No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ADRIN SMACK
Petitioner

v.

SUPERINTENDENT MAHANOY SCI
Respondent,

and

ATTORNEY GENERAL OF DELAWARE
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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February 18, 2025

Table of Contents

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1600

ADRIN SMACK,
Appellant

v.

SUPERINTENDENT MAHANOY SCI; ATTORNEY GENERAL DELAWARE

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 1-19-cv-00691)
District Judge: Honorable Gregory B. Williams

Submitted Under Third Circuit L.A.R. 34.1(a)
May 6, 2024

Before: PORTER, MONTGOMERY-REEVES, and ROTH, *Circuit Judges*.

(Opinion filed: November 20, 2024)

OPINION*

MONTGOMERY-REEVES, *Circuit Judge*.

Adrin Smack appeals the District Court's denial of an application for a writ of habeas corpus under 28 U.S.C. § 2254. Smack argues that the District Court erred in

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

holding that no clearly established federal law determined by the Supreme Court requires all disputed facts be proven by a preponderance of the evidence at a state sentencing hearing. Smack also argues that the Delaware sentencing court relied on materially false information in imposing his sentence. Because Smack fails to identify clearly established federal law governing the burden of proof for all disputed facts at his state sentencing hearing and because Smack fails to identify any materially false information relied on by the sentencing court, an application for writ of habeas corpus will not be granted. Thus, we will affirm.

I. BACKGROUND[1]

Around August 2014, the FBI began investigating a drug trafficking organization that it believed Smack co-led. Law enforcement eventually intercepted a phone call between Smack and a co-defendant during which the co-defendant told Smack that he was hiding something behind a radiator in the co-defendant's residence. When law enforcement searched the co-defendant's residence, they found a military style tactical vest; $16,108 cash; a loaded black Taurus .9-millimeter handgun; and 803 bundles of heroin.

Thereafter, a Delaware grand jury returned a 261-count indictment against multiple defendants, including Smack. Smack was charged with seventy-one counts of drug dealing, one count of giving a firearm to a person prohibited, one count of

[1] In presenting the relevant facts, both the District Court and Appellees rely significantly on Smack's opening brief on direct appeal to the Delaware Supreme Court. This Court does the same.

possession of marijuana, two counts of conspiracy second degree, and five counts of possession of a firearm by a person prohibited. Smack pleaded guilty to four counts of drug dealing, one count of conspiracy second degree, and one count of possession of a firearm by a person prohibited.

At Smack's first sentencing hearing, the government recounted facts underlying the charges in Smack's indictment, presented evidence showing that Smack distributed drugs in large quantities, and characterized Smack as a kingpin in a drug dealing enterprise. Smack disputed some of the sentencing facts. The Delaware Superior Court continued Smack's sentencing hearing and requested briefing on the appropriate burden of proof governing disputed facts. Smack argued that the government must prove anything beyond the offenses of conviction by a preponderance of the evidence and not under the government's proffered minimal indicia of reliability standard. The Delaware Superior Court agreed with the government.

At Smack's second sentencing hearing, the Delaware Superior Court sentenced him to an aggregate of fourteen years of incarceration (which was within the statutory penalty range under Delaware law of two to seventy-six years) followed by decreasing levels of supervision. Smack appealed, and the Delaware Supreme Court affirmed the Delaware Superior Court's judgment. Smack filed a petition for writ of certiorari to the United States Supreme Court that was denied. Smack then filed in the District Court an application for a writ of habeas corpus, which was denied. Smack appealed the District Court's denial, and this Court granted a certificate of appealability regarding the appropriate burden of proof for disputed facts at Smack's state sentencing hearing.

II. DISCUSSION[2]

In this appeal, Smack argues that the District Court erred in denying his application for a writ of habeas corpus under § 2254 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, this Court "shall entertain an application for a writ of habeas corpus in [sic] behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[3] 28 U.S.C. § 2254(a). But if the state court adjudicated petitioner's claims on the merits, a habeas application shall not be granted unless the state court's adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

[2] The District Court had jurisdiction over this case under 28 U.S.C. § 2254. We have jurisdiction over this appeal under 28 U.S.C. § 1291 and 28 U.S.C. § 2253(c)(1)(A). "Because the District Court ruled on [appellant's] habeas petition without conducting an evidentiary hearing, our review of its legal conclusions is plenary." *Lewis v. Horn*, 581 F.3d 92, 100 (3d Cir. 2009) (citing *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001)).

[3] Although 28 U.S.C. § 2254 refers to a habeas "application," we follow the Supreme Court's convention and use the word "petition" interchangeably with the word "application." *See, e.g.*, *Magwood v. Patterson*, 561 U.S. 320, 324 n.1 (2010).

Smack argues that the Delaware state court proceedings fail on both fronts because his sentence (1) violated clearly established federal law and (2) resulted from an unreasonable determination of the disputed facts.[4] We address each argument in turn.[5]

A. Contrary To or Unreasonable Application of Clearly Established Federal Law

As noted above, AEDPA bars habeas relief unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). "[C]learly established Federal law" refers "to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Dennis v. Sec'y, Pa. Dep't of Corrs.*, 834 F.3d 263, 280 (3d Cir. 2016) (second alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth" in Supreme Court precedent or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different" from that reached by the Supreme Court. *Williams*, 529 U.S. at 405–06. An "unreasonable application" of clearly established federal law occurs when the state court "correctly identifies the

[4] Smack also argues that the District Court and Delaware state courts erred in interpreting *Mayes v. State*, 604 A.2d 839 (Del. 1992). We need not analyze this argument because we do not rely on Delaware Supreme Court authority to resolve this case.

[5] Before the District Court, Smack also requested an evidentiary hearing, which the court denied. Smack does not appeal that decision, and we do not address it.

governing legal rule but applies it unreasonably to the facts of a particular prisoner's case. . . ." *Id*. at 407–08. It "is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme Court]." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

Here, Smack argues that *McMillan v. Pennsylvania*,[6] *Nichols v. United States*,[7] and *United States v. Watts*[8] "clearly established" that all disputed facts raised at a sentencing hearing must be proven by a preponderance of the evidence and that the rejection of his argument to this effect was contrary to or an unreasonable application of clearly established federal law. Not so.

In *McMillan*, "the United States Supreme Court considered the constitutionality of Pennsylvania's sentencing scheme which required sentencing facts relevant to sentencing considerations to be proven by a preponderance of the evidence." Opening Br. 18. But that case concerned the appropriate burden of proof for analyzing sentencing facts that would increase the State's mandatory statutory minimum. *McMillan*, 477 U.S. at 91.

[6] 477 U.S. 79 (1986), *abrogated by Alleyne v. United States*, 570 U.S. 99 (2013).

[7] 511 U.S. 738 (1994).

[8] 519 U.S. 148 (1997).

Smack's case involved no such consideration, as he was sentenced well within the minimum and maximum penalties under Delaware law. [9]

Similarly, *Nichols* concerned the constitutionality of a federal sentencing court's consideration of a defendant's previous misdemeanor conviction when applying a sentencing enhancement under the United States Sentencing Guidelines. *Nichols*, 511 U.S. at 746–47. That is, the sentencing facts in *Nichols* would result in a sentence with a longer top range of potential imprisonment time.

Finally, *Watts* addressed the narrow question of the appropriate burden of proof for factual findings leading to a federal sentencing enhancement; it provided no guidance on the burden of proof governing sentencing facts for a sentence *within* a statutorily permitted scope.

The holdings of these cases provide no support for Smack's argument that the burden of proof governing sentencing enhancement facts should equally apply to a sentence, like the one at issue here, that is within the range established only by his conviction. Smack has not identified a "squarely established," "specific legal rule" that

[9] The Supreme Court declined to constitutionalize burdens of proof in *McMillan*, noting that preponderance of the evidence satisfied due process for sentencing "considerations" or "factors" enhancing Pennsylvania's statutory minimum sentence. *Id*. at 85-86. The Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2000) clarified the distinction between sentencing "factors" and "elements"—holding that a fact increasing the statutory maximum was an "element" requiring a higher burden of proof—but the Court initially declined to extend *Apprendi* to facts increasing only the mandatory minimum. *Harris v. United States*, 536 U.S. 545 (2002). In *Alleyne v. United States*, 570 U.S. 99, 112 (2013), the Supreme Court overruled *Harris* and *McMillan*, holding that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum."

the state courts declined to apply to his case. *Knowles*, 556 U.S. at 122. Smack therefore has failed to show that the state courts contravened "clearly established federal law" and violated his due process rights.

Because Smack fails to cite to clearly established federal law, he cannot succeed under AEDPA based on this theory.[10, 11]

B. Unreasonable Determination of the Facts

Smack appears to argue that he also is entitled to relief based on the second prong of 28 U.S.C. § 2254(d). As discussed above, AEDPA does not bar habeas relief if the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). A reviewing court will find an unreasonable determination of the facts when the state court's factual findings are "objectively

[10] Smack also challenges the District Court's "reliance" on *White v. Woodall*, 572 U.S. 415 (2014). Opening Br. 26. The District Court's analysis of that case, in a footnote, was premised upon the possibility that Smack's "true argument" on appeal was that Delaware state courts unreasonably refused to extend the preponderance of the evidence standard to Delaware sentencing proceedings. Because Smack explicitly rejects the District Court's framing of his argument, we need not address it.

[11] Finally, relying on the same trio of Supreme Court cases, Smack argues that due process under the Fifth Amendment requires proof of all disputed sentencing facts by a preponderance of the evidence in federal sentencing proceedings. Thus, according to Smack, that burden of proof must also apply to *state* sentencing proceedings under the Fourteenth Amendment. Smack argues that "even if this Court determines that this particular due process protection has not yet been incorporated to the states, this Court has the discretion to find the right to be incorporated." Opening Br. 29. We reject the former argument for the reasons outlined in Section A. And we reject Smack's invitation to "find the right to be incorporated" because the power to create "clearly established" federal law in this context belongs exclusively to the Supreme Court. *Id.*

unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citations omitted). Smack contends that, because the Delaware state court relied on materially false information in sentencing him, it made an unreasonable determination that entitles him to relief.

The Supreme Court has "often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." *Apprendi*, 530 U.S. at 481 (emphasis in original). Judges are "largely unlimited" in the information they may consider when imposing sentence. *United States v. Tucker*, 404 U.S. 443, 446 (1972) (collecting cases). For example, the Supreme Court has stated that "mere error in resolving a question of fact . . . would [not] necessarily indicate a want of due process of law. . . . [E]ven an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law." *Townsend v. Burke*, 334 U.S. 736, 741 (1948). And the Justices have distinguished "a sentence imposed in the informed discretion of a trial judge" from a "sentence founded at least in part upon misinformation of constitutional magnitude." *Tucker*, 404 U.S. at 447. We therefore understand Supreme Court precedent to stand for the proposition that a reviewing court should generally respect a trial court's within-statutory-range sentence unless that sentence relies on materially untrue information of a constitutional magnitude that violates due process.

