just as with the typical Strickland standard, to show prejudice, a defendant must demonstrate a reasonable probability that, but for his counsel's unreasonable failure to raise this issue on appeal, he would have likely prevailed. Robbins, 528 U.S. at 285.

In the instant case, the jury returned a general verdict that did not specify drug type or amount. Therefore, Petitioner’s sentence should have been determined under 21 U.S.C. § 841(b)(1)(D) and the sentence of 240 months’ imprisonment exceeded the statutory maximum. Yet, appellate counsel failed to argued that Petitioner’s sentence must be vacated. Had counsel done do, the Fourth Circuit would have vacated Petitioner’s sentence.

Under 21 U.S.C. § 841(b)(1), drug identity and quantity must be treated as elements of the § 841(a) drug offenses because drug identity and quantity are factors that increase the applicable statutory minimum and maximum. United States v. Vazquez, 271 F.3d 93, 98 (3d Cir. 2001)(en banc). Said decision flowed form the decision issued in Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). Because drug identity and quantity increases the statutory

minimum and maximum punishment under 21 U.S.C. § 841(b)(1)(A)-(C), those factors must be proved to a jury by proof beyond a reasonable doubt. See, Apprendi, 530 U.S. at 494 n.19, Alleyne v. United States, 570 U.S. 99 (2013), United States v. Barbosa, 271 F.3d 438, 452-53 (3d Cir. 2001), United States v. Williams, 974 F.3d 320, 365-66 (3d Cir. 2020). After Apprendi, when a jury returns a verdict that does not specify drug type and amount, a district court is precluded “from imposing a sentence in excess of the statutory maximum for the least-punished object on which the conspiracy conviction could have been based.” United States v. Rhynes, 196 F.3d 207, 238 (4 Cir. th 1999), vacated in part on other grounds, 218 F.3d 310 (4th Cir. 2000) (en banc). See also United States v. Bowens, 224 F.3d 302, 314 (4th Cir. 2000).

In the trial court, the jury returned a general verdict that did not specify drug type or amount. This fact is undisputed. The jury verdict shows that Petitioner was found guilty of “Conspiracy to Distribute and Possession with Intent to Distribute Heroin, Cocaine, Cocaine Base, and Marijuana.” R. 893 Jury Verdict. The verdict does not specify drug identity or drug amount. The “least-punished object” of the conspiracy is marijuana, which carries a maximum penalty of ten years imprisonment under § 841(b)(1)(D).³ Petitioner, however, was sentenced above the statutory

³Petitioner’s statutory maximum term of imprisonment was increased from five years to ten years because he had previously been convicted of a felony drug offense. See § 841(b)(1)(D).

maximum to a term of 20 years' imprisonment.

The effect of the general verdict is that Petitioner's term of imprisonment cannot exceed 10 years under § 841(b)(1)(D). However, Petitioner received a sentence of 240 months imprisonment, more than double the statutory maximum. The error was plain and Appellate Counsel's failure to recognize the error and raise it on direct appeal fell below an objective standard of reasonableness. Had counsel done so, the Fourth Circuit would have vacated Petitioner's sentence so that a new sentence could be imposed within the statutory maximum. See, Rhynes, 196 F.3d at 238, Bowens, 224 F.3d at 314. Accordingly, Petitioner received ineffective assistance of counsel under Strickland, and his sentence should have been vacated. In dismissing Petitioner's § 2255 motion, the court failed to recognize that the type of controlled substance (marijuana, heroin, cocaine, or cocaine base) is subject to the rules of Apprendi and Alleyne. The Fourth Circuit should have corrected this clearly erroneous application of constitutional law. At minimum, the district court's finding otherwise is debatable and the Fourth Circuit should have granted certificate of appealability. See Miller-El, 537 U.S. at 336, 348; 28 U.S.C. § 2253(c)(2).

B. Whether Petitioner's right to due process and a jury trial was violated when the court increased his sentence based on conduct Petitioner was acquitted of committing after a jury trial.

Although United States v. Watts, 519 U.S. 148, 149 (1997) found it permissible

for a court to use acquitted conduct at sentencing under a preponderance of the evidence standard, it is time that this Court revisit that decision. This case raises the recurring issue of whether the Constitution and federal sentencing law limits reliance on facts rejected by the jury in order to dramatically increase a defendant's sentencing range and term of imprisonment under the Guidelines.