Smack fails this test. And, contrary to his assertions, neither *Tucker* nor *Townsend* save his claim. Though a state habeas case, *Townsend* is distinguishable because that record showed the sentencing judge's reliance on "assumptions concerning [Townsend's]

criminal record which were materially untrue." 334 U.S. at 741. The state trial court sentenced Townsend based in part on charges of which he had been found not guilty. The Supreme Court noted that "it savors of foul play or of carelessness when we find from the record that, on two other of the charges which the court recited against the defendant, he had also been found not guilty." *Id*. at 740. As such, on this record, the Supreme Court concluded that Townsend "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." *Id*. at 741. *Tucker* concerned a defendant's sentence in a federal trial court based in part on convictions obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963). 404 U.S. at 447. Smack does not successfully identify any materially false information relied on by the sentencing court, nor does he explain how the distinct errors in *Tucker* or *Townsend* suggest that his sentence is constitutionally deficient.[12]

[12] Smack also contends that the District Court failed to consider how the phrase "materially untrue" is interpreted in *Townsend* and *Tucker*. Smack argues that "materially untrue" in this context must mean "information that is more likely than not untrue, or stated otherwise, information that does not meet the preponderance of the evidence standard." Opening Br. 25. And he argues that the District Court should have considered "the present day effect" of *Townsend* and *Tucker* in light of "the holdings in *McMillan*, *Nichols*, and *Watts*." Opening Br. 25. But the District Court examined *Nichols*, which analyzes *Tucker* multiple times. *See, e.g.*, 511 U.S. at 747. And Smack provides no support for the definition he supplies. Further, considering "the present day effect" of *Townsend* and *Tucker* in light of "the holdings in *McMillan*, *Nichols*, and *Watts*" does not change the outcome. These cases do not clearly establish that the preponderance of the evidence burden of proof applies to disputed sentencing facts that do not expand the sentencing range beyond that established by a defendant's conviction.

Therefore, Smack has failed to show that the Delaware courts relied on any "materially false" information that violates his constitutional rights.[13] Smack has failed to show that he is entitled to habeas relief.

III. CONCLUSION

For the reasons discussed above, we will affirm the order of the District Court, denying the application for a writ of habeas corpus.

[13] Finally, Smack argues that the District Court erred by finding that Smack had conceded that the Delaware Superior Court could consider all indictment counts under the minimal indicia of reliability standard. Smack is incorrect. During Smack's second sentencing hearing, his counsel conceded that the court could consider all of the indicted counts, including those to which Smack had not pleaded guilty. And even absent his counsel's concession, Smack cannot win for the reasons stated in Section B.

CLD-175

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **23-1600**

ADRIN SMACK, Appellant

VS.

SUPERINTENDENT MAHANOY SCI; ET AL.

(D. Del. Civ. No. 1-19-cv-00691)

Present: SHWARTZ, MATEY, and FREEMAN, Circuit Judges

Submitted is appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1),

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is granted. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Jurists of reason could debate the denial of appellant's claim that the trial court deprived him of due process by relying on disputed facts at sentencing without first finding those facts by a preponderance of the evidence. See, e.g., United States v. Norton, 48 F.4th 124, 131 & n.12 (3d Cir. 2022); United States v. Berry, 553 F.3d 273, 280, 284 (3d Cir. 2009); United States v. Juwa, 508 F.3d 694, 701 (2d Cir. 2007). The Clerk will issue a briefing schedule at an appropriate time.

By the Court,

s/ Arianna J. Freeman
Circuit Judge

Dated: July 26, 2023
Sb/cc: All Counsel of Record

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ADRIN SMACK, Petitioner, v. THERESA DELBALSO, Superintendent, SCI Mahanoy, and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondents.	:	Civil Action No. 19-691-GBW

ORDER

At Wilmington, this 3rd day of March, 2023, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Petitioner Adrin Smack's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (D.I. 1; D.I. 33) is **DISMISSED**, and the relief requested therein is **DENIED**.

2. The Court declines to issue a certificate of appealability because Petitioner has failed to satisfy the standards set forth in 28 U.S.C. § 2253(c)(2).

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ADRIN SMACK,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 19-691-GBW
	:	
THERESA DELBALSO, Superintendent, SCI Mahanoy, and ATTORNEY GENERAL OF THE STATE OF DELAWARE,	:	
	:	
Respondents.	:	

Christopher S. Koyste, Esquire, Wilmington, Delaware. Attorney for Petitioner.

Elizabeth M. McFarlan, Deputy Attorney General of the Delaware Department of Justice, Wilmington, Delaware. Attorney for Respondents.

MEMORANDUM OPINION[1]

March 3d, 2023
Wilmington, Delaware

[1]This case was re-assigned to the undersigned's docket on September 7, 2022.

Williams, District Judge:

Presently pending before the Court is Petitioner Adrin Smack's counseled Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. (D.I. 1; D.I. 33) The American Civil Liberties Union ("ACLU") and the Office of Defense Services for the State of Delaware ("ODS") filed Amicus Briefs in support of the Petition. (D.I. 35; D.I. 36) The State filed an Answer in opposition, to which Petitioner filed a Reply. (D.I. 43; D.I. 48) For the reasons discussed, the Court will deny the Petition.

I. BACKGROUND[2]

On or around August 2014, an FBI Task Force began investigating a drug trafficking organization known as the Sparrow Run Crew. (D.I. 30 at 104) Evidence obtained during the investigation indicated that this organization was responsible for distributing heroin and cocaine base to a wide network of distributors and sub-distributors. The heroin was distributed by Petitioner in quantities ranging from multiple bundles to multiple logs per transaction. Law enforcement believed that Petitioner and his co-defendant, Miktrell Spriggs, were co-leaders of the organization and that they pooled money to buy heroin and cocaine from sources of supply. The FBI Task Force's investigation included the

[2]The recitation of the factual background is taken verbatim from Petitioner's Opening Brief on direct appeal to the Delaware Supreme Court. (*See* D.I. 30 at 104-05)

use of confidential sources to conduct controlled purchases, as well as to enable law enforcement to monitor phone calls between Petitioner and these confidential sources. (*Id.*)

On April 10, 2015, a Superior Court order was issued authorizing law enforcement to intercept the wireless communications to and from Petitioner's cell phone. (D.I. 29 at 140-151; D.I. 30 at 104) On April 18, 2015, a phone call between Petitioner and his co-defendant, Al-Ghaniyy Price, was intercepted. (D.I. 30 at 104-05) During this call, Price informed Petitioner that he was hiding something behind a radiator in his (Price's) residence. (D.I. 30 at 105) In response, Petitioner advised Price to make sure that no one saw him hide the object behind the radiator. Later on that day, law enforcement intercepted a text message from Price to Petitioner advising that "Yo bro it's there." (D.I. 30 at 105) A subsequent search of Price's residence revealed a military style tactical vest, $16,108, a loaded black Taurus .9-millimeter handgun, and 803 bundles of heroin. (*Id.*); *see also Smack v. State*, 172 A.3d 390 (Table), 2017 WL 4548146, at *1 (Del. Oct. 11, 2017).

In May 2015, a New Castle Grand Jury returned a 261-count indictment against multiple defendants, including Petitioner. (D.I. 29 at 19-105)

> [Petitioner] was charged with seventy-one counts of drug dealing, one count of possession of marijuana, one count of giving a firearm to a person prohibited, five counts of

> possession of a firearm by a person prohibited, and two counts of conspiracy second degree. [Petitioner] pleaded guilty to four counts of drug dealing, one count of possession of a firearm by a person prohibited, and one count of conspiracy second degree.

Smack v. State, 172 A. 3d 390 (Table), 2017 WL 4548146, at *1 (Del. Oct. 11, 2017)

At Petitioner's June 22, 2016 sentencing hearing, the prosecutor recounted facts underlying the charges in Petitioner's indictment, presented evidence to show that Petitioner was a mass distributor of drugs, and noted that Petitioner asserts he is not a "kingpin" in a drug dealing enterprise. (D.I. 29 at 116-17) Petitioner disagreed with the prosecutor's use of the term "kingpin," argued that he was a "retail" level drug dealer, contended that the sentencing court had to determine any disputed facts under the "preponderance of the evidence standard," and requested additional time to "present every bit of evidence" to dispute the "kingpin" characterization. (*Id.* at 120-22) The Superior Court continued Petitioner's sentencing to allow him to develop his arguments and to brief the issue of the applicable burden of proof for contested facts presented during the sentencing hearing. (*Id.* at 115-123) In his briefing and at oral argument, Petitioner asserted that the State must prove anything beyond the offenses of conviction – including his status as a drug "kingpin" – by a preponderance of the evidence and not, as the State argued, under the minimal indicia of reliability standard. (D.I. 29 at 125-129;

D.I. 30 at 40, 55-56, 63) He also argued that the State should be required to present testimony and that the defense should be permitted to call witnesses at the sentencing hearing. (D.I. 129 at 125-129) The State filed a response in opposition contending that Petitioner's requests for a "post-plea trial at sentencing" should be denied pursuant to *Mayes v. State*, 604 A.2d 839 (Del. 1992) and Delaware Superior Court Criminal Rule 32. (D.I. 29 at 130-135)

On November 17, 2016, after considering the submitted briefings and oral argument, the Superior Court denied Petitioner's request for an evidentiary hearing under Delaware Superior Court Criminal Rule 32(a). (D.I. 13-11 at 8-9) The Superior Court noted that Petitioner cited federal cases "for the proposition that he has rights beyond those enumerated in Superior Court Rule 32," but found those cases to be of "little value …because they turn on Federal Criminal Rule 32 which is different from Delaware's rule." (D.I. 13-11 at 9) The Superior Court determined "all that is required is that the court afford the defendant some opportunity to rebut the Government's allegation," and the prosecution is "not required to call witnesses to support its contention that the Defendant was heavily involved in drug trade." (D.I. 13-11 at 9) Consequently, the Superior Court held that petitioner "has no right, under Rule 32 or the Constitution, to a full-blown evidentiary hearing." (D.I. 13-11 at 9)

The Superior Court also held that it could consider evidence offered by the State at sentencing if it met the "minimum indicia of reliability" standard. (D.I. 13-11 at 10) The Superior Court explained,

> the State may rely upon (in addition to the Presentence Investigation) the indictment and the affidavit submitted by the State in support of its application to obtain a warrant to intercept wire communications. The court finds these bear the requisite indicia of reliability and may be relied upon by the State at sentencing.

(D.I. 13-11 at 10)

Petitioner's second sentencing hearing took place on November 23, 2017. (D.I. 30 at 74-84) The Superior Court sentenced Petitioner to an aggregate of fourteen years of incarceration, followed by decreasing levels of supervision. *See Smack*, 2017 WL 4548146, at *1; (D.I. 30 at 85-92)

Petitioner appealed, and the Delaware Supreme Court affirmed the Superior Court's judgment on October 11, 2017. *See Smack*, 2017 WL 4548146, at *3. Petitioner filed a petition for writ of certiorari, arguing that "Delaware has inadvertently created a lower burden of proof for state courts when resolving disputed aggravated facts presented at a sentencing hearing contrary to what [the Supreme] Court has consistently indicated since 1986." (D.I. 13-14 at 7; D.I. 15-4 at 17) The United States Supreme Court denied Petitioner's petition for writ of

certiorari on April 16, 2018. *See Smack v. Delaware*, 138 S.Ct. 1548 (Apr. 16, 2018).

II. GOVERNING LEGAL PRINCIPLES

A. The Antiterrorism and Effective Death Penalty Act of 1996

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "to reduce delays in the execution of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). Pursuant to AEDPA, a federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Additionally, AEDPA imposes procedural requirements and standards for analyzing the merits of a habeas petition in order to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

B. Standard of Review

If a state's highest court adjudicated a federal habeas claim on the merits, the federal court must review the claim under the deferential standard contained in 28 U.S.C. § 2254(d). Pursuant to § 2254(d), federal habeas relief may only be granted if the state court's decision was "contrary to, or involved an unreasonable

application of, clearly established federal law, as determined by the Supreme Court of the United States," or the state court's decision was an unreasonable determination of the facts based on the evidence adduced in the trial. 28 U.S.C. § 2254(d)(1) & (2); *see Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). A claim has been "adjudicated on the merits" for the purposes of § 2254(d) if the state court decision finally resolved the claim on the basis of its substance, rather than on a procedural or some other ground. *See Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009). The deferential standard of § 2254(d) applies even "when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). As explained by the Supreme Court, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99.

Finally, when reviewing a habeas claim, a federal court must presume that the state court's determinations of factual issues are correct. *See* § 2254(e)(1). This presumption of correctness applies to both explicit and implicit findings of fact, and is only rebutted by clear and convincing evidence to the contrary. *See* § 2254(e)(1); *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (stating that the clear and convincing standard in § 2254(e)(1) applies to factual issues, whereas the unreasonable application

standard of § 2254(d)(2) applies to factual decisions).

III. DISCUSSION

Petitioner's timely-filed Petition asserts the following two Claims: (1) the Superior Court violated Petitioner's due process rights during his sentencing hearing by considering unproven aggravated sentencing facts under an erroneous minimal indicia of reliability standard; and (2) the Superior Court violated Petitioner's due process rights by denying his request for an evidentiary hearing to challenge the State's presentation of contested aggravating factors during Petitioner's sentencing hearing. (D.I. 33 at 2) Petitioner presented these Claims to the Delaware Supreme Court on direct appeal of his sentencing. (D.I. 30 at 102-103) The Delaware Supreme Court rejected Petitioner's arguments as meritless. *See Smack*, 2017 WL 4548146, at *1-2. Given these circumstances, Petitioner will only be entitled to habeas relief if the Delaware Supreme Court's decision was either contrary to, or an unreasonable application of, clearly established Supreme Court precedent.[3]

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[3]The Court notes that it has also considered the arguments presented in the Amicus Briefs when determining if Claims One and Two warrant habeas relief. (*See* D.I. 40; D.I. 41) The arguments in the Briefs mirror Petitioner's arguments and assert that the Delaware state courts erred by "equating the threshold standard of minimal indicia of reliability for admission of evidence that the Court could consider in making a factual determination with the actual evaluation of admitted evidence standard, which by federal constitutional mandate is proof by a preponderance of the evidence." (D.I. 40 at 8; *see also* D.I. 41 at 8-10)

A. Claim One: Due Process Violation During Sentencing

The Delaware Supreme Court provided the following explanation when rejecting Petitioner's argument that the Superior Court violated his due process rights by applying the minimal indicia of reliability standard during sentencing:

> [Petitioner] relies on a series of federal cases where the court applied a preponderance of the evidence standard to establish facts warranting a sentence enhancement under the federal sentencing guidelines. According to [Petitioner], the same burden of proof should apply to the State when it argued for a harsher sentence based on [Petitioner's] status as a drug kingpin. The federal cases, however, are inapposite. Under the federal sentencing guidelines, the judge must find facts at sentencing using evidentiary burdens because those factual determinations can cause an increase in the sentencing ranges under the guidelines. Here, [Petitioner's] guilty plea resulted in a sentencing range of two to seventy-six years. To fix the sentence within that statutory range, the judge was entitled to consider all facts that had a minimal indicia of reliability—including the intercepted text messages and phone conversations that led to the seventy-seven charges of drug dealing brought against [Petitioner]. The court could and did find from these facts that [Petitioner] was more than a street-level drug dealer.

Smack, 2017 WL 4548146, at *2.

Petitioner contends that the Delaware Supreme Court erroneously "failed to consider controlling United States Supreme Court precedent interpreting the Due Process Clause of the Fourteenth Amendment as requiring that disputed facts presented during a sentencing hearing and considered by the sentencing judge be

proven by a preponderance of the evidence." (D.I. 33 at 10) According to Petitioner, it has been the "state of the law" "since the United States Supreme Court issued its decision in *United States v. Watts*, 519 U.S. 148 (1997)," that "the Due Process Clause of the Fourteenth Amendment requires disputed facts presented during a sentencing hearing be proven by a preponderance of the evidence if they are to be considered by the sentencing judge when determining a defendant's sentence." (D.I. 33 at 20) Petitioner cites the Supreme Court decisions *McMillan v. Pennsylvania*, 477 U.S. 79 (1986),[4] and *Nichols v. United States*, 511 U.S. 738 (1994) as additional support for his contention as to what constitutes the "state of the law" – which presumably means "clearly established federal law" – applicable to Claim One. Petitioner is mistaken.

In *Watts*, the Supreme Court held that a federal sentencing court could consider conduct for which a defendant was acquitted to enhance his sentence under the United States Sentencing Guidelines ("USSG"), "so long as that conduct has been proved by a preponderance of the evidence." *Watts*, 519 U.S. at 158. In *McMillan*, the Supreme Court held that a Pennsylvania statute allowing for a five-

[4]*McMillan* was overruled in *Alleyne v. United States*, 570 U.S. 99 (2013). *See United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) ("Finding no basis in the original understanding of the Fifth and Sixth Amendments for *McMillan* and *Harris* [*v. United States*, 536 U.S. 545 (2002)], the [*Alleyne*] Court expressly overruled those decisions...."). The *McMillan* holding that was overruled, however, was the principle that factors implicating mandatory minimum sentences did not require proof beyond a reasonable doubt.

year minimum statutory sentencing enhancement if the government proved by a preponderance of the evidence the fact that the defendant visibly possessed a firearm during the commission of a felony satisfied due process. *See McMillan*, 477 U.S. at 91. Similarly, in *Nichols*, the Supreme Court held that a federal sentencing court could consider a defendant's previous uncounseled misdemeanor conviction when applying a sentencing enhancement under the USSG if the underlying conduct was proven by a preponderance of the evidence. *See Nichols*, 511 U.S. at 746-47.

The common thread in each of these cases is the presence of a state statutory or federal sentencing guideline enhancement. Petitioner's case, however, did not involve a statutory sentencing enhancement provision, and the sentence imposed was within statutory limits. Consequently, even if the aforementioned cases could, or should, be viewed as articulating a general proposition that state sentencing courts must apply a preponderance of evidence standard when considering disputed facts that will alter a sentencing range, they do not constitute clearly established Supreme Court precedent mandating a preponderance of the evidence standard in a state sentencing proceeding where the sentence is within statutory limits and there is no statutory sentencing enhancement.

The Supreme Court has consistently held that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a

specific legal rule that has not been squarely established by [it]." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2000). Therefore, the Delaware state courts' refusal to apply a preponderance of the evidence standard during Petitioner's sentencing, and its application of the of the minimal indicia of reliability standard, does not, on its own, warrant relief under § 2254(d).[5] *See Carey v. Musladin*, 549 U.S. 70, 76-77 (2006) (noting that a lack of Supreme Court holdings on a specific issue precludes finding that the state court decision on that issue was contrary to or unreasonable application of clearly established federal law).

Moreover, Claim One fails to warrant relief when it is considered in the context of the clearly established Supreme Court precedent governing the due process rights of defendants during sentencing. Sentencing courts have long "exercise[d] a wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams v. New York*, 337 U.S. 241, 246 (1949); *see Witte v. United States*, 515 U.S. 389, 399-401 (1995) (noting that the Due Process Clause

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[5]To the extent Petitioner's true argument is that the Delaware state courts unreasonably refused to extend the preponderance of the evidence standard to Delaware sentencing proceedings, the argument does not warrant relief under § 2254(d). The Supreme Court "has never adopted the unreasonable-refusal-to-extend rule." *White v. Woodall*, 572 U.S. 415, 426 (2014). "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies [the Supreme] Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." *Id.*

does not provide convicted defendants at sentencing the same constitutional protections afforded to defendants at a criminal trial). Nevertheless, a sentencing court violates a defendant's right to due process if it bases a defendant's sentence on information that is materially false and if the defendant was not given notice and an opportunity to contest the facts upon which the sentencing court relied in imposing the sentence. *See United States v. Tucker*, 404 U.S. 443, 447 (1972) (finding a due process violation when the "sentence [was] founded at least in part upon misinformation of constitutional magnitude."); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (finding that the sentencing proceedings violated due process due to "the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide."). In order to prevail on a claim that a sentence was based on materially false information or on a material misapprehension of fact, a defendant must demonstrate that the information before the sentencing court was materially false and that the court relied on the false information when imposing the sentence. *See Tucker*, 404 U.S. at 447.

Petitioner has made no such showing. At the original sentencing hearing on June 22, 2016, the prosecutor and defense counsel disagreed over the characterization of Petitioner as a drug kingpin. (D.I. 29 at 116-17, 120-21) Defense counsel contended that Petitioner was a "retail" level drug dealer and

requested an evidentiary hearing to dispute the kingpin characterization. (D.I. 29 at 120-21) The Superior Court continued the sentencing to allow defense counsel to develop his claim that Petitioner was entitled to an evidentiary hearing and to brief what he believed to be the proper standard of proof. (D.I. 29 at 115-23) The parties submitted briefing, and the Superior Court held oral argument on November 9, 2016. During oral argument, the State informed defense counsel that, at sentencing, it intended to rely on each count of drug dealing in the indictment which specifically named Petitioner as the defendant. (D.I. 13-5 at 85) After oral argument – in a letter dated November 11, 2016 – the State informed the Superior Court and defense counsel that it was not going to ask the court to consider the drugs recovered from co-defendant Price's home during sentencing. (D.I. 13-5 at 89) In a letter dated November 18, 2016, defense counsel informed the Superior Court and the State that he "does not contest the Court's consideration at sentencing, under the minimum indicium of reliability burden of proof, any of the indicted counts that [Petitioner] was not convicted of, with exception to Counts 248-253, and Count 258." (D.I. 13-5 at 90) Defense counsel included his reasons for contesting the aforementioned seven counts being used as aggravating factors for determining Petitioner's sentence. (D.I. 13-5 at 91)

Based on the foregoing, the Court concludes that the disputed facts *at the beginning of the second sentencing hearing* were: (1) whether Petitioner was a

drug kingpin or was only involved in drug dealing to support his family (D.I. 33 at 17); and (2) Counts 248-253, and Count 258. During the second sentencing hearing, defense counsel argued that Petitioner was not a drug kingpin, but rather, a retail drug entrepreneur. (D.I. 13-5 at 94-97) Both Parties referred to the seventy-seven counts of drug dealing as supporting their respective arguments. For instance, the State argued that, "if you can gather sufficient evidence to charge 77 counts of drug dealing in two months of intercepted phone calls, that would suggest that that is certainly a full-time job." (D.I. 13-5 at 96-97) When asked by the Court to summarize the aggravating circumstances the State intended to rely upon, the prosecutor responded, "[Petitioner's] prior violent criminal conduct, which is the violent offense of robbery and the handgun [… which] were committed when he was 17." (D.I. 13-5 at 97) In response, defense counsel argued that "we don't have a definition of what kingpin is. […] First, 77 drug deals that are recorded within a two-month time-period, Your Honor, that is relatively – first off, it's indicative of retail sales, which is how he was indicted. […] That's, actually, a small amount of deals." (D.I. 13-5 at 98) At this point in the hearing, Petitioner was given the opportunity to address the court. The Superior Court asked Petitioner why he had a firearm. Petitioner responded, "on the streets you have people trying to rob you, kill you. So, basically, it's for protection." (D.I. 13-5 at 100) The Superior Court provided defense counsel an

opportunity to make additional comments. Defense counsel engaged in the following discourse.