At sentencing, Petitioner disputed the amount of drugs attributed to him and the range of imprisonment calculations under the Sentencing Guidelines. The court explained that disputed calculations under the Sentencing Guidelines were immaterial because it was “varying upwards” to the “statutory maximum penalty” of 240 months’ imprisonment in light of the Section 3553(a) factors. Brown 811 Fed.Appx at 829. The court’s decision at sentencing was based on allegations that Petitioner had engaged in a violent RICO conspiracy and personally committed acts of violence and murder with a firearm—the same charges that were dropped in this case. More importantly, Petitioner was subsequently charged in the Eastern District of Virginia with racketeering, under § 1959(a)(3); and use of a firearm, under § 924(c), and was acquitted of those charges. See United States v. Brown, 17-cr-00150 (ED Va.). Doc. 427 Jury Verdict. Thus, he was tried and acquitted of all violent conduct attributed to him at sentencing in this case. See United States v. Brown, 811 Fed.Appx at 825-826. It is patently unjust that Petitioner’s sentence was increased more than 15

years based on allegations of violent conduct a jury considered and expressly found Petitioner had not committed.

Although United States v. Watts, 519 U.S. 148, 149 (1997) found it permissible for a court to use acquitted conduct at sentencing under a preponderance of the evidence standard, the issue has become increasingly addressed by various courts throughout the United States in the time since the Supreme Court addressed the issue. The holding in Watts has been repeatedly criticized for violation both due process and the right to a jury trial and guidance from the Supreme Court has repeatedly been sought on this question. A resolution of this issue is long overdue. The government's strategic abuse of the Watts decision to aggressively seek and obtain drastically increased penalties based on conduct considered and rejected by a jury must come to an end.

This Court has repeatedly stressed the importance of a defendant's right to have a jury decide facts essential to punishment: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government." United States v. Haymond, 139 S. Ct. 2369, 2373 (2019) (plurality op.); accord Alleyne v. United States, 570 U.S. 99, 114 (2013); Blakely v. Washington, 542 U.S. 296, 306 (2004); Apprendi v. New Jersey, 530 U.S. at 477 (2001). But when a judge relies on

jury-rejected facts as the basis to significantly increase a sentence, the promise of a jury trial becomes empty and this vital protection becomes illusory.

This dangerous erosion of Fifth and Sixth Amendment is evident in this case where Petitioner's term of imprisonment was based exclusively on facts that were considered and rejected by a jury. When as here, acquittals carry no real sentencing consequences, prosecutors have nothing to lose (and much to gain) from bringing multiple charges even when they might expect the jury to ultimately reject many such charges. The trial functions as just a first "bite at the apple," offering prosecutors a chance to present their case to the jury and then, even if unsuccessful, present it again to the sentencing judge so long as the jury finds the defendant guilty of at least one charge. This Court has stressed the need "to give intelligible content to the right of [a] jury trial," Blakely, 542 U.S. at 305. Indeed, jury trials are "fundamental to the American scheme of justice." Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020). The jury-trial right is "clearly intended to protect the accused from oppression by the Government." Singer v. United States, 380 U.S. 24, 31 (1965); Batson v. Kentucky, 476 U.S. 79, 86 (1986) (the jury-trial right "safeguard[s] a person accused of crime against the arbitrary exercise of power by prosecutor or judge"); Jones v. United States, 526 U.S. 227, 244-48 (1999); Apprendi, 530 U.S. at 477 (the jury "guard[s] against a spirit of oppression and tyranny on the part of rulers," and acts "as the great

bulwark of our civil and political liberties” (citation omitted)); Blakely, 542 U.S. at 305-06; Booker, 543 U.S. at 237-39; Alleyne, 570 U.S. at 114 (“the historic role of the jury as an intermediary between the State and criminal defendants”). But when a prison sentence is increased based expressly on allegations indisputably rejected by a jury, the jury trial right is nullified. That is what occurred here, where more than 15 years of Petitioner’s sentence is based on the very same criminal allegations a jury expressly considered and rejected. Thus, Petitioner’s trial and acquittal in the Eastern District of Virginia meant nothing—it was an acquittal in name only with no meaningful consequence or limit on punishment based on the very allegation the jury unanimously rejected.