> Defense Counsel: [W]hen this case was approached, [Petitioner] was labeled a kingpin early on in the investigation before there was any opportunity to tabulate and gather information.
>
> Indicted counts, Your Honor, don't necessarily indicate what level of criminal activity individuals have.
>
> Court: Well, we have had this discussion, and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to at least, consider the indicted counts. I am not going to punish him for that, I can't do that, but I can consider it; don't you agree?
>
> Defense Counsel: Under the standards that Your Honor has expressed [*i.e.*, minimal indicia of reliability], I agree that you could.

(D.I. 13-5 at 100)

Given Petitioner's concession at the end of the second sentencing hearing that the Superior Court could consider all the counts of the indictment under the minimal indicia of reliability standard,[6] the Court cannot conclude that Petitioner's

[6]In his Opening Brief in this proceeding, Petitioner contends that the Superior Court's reference to "the indicted counts" meant "all of the indicted counts, including the 74 non-conviction counts." (D.I. 33 at 31) Consequently,

sentence was based on any "disputed" facts. Nevertheless, even if those facts were still disputed at the end of the hearing, Petitioner has not shown that the information before the Superior Court – including the information supporting the counts of the indictment – was materially false or inaccurate, or that the Superior Court relied on any materially false or inaccurate information when imposing his sentence. A trial court's alleged error in resolving a disputed factual question at sentencing does not constitute reliance on materially false information. *See Townsend*, 334 U.S. at 741 ("Nor do we mean that mere error in resolving a question of fact...would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw

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Petitioner's response to the Superior Court's statement during sentencing – that he agreed the court could consider the indicted counts – indicates Petitioner's agreement that, under the minimal indicia of reliability standard, the Superior Court could consider all the counts of the indictment. In other words, despite Petitioner's contention to the contrary – made retrospectively in his Opening Brief in this proceeding – that his November 18, 2016 letter shows he still contested the sentencing court's reliance on Counts 248-253 and Count 258 under the minimal indicia of reliability standard (D.I. 33 at 32 n.137), the Court views defense counsel's statement at the *end* of the second sentencing hearing on November 23, 2016 as demonstrating that he no longer contested the Counts identified in his November 18, 2016 letter. The Court believes this is a reasonable factual determination given the tenacious manner with which Petitioner articulated his arguments during the second sentencing hearing. More specifically, if, at the end of the second sentencing hearing, Petitioner still believed that the Superior Court could not consider Counts 248-253 and Count 258 when determining his sentence – even if determined under the minimal indicia of reliability standard – it is reasonable to conclude that defense counsel would have articulated that opinion.

inference from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law."); *Tucker*, 404 U.S. at 447 (distinguishing "a sentence imposed in the informed discretion of a trial judge" from a "sentence founded at least in part upon misinformation of constitutional magnitude.").

Additionally, sentencing courts are granted wide latitude when imposing sentences within the statutory limits. *See Apprendi v. New Jersey,* 530 U.S. 466, 48, 490 (2000) ("we should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion ... in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case") (emphasis in original). The prosecutor in this case was arguing in support of a sentence that was within the statutory sentencing limits of two to seventy-six years, not an increase of the sentencing range. *See Smack*, 2017 WL 4548146, at *2. The Superior Court did not use statutory or guideline-based enhancements when it sentenced Petitioner to fourteen years of incarceration which was well within the sentencing range of two to seventy-six years.

Given these circumstances, the Court concludes that the Delaware Supreme Court did not unreasonably apply *Tucker* and *Townsend* when denying Claim One.

Accordingly, the Court will deny Claim One for failing to satisfy the standards of § 2254(d).

B. Claim Two: Due Process Violate By Denying Evidentiary Hearing

In Claim Two of his Opening Brief, Petitioner contends that the Delaware state courts violated his due process rights by denying his request for an evidentiary hearing regarding disputed facts presented during his sentencing to ensure that the State satisfied the preponderance of the evidence standard. (D.I. 33 at 10) Petitioner also asserts that "this Court must overturn [Petitioner's] conviction and remand this matter to the Delaware Superior Court for a new sentencing hearing with instructions that [Petitioner] be permitted to present testimony and other evidence to rebut the State's presentation of contested aggravating facts." (D.I. 33 at 46) Yet, in his Response to the State's Answer, Petitioner states that, "[a]s described … in his Opening Brief, [he] asserts that the state court record clearly establish[es] the constitutional error in the Delaware Supreme Court's adherence to the 'minimal indicia of reliability' burden of proof during Delaware sentencing hearings. As such, [he] asserts that an evidentiary hearing is warranted *only in the event* that this Court finds that the record is inadequate to grant [Petitioner's] habeas claim." (D.I. 48 at 22) (emphasis added) Although not entirely clear, Petitioner's Response appears to assert a new

argument that this Court should conduct an evidentiary hearing in this proceeding, in addition to his original argument that the case should be returned to the Superior Court for that court to conduct an evidentiary hearing, if the Court concludes that the Superior Court should have applied a preponderance of the evidence standard and it finds that the record is insufficient to determine whether that standard was satisfied. Before considering these two variations of Claim Two, the Court provides the following summary of the portions of the history in this case it views as most relevant to its consideration of Claim Two.

During the oral argument that occurred between the initial and second sentencing hearings, defense counsel argued that Delaware Superior Court Rule of Criminal Procedure 32 was sufficiently similar to Federal Rule of Criminal Procedure 32 such that the Superior Court was required to hold an evidentiary hearing allowing him "to rebut whatever information is contained in the documents [the Superior Court] would consider [during sentencing]." (D.I. 13-5 at 77-80) More specifically, defense counsel argued:

> So the Federal rules are dealing with the – how to go about resolving. It is at the Court's discretion how to present evidence whether we would – whether, under fairness, we should be able to cross-examine individuals making assertions about [Petitioner's] conduct and that's something Your Honor would have to rule upon.
>
> But I think the best way to do that is to first have the State – and normally it would be done in the presentence

> report – but the State make their arguments, indicate what supports it and then I would have an opportunity to respond and indicate whether cross-examination is needed in order to be able to adequately respond to it.

(D.I. 13-5 at 80) After further argument, defense counsel stated he was disputing "criminal conduct beyond the offense of conviction." (D.I. 13-5 at 84)

The Superior Court responded:

> All right. Here's what I'm going to do – let me hear from the State. And I understand your position and I am going to require the State to advise you in writing of the documents it intends to rely upon at sentencing.
>
> * * *
>
> Okay. Let me hear from the State. And, specifically, what – I'm interested in two things: What should you provide in terms of information to the defendant in advance of the sentencing; and, two, what opportunity, if any, does the defendant have to contest that information?

(D.I. 13-5 at 81) The State responded:

> Well, Your Honor, as the State has already said, both in writing and today, the State is not at all clear on exactly what facts the defense wishes to contest at sentencing. And the reason the State says that is because the State actually – Your Honor may recall – in June went through its entire sentencing procedure and argument.
>
> In addition to that, there was the presentence investigation that not only references the very same things that the State referenced at sentencing meaning the drugs, the money, the guns that were all found in Mr. Price's home, so it's the State's position that all of that was made known to the defendant prior to the June

> hearing. There was no assertion when we began that hearing in June that there were any issues specifically with factual assertions that were made during the State's sentencing presentation. And so the State is in a position where it's being asked to provide documentary proof to everything that it said without any real indication of, well, we're conceding that, yes, in fact, the State provided the DNA report and that the DNA report did say that.
>
> * * *
>
> The State's saying that each count of drug dealing for which [Petitioner] is specifically named as the defendant is supported by probable cause. The grand jury returned the indictment – [...] and that's the State's reliance.

(D.I. 13-5 at 82, 85) After oral argument, the State informed Petitioner and the Superior Court that it "will not ask the Court to consider [the drugs found in Price's home]." (D.I. 13-5 at 89) In response, defense counsel informed the Superior Court that he "does not contest the Court's consideration at sentencing, under the minimum indicia of reliability burden of proof, any of the indicted counts [Petitioner] was not convicted of, with exception to" Counts 248-253, and Count 258. (D.I. 13-5 at 90)

1. Claim Two as originally presented: Did the Delaware state courts violate due process by refusing to hold an evidentiary hearing

As an initial matter, the Court notes that Petitioner does not identify any Supreme Court precedent requiring a state court to hold an evidentiary hearing in

circumstances similar to his. Instead, Petitioner crafts his argument by analogizing Federal Rule of Criminal Procedure 32 to Delaware Superior Court Rule of Criminal Procedure 32(c) and relying on Third Circuit cases applying Federal Rule of Criminal Procedure 32. (D.I. 33 at 38-44) While the Court views the absence of any Supreme Court precedent requiring an evidentiary hearing as providing a sufficient basis to deny Claim Two, it also concludes that Claim Two does not warrant relief even it were to consider Federal Rule of Criminal Procedure 32 as providing guidance in this situation.

Under Federal Rule of Criminal Procedure 32(i) (former Rule 32(c)(3)(D)), "[s]entencing judges are not […] required to make findings regarding alleged inaccuracies in PSIs or determinations that the alleged inaccuracies will not be relied on, where a defendant fails to controvert the accuracy of the PSI." *United States v. Vancol*, 778 F. Supp. 219, 225 (D. Del. 1991). In Petitioner's case, at the end of the second sentencing hearing, defense counsel agreed that the Superior Court could consider all the counts in the indictment under the minimal indicia of reliability standard – including the seven Counts Petitioner had originally contested at the start of the second sentencing hearing – which is what the Superior Court did. Given defense counsel's apparent change of mind and concession that there were no disputed facts under the minimal indicia of reliability standard, the Court concludes that the Superior Court did not violate due process – or Petitioner's

interpretation of Federal Rule 32's parameters – by refusing to hold a separate evidentiary hearing.

Even if defense counsel's statement at the end of the second sentencing hearing did not constitute a withdrawal of his original disputed facts, the Superior Court's refusal to conduct an evidentiary hearing did not violate Petitioner's due process rights. "[Federal Rule of Criminal Procedure] 32 does not make an evidentiary hearing mandatory; it only requires the District Court to either make a finding as to the disputed facts or expressly disclaim use of the disputed facts in sentencing." *United States v. Bigica*, 543 F. Appx 239, 244 (3d Cir. 2013) (citing *United States v. Furst*, 918 F.2d 400, 408 (3d Cir. 1990)). The Superior Court complied with that rule. During oral argument, Petitioner stated he was disputing "criminal conduct beyond the offense of conviction," because he was unsure if the "77 sales [were] from [Petitioner]." (D.I. 13-5 at 84-85) The State responded it was relying on "each count of drug dealing" specifically naming Petitioner. (D.I. 13-5 at 85) Defense counsel stated he needed additional time to "go through the indictment" because, although he expected "the vast majority of any of the drug deals, which are small drug deals that are outlined within the indictment, is something that [Petitioner] would take responsibility for," he needed more time to determine which "additional counts that [Petitioner] did not plead to within the indictment" involved the "conduct beyond conviction" defense counsel was

disputing. (D.I. 13-5 at 86) The Superior Court provided defense counsel extra time to identify the disputed uncharged counts, and defense counsel identified Counts 248 -253 and Count 258 as the disputed facts prior to the second sentencing hearing. (D.I. 13-5 at 90-91) During the second sentencing hearing defense counsel argued, as he did in the initial sentencing hearing, that Petitioner was a retail drug dealer, not a drug kingpin. (D.I. 30 at 76-77, 80) Both the prosecutor and defense counsel described Petitioner's criminal activity as the sale of heroin to individual addicts. (D.I. 30 at 76-79)

As explained by the Delaware Supreme Court on direct appeal, during the second sentencing hearing, Petitioner "had, and took, the opportunity to argue he was a middleman in the conspiracy and not the kingpin." *Smack*, 2017 WL 4548146, at *2. At the end of the second sentencing hearing, after extensive argument by both Parties, the Superior Court explicitly stated that it was considering the indicted counts, and defense counsel agreed that the court could do so under the minimal indicia of reliability standard. (D.I. 13-5) The Superior Court then stated:

> Crafting sentencing is always difficult.
>
> I fully understand [Petitioner's] contentions essentially that, through no fault of his own, [he] lives in an environment where he has really no means of supporting himself other than illegal conduct.

> I can understand that.
>
> I can understand that [Petitioner] did not choose to be born into the live in which he has lived.
>
> But on the other side of the coin is, I think of all of the victims of his crime. And not only the people who purchased the drugs which he sells, but also their loved ones and families.
>
> I think about all of the lives that he has destroyed.
>
> I think about the fact that he has willingly destroyed them because it provides him with money.
>
> And I believe that, in addition to the value of punishment, there is also here a need to try to defer others from doing this. And, also frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.
>
> I have to balance those.
>
> The General Assembly has, in the large part, done that balancing for me by specifying the realm of the sentences to be imposed.

(D.I. 13-5 at 100-101)

In short, the record reveals that the Superior Court considered Petitioner's "contested facts and decided not to draw the inferences he wished from those facts. Simply put, [Petitioner] characterized the facts [...] differently, and [...], after giving time for argument, found [Petitioner's] characterization unworthy of credence." *Bigica*, 543 F. App'x at 244. Accordingly, the Court concludes that the

Delaware state courts did not violate Petitioner's due process rights by refusing to conduct an evidentiary hearing during his sentencing proceeding.

2. Claim Two's new request for an evidentiary hearing in this proceeding

Notably, Petitioner does not challenge the Delaware state courts' determination that the facts relied upon at sentencing satisfied the minimal indicia of reliability standard. Instead, Petitioner's request for an evidentiary hearing in this proceeding appears to be dependent on the sought-after holding from this Court that the Superior Court should have applied the preponderance of the evidence standard during his second sentencing hearing. Given the Court's conclusion that the Delaware state courts did not violate Petitioner's due process by applying the minimal indicia of reliability standard during his second sentencing hearing, the Court finds that Petitioner has not presented a reason for conducting an evidentiary hearing in this proceeding. Accordingly, the Court will deny Claim Two to the extent it asks this Court to hold an evidentiary hearing in this proceeding.

IV. CERTIFICATE OF APPEALABILITY

A district court issuing a final order denying a § 2254 petition must also decide whether to issue a certificate of appealability. *See* 3d Cir. L.A.R. 22.2 (2011); 28 U.S.C. § 2253(c)(2). A certificate of appealability is appropriate when

a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Court has concluded that the instant Petition does not warrant relief. Reasonable jurists would not find this conclusion to be debatable. Accordingly, the Court will not issue a certificate of appealability.

V. CONCLUSION

For the reasons discussed, the Court concludes that the instant Petition must be denied without an evidentiary or the issuance of a certificate of appealablity. An appropriate Order will be entered.

EFiled: Oct 11 2017 08:39AM EDT
Filing ID 61228032
Case Number 601,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADRIN SMACK,	§	
	§	No. 601, 2016
Defendant-Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware
v.	§	
	§	Cr. ID. No. 1505015401
STATE OF DELAWARE,	§	
	§	
Plaintiff-Below,	§	
Appellee.	§	

Submitted: September 27, 2017
Decided: October 11, 2017

Before **STRINE**, Chief Justice; **VAUGHN**, and **SEITZ**, Justices.

ORDER

This 11th day of October, 2017 having considered the briefs and the record below, it appears to the Court that:

(1) Adrin Smack pleaded guilty to four counts of drug dealing, one count of possession of a firearm by a person prohibited, and one count of conspiracy second degree. At sentencing, the State claimed that Smack acted as a "kingpin" in a drug operation and should be sentenced to the fifteen years recommended by the State instead of the eight years recommended by the defendant. Smack requested an evidentiary hearing as part of sentencing, and argued that the State must prove his status as a drug "kingpin" by a preponderance of the evidence. The Superior Court

denied Smack's request for an evidentiary hearing and ruled it could consider evidence offered by the State at sentencing if it met a "minimal indicia of reliability" standard. The court sentenced Smack to an aggregate of fourteen years at Level V followed by probation. Smack appeals and argues the Superior Court violated his due process rights by denying him an evidentiary hearing and applying the wrong burden of proof at sentencing. According to Smack, the State was required to prove by a preponderance of the evidence that Smack was a drug kingpin. Because this Court has previously upheld the use of a minimal indicia of reliability standard to consider evidence offered at a sentencing hearing, and due process does not require an evidentiary hearing, we affirm the Superior Court's decision.

(2) In April 2015, the FBI tapped Smack's cell phone and intercepted communications between Smack and his codefendant, Al-Ghaniyy Price, regarding contraband in Price's home. A search revealed two guns, a tactical vest, $16,108 in cash, and 803 bundles of heroin. Smack was charged with seventy-one counts of drug dealing, one count of possession of marijuana, one count of giving a firearm to a person prohibited, five counts of possession of a firearm by a person prohibited, and two counts of conspiracy second degree. Smack pleaded guilty to four counts of drug dealing, one count of possession of a firearm by a person prohibited, and one count of conspiracy second degree.

(3) At the June 22, 2016 sentencing hearing, the State presented evidence to show that Smack was a mass distributor of drugs. Smack maintained he was a small-time retail dealer. The hearing was continued to allow Smack to support his contention that facts relied on by the State at sentencing must be proven by a preponderance of the evidence. In addition, he argued that he should have the opportunity to cross-examine witnesses at an evidentiary hearing to challenge the State's evidence that he was a kingpin in the trafficking organization.

(4) On November 17, 2016, the court held that evidence could be considered at sentencing as long as it had minimal indicia of reliability. The court also denied Smack's request for an evidentiary hearing. The court sentenced Smack to an aggregate of fourteen years at Level V followed by decreasing levels of supervision.[1] Smack appeals, arguing the court violated his due process rights by applying the minimal indicia of reliability standard and by denying his request for an evidentiary hearing. This Court reviews questions of law and constitutional claims *de novo*.[2]

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[1] Specifically, the Court sentenced Smack for Tier 4 drug dealing: 20 years at Level V suspended after 6 years, 6 months at Level 4, and 12 months at Level III; for Tier 4 drug dealing: 20 years at Level V suspended after 6 years and 18 months at Level III; for two counts of drug dealing: 8 years at Level V suspended after 1 year and 18 months at Level III; for possession of a firearm by a person prohibited: 2 years at Level V suspended for 12 years at Level III; for conspiracy second degree: 2 years at Level V suspended for 1 year at Level III. Opening Br. Ex. B.

[2] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010). The State argues that an abuse of discretion standard applies. While this Court reviews a sentencing decision for an abuse of discretion, *Fink v. State*, 817 A.2d 781, 790 (Del. 2003), Smack "is not seeking review of the specific sentence

(5) First, this Court settled the evidentiary standard in *Mayes v. State*, holding that "in reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record below that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability."[3] Smack argues *Mayes* does not apply because the standard was not contested. But the fact the standard was not at issue is irrelevant—the Court explicitly stated the sentencing judge "comported with due process by relying on information meeting the 'minimal indicium of reliability beyond mere allegation' standard."[4] Subsequent cases rely on *Mayes* in applying this standard.[5]

(6) Smack relies on a series of federal cases where the court applied a preponderance of the evidence standard to establish facts warranting a sentence enhancement under the federal sentencing guidelines.[6] According to Smack, the same burden of proof should apply to the State when it argued for a harsher sentence

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imposed." Reply Br. at 1. Rather, Smack appeals "the Superior Court's legal determination" regarding the burden of proof and evidentiary hearing. *Id.* Therefore, we apply a *de novo* standard of review. *Zebroski*, 12 A.3d at 1119.

[3] *Mayes v. State*, 604 A.2d 839, 843 (Del. 1992); *see also Laboy v. State*, 663 A.2d 487, at *1 (Del. 1995); *Lake v. State*, 1984 WL 997111, at *1 (Del. Oct. 29, 1984).

[4] *Mayes*, 604 A.2d at 840.

[5] *See Davenport v. State*, 150 A.3d 274, 274 n.22 (Del. 2016), *cert. denied*, 137 S. Ct. 1447 (2017); *Scannapieco v. State*, 140 A.3d 434 (Del. 2016); *Turner v. State*, 93 A.3d 655, at *2 (Del. 2014).

[6] *United States v. Watts*, 519 U.S. 148, 156 (1997); *Nichols v. United States*, 511 U.S. 738, 748 (1994); *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986); *United States v. McDowell*, 888 F.2d 285, 291 (3d Cir. 1989).

based on Smack's status as a drug kingpin. The federal cases, however, are inapposite. Under the federal sentencing guidelines, the judge must find facts at sentencing using evidentiary burdens because those factual determinations can cause an increase in the sentencing ranges under the guidelines.[7] Here, Smack's guilty plea resulted in a sentencing range of two to seventy-six years.[8] To fix the sentence *within* that statutory range, the judge was entitled to consider all facts that had a minimal indicia of reliability—including the intercepted text messages and phone conversations that led to the seventy-seven charges of drug dealing brought against Smack.[9] The court could and did find from these facts that Smack was more than a street-level drug dealer.