The practice of increasing sentences based on jury rejected facts has been described as “repugnant,” “Kafka-esque,” “uniquely malevolent,” and “pernicious.” See United States v. Watts, 519 U.S. 148, 169-70 (1997) (Stevens, J. , dissenting); United States v. Ibanga, 454 F. Supp. 2d 532, 536 (E.D. Va. 2006) (Kelley, J.) The late-Justice Scalia, joined by Justices Thomas and Ginsburg, dissented from a denial of certiorari in a case raising this issue in Jones v. United States, 574 U.S. 948, 948-49 (2014). Justice Scalia stressed that he found a judge’s fact-finding which significantly increased a drug defendant’s sentence to be especially concerning when based on acquitted conduct. In his view, Jones was “a particularly appealing case” for

review “because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury acquitted them of that offense.” Id. (emphasis in original). Courts continue to criticize the practice as unconstitutional and unjust. United States v. Martinez, 769 Fed. App'x. 12, 17 (2d Cir. 2019) (Pooler, J., concurring) (using acquitted conduct to enhance a sentence is “fundamentally unfair” and runs afoul of the Sixth Amendment); United States v. Canania, 532 F.3d 764, 776 (8 Cir. 2008) (Bright, J., concurring) (“consideration th of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional”); United States v. Faust, 456 F.3d 1342, 1349 (11th Cir. 2006)(Barkett, J., concurring)(“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. Mercado, 474 F.3d 654, 658 (9 Cir. 2007) (Fletcher, J., dissenting) (“Reliance th on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); United States v. Bell, 808 F.3d 926, 929 (D.C. Cir. 2015)(Millett, J., concurring)(“when the central justification the government offers for such an extraordinary increase in the length of imprisonment is the very conduct for which the jury acquitted the defendant, that liberty protecting bulwark becomes little more than a speed bump at sentencing.”).

And despite the decision in Watts, more than a few district courts have concluded that sentencing based upon conduct for which the defendant was acquitted is unconstitutional. See, e.g., United States v. Coleman, 370 F. Supp. 2d 661, 671 (SD Ohio 2005)(Marbley, J.)("jury's central role in the criminal justice system is better served by respecting the jury's findings"); United States v. Pimental, 367 F. Supp. 2d 143, 152 (D Mass 2005)(Gertner, J.)("To consider acquitted conduct trivializes 'legal guilt' or 'legal innocence...'"); United States v. Ibanga, 454 F. Supp. 2d at 539 (Kelley, J.) (punishing defendant for acquitted conduct "contravened the statutory goal of furthering respect for the law and would have resulted in unjust punishment for the offense for which he was convicted"). These rulings, grounded in both the Fifth and Sixth Amendments' guarantee of due process and a jury trial, recognize the fundamental problems with allowing prosecutors and judges to nullify jury findings at sentencing and render jury trials "a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." Blakely, 542 U.S. at 307.

This case provides a stark example of how enhanced punishments based on jury-rejected facts undermine the jury's constitutionally-defined role in our criminal system and the protections of the Fifth and Sixth Amendments. Brown was acquitted of all violent conduct alleged by the government in this case. Yet those jury rejected facts provided the foundation for the court to increase Brown's sentence by more than

15 years. The use of acquitted conduct to enhance Petitioner's sentence eviscerated the jury's fundamental role and violated Petitioner's right to due process.

The use of acquitted conduct to increase Petitioner's term of imprisonment by more than 15 years violates Petitioner's right to due process and a jury trial under the Fifth and Sixth Amendments. In order to "give intelligible content to the right of a jury trial," Blakely, 542 U.S. at 305-06, Petitioner's sentence should be vacated because of the court's undue, yet fundamental, reliance on acquitted conduct to serve as the only given justification for a 15-year upward variance and enhanced sentence. Correcting Petitioner's sentence will ensure that the "right of jury trial [will] be preserved, in a meaningful way guaranteeing that the jury [will] still stand between the individual and the power of the government" Booker, 543 U.S. at 237; Apprendi, 530 U.S. at 477, 490 n.16.

In light of the breadth of case law agreeing with Petitioner's position and calling for Watts to be overturned, the district court's refusal to vacate Petitioner's sentence on this basis was debatable and worthy of further consideration. See Miller-El, 527 U.S. at 348; Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000); Rose v. Lee, 252 F.3d 676, 683 (4th Cir. 2001); 28 U.S.C. § 2253(c)(2). Therefore, certificate of appealability should have issued and the Fourth Circuit's decision otherwise conflicts with Miller-El, 527 U.S. at 348, and Slack v. McDaniel,

529 U.S. 473, 484, 120 S. Ct. 1595 (2000).

CONCLUSION

Petitioner respectfully submits that he has demonstrated compelling reasons to grant writ of certiorari in this case. Accordingly, certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on July 15, 2024 a true and accurate copy of the foregoing petition and the following appendix were sent via U.S. Mail to the Solicitor General's Office, Room 5614, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001; and to the Office of the Assistant United States Attorney for the Western District of Virginia, 310 First Street, S.W. Room 906, Roanoke, VA 24008 and a PDF copy was emailed to the Office of the Solicitor General to SupremeCtBriefs@USDOJ.gov.

/s/ Matthew M. Robinson
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APPENDIX