(7) Second, "due process does not necessitate a full evidentiary hearing to determine the reliability of the information."[10] It only requires the defendant be

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[7] *United States v. Lee*, 625 F.3d 1030, 1034–35 (8th Cir. 2010) ("[D]ue process never requires applying more than a preponderance-of-the-evidence standard for finding sentencing facts, even where the fact-finding has 'an extremely disproportionate impact on the defendant's advisory guidelines range.'") (quoting *United States v. Villareal-Amarillas*, 562 F.3d 892, 897 (8th Cir. 2009)); *United States v. Askew*, 193 F.3d 1181, 1183 (11th Cir. 1999) ("The Government bears the burden of establishing by a preponderance of the evidence the facts necessary to support a sentencing enhancement.").

[8] App. to Answering Br. at 1. Smack pleaded guilty to two counts of Drug Dealing Class B, which has a range of two to twenty-five years. 11 *Del. C.* § 4205(b)(2). He pleaded guilty to two counts of Drug Dealing Class D and one count of Possession of a Firearm by a Person Prohibited, which each have a maximum of eight years. *Id.* §§ 1448, 4205(b)(4). And he pleaded guilty to one count of Conspiracy Second Degree, which has a maximum of two years. *Id.* §§ 512, 4205(b)(7).

[9] App. to Opening Br. at 225–27.

[10] *Lake*, 1984 WL 997111, at *1; *see also United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983); *Farrow v. United States*, 580 F.2d 1339, 1360 (9th Cir. 1978); *United States v. Rosner*, 485 F.2d 1213, 1230 (2d Cir. 1973); *United States v. Malcolm*, 432 F.2d 809, 817 (2d Cir. 1970).

allowed to explain or rebut the evidence presented.[11] The court did not abuse its discretion in denying an evidentiary hearing because Smack had, and took, the opportunity to argue he was a middleman in the conspiracy and not the kingpin.[12]

(8) The Superior Court did not err by applying a minimal indicia of reliability standard or by denying the evidentiary hearing.

NOW, THEREFORE, it is hereby ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Justice

[11] Super. Ct. Crim. R. 32(1)(B)–(C) (requiring the court to "(B) Afford counsel for the defendant an opportunity to speak on behalf of the defendant, and (C) Address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence"); *Lake*, 1984 WL 997111, at *1 ("[A] defendant who contests the accuracy of information contained in a presentence report must be given the opportunity to explain or rebut any uncorroborated evidence . . . . Discretion to rebut, however, lies in the hands of the sentencing judge . . . ."); *Rosner*, 485 F.2d at 1230 (stating "[n]ormally, verbal explanation or comment is sufficient," to rebut evidence presented at sentencing).

[12] *State of Delaware v. Smack*, No. 1505015401, at 8–11 (Del. Super. Ct. Nov. 23, 2014) (TRANSCRIPT) ("Mr. Smack was no kingpin. He was a retail drug dealer . . . . He wasn't a supplier of other individuals. . . . There was no indication at all that Mr. Smack [was a] supplier to anyone else."); *cf. Papajohn*, 701 F.2d at 763 (denying evidentiary hearing because "[t]he transcript of the sentencing hearing clearly shows that appellant was given and took the opportunity to reiterate his position that he was merely a middleman rather than the central figure in the conspiracy").

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOHN A. PARKINS, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
TELEPHONE: (302) 255-2584

November 17, 2016

Sonia Augusthy, Esquire
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

Christopher S. Koyste, Esquire
Law Office of Christopher S. Koyste LLC
709 Brandywine Boulevard
Wilmington, Delaware 19809

Re: State v. Adrin Smack
I.D. No. 1505015401

Dear Counsel:

Presently before the court are two issues: (1) whether the defendant is entitled to an evidentiary hearing at sentencing, and (2) what standard governs the admissibility of matters the court can consider before imposing sentence. The court holds that (1) Defendant is not entitled to an evidentiary hearing and (2) the court may consider matters so long as they are accompanied by a minimal indicia of reliability.

Defendant is not entitled to an evidentiary hearing in connection with his sentencing. Superior Court Criminal Rule 32 largely defines a defendant's procedural rights at sentencing. That rule affords a defendant the right to have his or her counsel read the presentence investigation; to comment on that investigation and "other matters relating to the appropriate sentence"; to

address the court at the sentencing through counsel or in person (or both); and to present "any information in mitigation."[1] Notably the rule makes no provision, much less requires, an evidentiary hearing. Defendant cites federal cases for the proposition that he has rights beyond those enumerated in Superior Court Rule 32. Those cases are of little value here because they turn on Federal Criminal Rule 32 which is different from Delaware's rule. The Third Circuit Court of Appeals has observed that "[n]either the Supreme Court nor this one have held that the Due Process Clause entitles a defendant to advance notice of the information upon which he or she will be sentenced or to comment meaningfully on that evidence. Courts have, however, found such rights created by Federal Rule of Criminal Procedure 32(c)(1)."[2] Although the Due Process Clause affords the defendant some rights, it does not require an evidentiary hearing. "A defendant ha[s] no right to present witnesses or to receive a full-blown evidentiary hearing."[3] All "that is required is that the court afford the defendant some opportunity to rebut the Government's allegations."[4] Accordingly the court finds that Mr. Smack has no right, under Rule 32 or the Constitution, to a full-blown evidentiary hearing. Of immediate concern, this means that the State is not required to call witnesses to support its contention that Defendant was heavily involved in drug trade.

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1 *Superior Court Criminal Rule* 32. Neither counsel nor the defendant may see the investigator's final recommendation. *Id.* at (c)(3).
2 *United States v. Reynoso*, 254 F.3d 467, 473 (3d Cir. 2001).
3 *United States v. Prescott*, 920 F.2d 139, 143 (2d Cir. 1990).
4 *United States v. Sabhnani*, 599 F.3d 215, 258 (2d Cir. 2010) *quoting United States v. Maurer*, 226 F.3d 150, 151-52 (2d Cir. 2000).

The remaining issue is the standard which applies to information presented at sentencing. That question was resolved by the Delaware Supreme Court in *Mayes v. State*:

> [A] sentencing court abuses its discretion if it sentences on the basis of inaccurate or unreliable information. Moreover, the due process clause of the Fifth Amendment prohibits a criminal defendant from being sentenced on the basis of information which is *either false or which lacks minimal indicia of reliability*. "[M]aterial false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."[5]

The minimum-indicia-of-reliability standard employed by the Supreme Court in *Mayes* is the same as the federal courts have held is required by the Constitution.[6]

The court understands that the State may rely upon (in addition to the Presentence Investigation) the indictment and the affidavit submitted by the State in support of its application to obtain a warrant to intercept wire communications. The court finds these bear the requisite indicia of reliability and may be relied upon by the State at sentencing.

Very truly yours,

John A. Parkins, Jr.

oc: Prothonotary

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5 604 A.2d 839, 843 (Del. 1992)(emphasis added).

6 *United States v. Matthews*, 773 F.2d 48, 51 (3d Cir. 1985) ("Factual matters considered as a basis for sentence must have "some minimal indicium of reliability beyond mere allegation" and must "either alone or in the context of other available information, bear some rational relationship to the decision to impose a particular sentence.").

RULE 9 WARRANT
REINDICTMENT

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	INDICTMENT BY THE GRAND JURY
V.	)	
	)	
KENNETH COLEMAN	)	I.D. #1505004583
CHARLES COLEMAN	)	I.D. # 1505004592, 1505008258
DESIREE MILLER	)	I.D. # 1505006337
KEVIN COLEMAN	)	I.D. # 1505004603
TYRONE WILLIAMS	)	I.D. # 1505004627
ANDRE REED	)	I.D. # 1505004631
FELICIA BROWN	)	I.D. # 1505004634
COREY BRITTINGHAM	)	I.D. # 1505015409, 1503014971
MIK'TRELL SPRIGGS	)	I.D. # 1505015406
KEVIN GALE	)	I.D. # 1505015376
ADRIN SMACK	)	I.D. # 1505015401 — 9
LOUIS VISCO	)	I.D. # 1505015396
BRYAN SHAHADI	)	I.D. # 1505015431
JESUS VASQUEZ	)	I.D. # 1505015435
SHERRY WHITE	)	I.D. # 1505015442
RYAN KASEES	)	I.D. # 1505015438
DANIEL GRAHAM	)	I.D. # 1506023835 (RULE 9 WARRANT)
AL-GHANIYY PRICE	)	I.D. # 1505015550
DANIELLE TERRY	)	I.D. # 1505015579
HULON SPENCER	)	I.D. # 1505010097
DANIEL HAYE	)	I.D. # 1505015597
CASIE HUBER	)	I.D. # 1505015601
JESSIE JORGE	)	I.D. # 1505015603
JESSICA ZEIMER	)	I.D. # 1505015606
AARON ALEXANDER	)	I.D. # 1505015607
MARCO ACOSTA MEDINA	)	I.D. # 1505015610, 1504020200
AMY SUBER	)	I.D. # 1505015615
MICHAEL DORN	)	I.D. # 1505015622
ROBIN SPICER	)	I.D. # 1505015623
JONATHAN HILBECK	)	I.D. # 1505015625
JOSHUA TAYLOR	)	I.D. # 1505015629
STEFAN ZYSKOWSKI	)	I.D. # 1505015631
TYERIN ANDERSON	)	I.D. # 1505015639
WILLIAM ROBERTS	)	I.D. # 1505015649
MICHAEL KINLAW	)	I.D. # 1505003373; 1505002337; 1505015625
MELISSA DORSEY	)	I.D. # 1505002368
TIFFANY SMACK	)	I.D. # 1505015657
JORDAN MURSON	)	I.D. # 1504020170
JORDAN ELDRETH	)	I.D. # 1504020183
JAMES CRAIG	)	I.D. # 1504020185
CHRISTIAN DURAN	)	I.D. # 1504020225 (RULE 9 WARRANT)
STEPHANIE J. STRATOTI	)	I.D. # 1505023078

2015 JAN -6 PM 3:29

The Grand Jury charges KENNETH COLEMAN, CHARLES COLEMAN, DESIREE MILLER, KEVIN COLEMAN, TYRONE WILLIAMS, ANDRE REED, FELICIA BROWN, COREY BRITTINGHAM, MIK'TRELL SPRIGGS, KEVIN GALE, ADRIN SMACK, LOUIS VISCO, BRYAN SHAHADI, JESUS VASQUEZ, SHERRY WHITE, RYAN KASEES, DANIEL GRAHAM, AL-GHANIYY PRICE, DANIELLE TERRY, HULON SPENCER, DANIEL HAYE, CASIE HUBER, JESSIE JORGE, JESSICA ZEIMER, AARON ALEXANDER, MARCO ACOSTA MEDINA, CHRISTIAN DURAN, AMY SUBER, MICHAEL DORN, ROBIN SPICER, JONATHAN HILBECK, JOSHUA TAYLOR, STEFAN ZYSKOWSKI, TYERIN ANDERSON, WILLIAM ROBERTS, MELISSA DORSEY, TIFFANY SMACK, MICHAEL KINLAW, JORDAN MURSON, JORDAN ELDRETH, JAMES CRAIG, CHRISTIAN DURAN, and STEPHANIE J. STRATOTI with the following offenses:

COUNT 1. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

KENNETH COLEMAN, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 2. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

KENNETH COLEMAN, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or

more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 3. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

CHARLES COLEMAN, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 4. A FELONY

#N_____

#N_____

CONSPIRACY SECOND DEGREE, in violation of Title 11, Section 512 of the Delaware Code.

KENNETH COLEMAN AND CHARLES COLEMAN, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of the felony of Drug Dealing, as set forth in Counts 2 and 3, which are incorporated herein by reference, did agree with each other to commit said crimes and one or more of them did commit an overt act in pursuance of said conspiracy by committing a substantial step in pursuance of said conspiracy.

COUNT 5. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

KENNETH COLEMAN, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 6. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

KEVIN COLEMAN, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 7. A FELONY

#N_____

#N_____

CONSPIRACY SECOND DEGREE, in violation of Title 11, Section 512 of the Delaware Code.

KENNETH COLEMAN AND KEVIN COLEMAN, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of the felony of Drug Dealing, as set forth in Counts 5 and 6, which are incorporated herein by reference, did agree with each other to commit said crimes and one or

more of them did commit an overt act in pursuance of said conspiracy by committing a substantial step in pursuance of said conspiracy.

COUNT 8. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

KENNETH COLEMAN, on or about the 30th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 9. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

DESIREE MILLER, on or about the 30th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 10. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

TYRONE WILLIAMS, on or about the 30th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 11. A FELONY

#N_____

#N_____

CONSPIRACY SECOND DEGREE, in violation of Title 11, Section 512 of the Delaware Code.

KENNETH COLEMAN AND DESIREE MILLER, on or about the 30th day of April, 2015, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of the felony of Drug Dealing, as set forth in Counts 8 and 10, which are incorporated herein by reference, did agree with each other to commit said crimes and one or more of them did commit an overt act in pursuance of said conspiracy by committing a substantial step in pursuance of said conspiracy.

COUNT 12. A FELONY

#N_____

#N_____

CONSPIRACY SECOND DEGREE, in violation of Title 11, Section 512 of the Delaware Code.

KENNETH COLEMAN AND TYRONE WILLIAMS, on or about the 30th day of April, 2015, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of the felony of Drug Dealing, as set forth in Counts 8 and 10, which are incorporated herein by reference, did agree with one another to commit said crimes did agree with each other to commit said crimes and one or more of them did commit an overt act in pursuance of said conspiracy by committing a substantial step in pursuance of said conspiracy.

COUNT 13. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

FELICIA BROWN, on, about, or between the 20th day April through the 1st day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 14. A FELONY

#N_____

#N_____

#N_____

CONSPIRACY SECOND DEGREE, in violation of Title 11, Section 512 of the Delaware Code.

FELICIA BROWN, KENNETH COLEMAN AND CHARLES COLEMAN, on or about the 1st day of May, 2015, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of the felony of Drug Dealing, as set forth in this indictment, did agree with each other to commit said crimes and one or more of them did commit an overt act in pursuance of said conspiracy by committing a substantial step in pursuance of said conspiracy.

COUNT 15. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

KENNETH COLEMAN, on or about the 3rd day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 16. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

ANDRE REED, on or about the 3rd day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 17. A FELONY

#N_____

#N_____

CONSPIRACY SECOND DEGREE, in violation of Title 11, Section 512 of the Delaware Code.

KENNETH COLEMAN AND ANDRE REED, on or about the 3rd day of May, 2015, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of the felony of Drug Dealing, as set forth in Counts 15 and 16, which are incorporated herein by reference, did agree with each other to commit said crimes and one or more of them did commit an overt act in pursuance of said conspiracy by committing a substantial step in pursuance of said conspiracy.

COUNT 18. A FELONY

#N_____

POSSESSION, PURCHASE, OWN, OR CONTROL A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

CHARLES COLEMAN, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control a firearm after having been convicted of Distribution Within 300 Feet of a Park, a felony, in Case Number 0310001498, in the Superior Court of the State of Delaware, in and for New Castle County on or about September 20, 2004.

COUNT 19. A FELONY

#N_____

POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY in violation of Title 11, Section 1447A of the Delaware Code.

CHARLES COLEMAN, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess a 9mm handgun, a firearm as defined by Title 11, Section 222 of the Delaware Code of 1974, as amended, during the commission of Drug Dealing, a felony as set forth in Count 20 of this indictment which is incorporated herein by reference.

COUNT 20. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

CHARLES COLEMAN, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess with intent to deliver morphine, opium, any

salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 21. A FELONY

#N_____

POSSESSION, PURCHASE, OWN, OR CONTROL AMMUNITION BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

CHARLES COLEMAN, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control ammunition after having been convicted of Distribution Within 300 Feet of a Park, a felony, in Case Number 0310001498, in the Superior Court of the State of Delaware, in and for New Castle County on or about September 20, 2004.

COUNT 22. A FELONY

#N_____

POSSESSION, PURCHASE, OWN, OR CONTROL AMMUNITION BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

CHARLES COLEMAN, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control ammunition after having been convicted of Distribution Within 300 Feet of a Park, a felony, in Case Number 0310001498, in the Superior Court of the State of Delaware, in and for New Castle County on or about September 20, 2004.

COUNT 23. A MISDEMEANOR

#N_____

ENDANGERING THE WELFARE OF A CHILD, in violation of Title 11, Section 1102(a)(1) of the Delaware Code.

CHARLES COLEMAN, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, being a parent, guardian, or other person legally charged with the care or custody of Ariana Brown, a child less than 18 years old, did knowingly act in a manner likely to be injurious to the physical, mental, or moral welfare of child by committing an offense set forth in Chapter 47 of Title 16 in any dwelling, knowing that [redacted] was present at the time.

COUNT 24. A MISDEMEANOR

#N_____

ENDANGERING THE WELFARE OF A CHILD, in violation of Title 11, Section 1102(a)(1) of the Delaware Code.

CHARLES COLEMAN, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, being a parent, guardian, or other person legally charged with the care or custody of Tru Brown, a child less than 18 years old, did knowingly act in a manner likely to be injurious to the physical, mental, or moral welfare of child by committing an offense set forth in Chapter 47 of Title 16 in any dwelling, knowing that [redacted] was present at the time.

COUNT 25. A MISDEMEANOR

#N_____

ENDANGERING THE WELFARE OF A CHILD, in violation of Title 11, Section 1102(a)(1) of the Delaware Code.

CHARLES COLEMAN, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, being a parent, guardian, or other person legally charged with the care

or custody of Destiny Coleman, a child less than 18 years old, did knowingly act in a manner likely to be injurious to the physical, mental, or moral welfare of child by committing an offense set forth in Chapter 47 of Title 16 in any dwelling, knowing that [redacted] was present at the time.

COUNT 26. A MISDEMEANOR

#N_____

ENDANGERING THE WELFARE OF A CHILD, in violation of Title 11, Section 1102(a)(1) of the Delaware Code.

CHARLES COLEMAN, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, being a parent, guardian, or other person legally charged with the care or custody of Charles Coleman, Jr., a child less than 18 years old, did knowingly act in a manner likely to be injurious to the physical, mental, or moral welfare of child by committing an offense set forth in Chapter 47 of Title 16 in any dwelling, knowing that [redacted] was present at the time.

COUNT 27. A FELONY

#N_____

POSSESSION OF A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448(a)(9) of the Delaware Code.

CHARLES COLEMAN, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess or control a deadly weapon, a semi-automatic firearm, automatic firearm or a handgun, while at the same time he possessed heroin, a controlled substance, in violation of §§ 4763 or 4764 of Title 16 of the Delaware Code.

COUNT 28. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

MIK'TRELL SPRIGGS, on or about the 11th day of December, 2014, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 29. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

MIK'TRELL SPRIGGS, on or about the 23rd day of January, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 30. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

MIK'TRELL SPRIGGS, on or about the 6th day of February, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 31. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

MIK'TRELL SPRIGGS, on or about the 13th day of March, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 32. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

MIK'TRELL SPRIGGS, on or about the 20th day of March, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 33. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

KEVIN GALE, on or about the 5th day of November, 2014, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 34. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

TYRONE WILLIAMS, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess with intent to deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 35. A FELONY
#N 15-07-0733

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

ADRIN SMACK, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess with intent to deliver 4 grams or more of morphine,

opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 36. A FELONY
#N 15-07-0734

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

ADRIN SMACK, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 37. A FELONY
#N 15-07-0735

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

ADRIN SMACK, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 38. A FELONY
#N 15-07-0736

GIVING A FIREARM TO PERSON PROHIBITED, in violation of Title 11, Section 1454 of the Delaware Code.

ADRIN SMACK, on or about the 22nd day of April, 2015, and the 23rd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly and unlawfully sell, transfer, give, lend or otherwise furnish a firearm to Michael Kinlaw, knowing that said person is a person prohibited as defined by Title 11, Section 1448 of the Delaware Code.

COUNT 39. A FELONY

~~#N~~ 15-07-0737

POSSESSION, PURCHASE, OWN, OR CONTROL A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

ADRIN SMACK, on or about the 22nd and 23rd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control a firearm: after having been adjudicated delinquent in Case Number 0801036237, in the Family Court of the State of Delaware, in and for New Castle County on or about July 15, 2008 to the charge of Robbery 2nd Degree, which conduct if committed by an adult, would constitute a felony, and the defendant had not reached his 25th birthday.

COUNT 40. A FELONY ~~#N~~ 15-07-0738

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 29th day of January, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 41. A FELONY ~~#N~~ 15-07-0739

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 9th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT42. A FELONY
#N 15-07-0740

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 13th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 43. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

LOUIS VISCO, on or about the 12th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 44. A FELONY
#N 15-07-0741

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 12th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 45. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

LOUIS VISCO, on or about the 13th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 46. A FELONY

#N 15-07-0742

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 13th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 47. A FELONY

#N_____

TAMPERING WITH PHYSICAL EVIDENCE, in violation of Title 11, Section 1269 of the Delaware Code.

LOUIS VISCO, on or about the 17th day of April, 2015, in the County of New Castle, State of Delaware, believing that certain physical evidence, heroin, was about to be produced or used in a prospective official proceeding, and intending to prevent its production, or use, did knowingly and unlawfully attempt to suppress it in an act of concealment, alteration, or destruction, to wit: threw it out the window.

COUNT 48. A FELONY #N 15-07-0743

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 17th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 49. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

LOUIS VISCO, on or about the 17th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 50. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

LOUIS VISCO, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 51. A FELONY #N 15 - 07 - 0744

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 52. A MISDEMEANOR
#N

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

LOUIS VISCO, on or about the 1st day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 53. A FELONY #N 15-07-0745

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 1st day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 54. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

BRYAN SHAHADI, on or about the 14th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 55. A FELONY 15-07-0746
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 14th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 56. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

BRYAN SHAHADI, on or about the 14th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 57. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 14th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 58. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JESUS VASQUEZ, on or about the 15th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 59. A FELONY 15-07-0747
~~#N~~_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 15th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 60. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JESUS VASQUEZ, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 61. A FELONY
#N 15-07-0748

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 62. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

SHERRY WHITE, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 63. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

SHERRY WHITE, on or about the 17th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 64. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

SHERRY WHITE, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 65. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

SHERRY WHITE, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 66. A FELONY #N 15-07-0750

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 67. A FELONY #N 15-07-0751

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 17th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 68. A FELONY #N 15-07-0749

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 69. A FELONY #N 15-07-0752

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer

thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 70. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

RYAN KASEES, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 71. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

RYAN KASEES, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 72. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

RYAN KASEES, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 73. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

RYAN KASEES, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 74. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

RYAN KASEES, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 75. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

RYAN KASEES, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 76. A FELONY #N 15-07-0753

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 77. A FELONY #N 15-07-0754

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 78. A FELONY #N 15-07-0755

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 79. A FELONY #N 15-07-0756

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer

thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 80. A FELONY #N 15-07-0757

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 81. A FELONY #N 15-07-0758

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 82. A FELONY
#N

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 26th day of February, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 83. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 27th day of February, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 84. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

DANIEL GRAHAM, on or about the 21st day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 85. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

DANIEL GRAHAM, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 86. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

DANIEL GRAHAM, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 87. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

DANIEL GRAHAM, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 88. A FELONY
~~#N~~ 15-07-0759

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 21st day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 89. A FELONY #N 15-07-0760

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 22nd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 90. A FELONY #N 15-07-0761

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 91. A FELONY #K 15-07-0762

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 92. A FELONY #N 15-07-0763

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver Percocet, a controlled substance as described in 16 Del. Code § 4716, or any mixture containing any such controlled substance.

COUNT 93. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AL-GHANIYY PRICE, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume Percocet, a controlled substance as described in 16 Del. Code § 4716.

COUNT 94. A FELONY
#N_____

MAINTAINING A DRUG PROPERTY, in violation of Title 16, Section 4760 of the Delaware Code.

AL-GHANIYY PRICE, on, about, or through the 18th day of April to the 28th day of May, 2015, in the County of New Castle, State of Delaware, being the tenant of a property, a dwelling, located at 326 Kemper Drive, Newark, Delaware, did knowingly consent to the use of the property by another, Adrin Smack, for the possession with intent to deliver controlled substances.

COUNT 95. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

AL-GHANIYY PRICE, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess with intent to manufacture Percocet, a controlled substance as described in 16 Del. Code § 4716.

COUNT 96. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver Percocet, a controlled substance as described in 16 Del. Code § 4716.

COUNT 97. A FELONY
~~#N~~ 15-07-0764

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 10th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver Xanax, a controlled substance as described in 16 Del. Code § 4720(b)(23).

COUNT 98. A FELONY
~~#N~~ 15-07-0765

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 17th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver Xanax, a controlled substance as described in 16 Del. Code § 4720(b)(23).

COUNT 99. A FELONY
#E 15-09-0766

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver Xanax, a controlled substance as described in 16 Del. Code § 4720(b)(23).

COUNT 100. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

DANIELLE TERRY, on or about the 10th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume Xanax, a controlled substance as described in 16 Del. Code § 4720(b)(23).

COUNT 101. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

DANIELLE TERRY, on or about the 17th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume Xanax, a controlled substance as described in 16 Del. Code § 4720(b)(23).

COUNT 102. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

DANIELLE TERRY, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume Xanax, a controlled substance as described in 16 Del. Code § 4720(b)(23).

COUNT 103. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

HULON SPENCER, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 104. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

HULON SPENCER, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 105. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

HULON SPENCER, on or about the 8th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 106. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

HULON SPENCER, on or about the 9th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 107. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

HULON SPENCER, on or about the 10th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 108. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

HULON SPENCER, on or about the 11th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 109. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

HULON SPENCER, on or about the 12th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 110. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

HULON SPENCER, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 111. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

HULON SPENCER, on or about the 15th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 112. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 113. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 114. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 8th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 115. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 9th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 116. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 10th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 117. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 11th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 118. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 12th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 119. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 120. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 15th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 121. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

DANIEL HAYE, on or about the 23rd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 122. A FELONY 15-07-0767
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 23rd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 123. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4752 of the Delaware Code.

CASIE HUBER, on or between the 7th day of April, 2015, and the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 124. A FELONY
#N 15-07-0768

DRUG DEALING, in violation of Title 16, Section 4752 of the Delaware Code.

ADRIN SMACK, on or between the 7th day of April, 2015, and the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 125. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

BRYAN SHAHADI, on or about the 11th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 126. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

BRYAN SHAHADI, on or about the 12th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 127. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

BRYAN SHAHADI, on or about the 13th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 128. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

BRYAN SHAHADI, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 129. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

BRYAN SHAHADI, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 130. A FELONY
~~#N~~ 15-07-0769

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 11th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 131. A FELONY
~~#N~~ 15-07-0770

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 12th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 132. A FELONY #N 15-07-0771

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 13th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 133. A FELONY #N 15-07-0772

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 134. A FELONY #N 15-07-0773

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 135. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JESSIE JORGE, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 136. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JESSIE JORGE, on or about the 8th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 137. A FELONY
#N 15-07-0774

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 138. A FELONY
#N 15-07-0775

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 8th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 139. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JESSICA ZEIMER, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 140. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JESSICA ZEIMER, on or about the 8th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 141. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JESSICA ZEIMER, on or about the 11th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 142. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 143. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 8th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 144. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 11th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 145. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AARON ALEXANDER, on or about the 15th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 146. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AARON ALEXANDER, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 147. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AARON ALEXANDER, on or about the 17th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 148. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AARON ALEXANDER, on or about the 23rd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 149. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AARON ALEXANDER, on or about the 27th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 150. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AARON ALEXANDER, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 151. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AARON ALEXANDER, on or about the 2nd day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 152. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AARON ALEXANDER, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 153. A FELONY 15 - 07 - 0776

#N~~I~~_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 15th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 154. A FELONY #N 15-07-0777

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 155. A FELONY #N 15-07-0778

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 17th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 156. A FELONY #N 15-07-0779

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 23rd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 157. A FELONY #N 15-07-0780

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 27th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 158. A FELONY 15-07-0781
#N

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 159. A FELONY 15-07-0782
#N

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 2nd day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 160. A FELONY 15-07-0783
#N

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 161. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

MARCO ACOSTA MEDINA, on or about the 12th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 162. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

MARCO ACOSTA MEDINA, on or about the 13th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 163. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

MARCO ACOSTA MEDINA, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 164. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

MARCO ACOSTA MEDINA, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 165. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

MARCO ACOSTA MEDINA, on or about the 23rd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 166. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

MARCO ACOSTA MEDINA, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 167. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

CHRISTIAN DURAN, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 168. A FELONY
#N 15-07-0784

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 12th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 169. A FELONY
#N 15-07-0789

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 13th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 170. A FELONY
#N 15-07-0790

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer

thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 171. A FELONY #K 15-07-0787

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 172. A FELONY #N 15-07-0788

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 23rd day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 173. A FELONY #N 15-07-0785

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 174. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AMY SUBER, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 175. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AMY SUBER, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 176. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AMY SUBER, on or about the 9th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 177. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AMY SUBER, on or about the 15th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 178. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

AMY SUBER, on or about the 15th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 179. A FELONY
#N 15-07-0786

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 8th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver or possess with intent to deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 180. A FELONY ~~#N~~ 15-07-0791

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 9th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver or possess with intent to deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 181. A FELONY ~~#N~~ 15-07-0792

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 15th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver or possess with intent to deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 182. A FELONY ~~#N~~ 15-07-0793

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver or possess with intent to deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 183. A FELONY ~~#N~~ 15-07-0794

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 15th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver or possess with intent to deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 184. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

MICHAEL DORN, on or about the 1st day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 185. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

MICHAEL DORN, on or about the 5th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 186. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

MICHAEL DORN, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 187. A FELONY
#N 15-07-0795

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 1st day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 188. A FELONY
#N 15-07-0796

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 5th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 189. A FELONY
#N 15-07-0797

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 190. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

ROBIN SPICER, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 191. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

ROBIN SPICER, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 192. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

ROBIN SPICER, on or about the 27th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 193. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

ROBIN SPICER, on or about the 29th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 194. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

ROBIN SPICER, on or about the 2nd day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 195. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

ROBIN SPICER, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 196. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

ROBIN SPICER, on or about the 8th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 197. A FELONY
#N 15-07-0799

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver or possess with intent to deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 198. A FELONY
#N 15-07-0802

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 199. A FELONY
#N 15-07-0798

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 27th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer

thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 200. A FELONY 15-07-0801

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 29th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 201. A FELONY

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 2nd day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 202. A FELONY 15-07-0802

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 203. A FELONY
#N 15-07-0804

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 8th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 204. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 205. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 206. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JONATHAN HILBECK, on or about the 6th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 207. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JONATHAN HILBECK, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 208. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

JOSHUA TAYLOR, on or about the 10th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 209. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

JOSHUA TAYLOR, on or about the 18th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 210. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JOSHUA TAYLOR, on or about the 17th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 211. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JOSHUA TAYLOR, on or about the 18th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 212. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JOSHUA TAYLOR, on or about the 20th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 213. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JOSHUA TAYLOR, on or about the 21st day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 214. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JOSHUA TAYLOR, on or about the 27th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 215. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JOSHUA TAYLOR, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 216. A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

JOSHUA TAYLOR, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 217. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 11th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 218. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 16th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 219. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

STEFAN ZYSKOWSKI, on or about the 11th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 220. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

STEFAN ZYSKOWSKI, on or about the 16th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10).

COUNT 221. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

TYERIN ANDERSON, on or about the 12th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver Percocet, a controlled substance as described in 16 Del. Code § 4716.

COUNT 222. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

TYERIN ANDERSON, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 223. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

TYERIN ANDERSON, on or about the 18th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 224. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 225. A FELONY
#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 226. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

WILLIAM ROBERTS, on or about the 7th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 227. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

WILLIAM ROBERTS, on or about the 13th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 228. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

MICHAEL KINLAW, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver marijuana, a controlled substance as described and classified in 16 Del. Code §§ 4701(26) and 4714(d)(19).

COUNT 229. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

MELISSA DORSEY, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver marijuana, a controlled substance as described and classified in 16 Del. Code §§ 4701(26) and 4714(d)(19).

COUNT 230. A FELONY

#N_____

#N_____

CONSPIRACY SECOND DEGREE, in violation of Title 11, Section 512 of the Delaware Code.

MICHAEL KINLAW AND MELISSA DORSEY, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of the felony of Drug Dealing, as set forth in Counts 223 and 224, which is incorporated herein by reference, did agree with each other to commit said crimes and one or more of them did commit an overt act in pursuance of said conspiracy by engaging in conduct constituting said felony or an attempt to commit said felony or by committing some other substantial step in pursuance of the conspiracy.

COUNT 231. A VIOLATION

#N_____

FAILURE TO OBEY AUTHORIZED PERSON DIRECTING TRAFFIC, in violation of Title 21, Section 4103(a) of the Delaware Code.

MICHAEL KINLAW, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did drive a motor vehicle upon a public roadway known as Route 72, Delaware, and did willfully fail or refuse to comply with any lawful order or direction of any police officer.

COUNT 232. A FELONY

#N_____

POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, in violation of Title 11, Section 1447A of the Delaware Code.

MICHAEL KINLAW, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess a .32 caliber, a firearm, as defined by Title 11, Section 222 of the Delaware Code of 1974, as amended, during the commission of Drug Dealing, a felony as set forth in Count 223 of this indictment which is incorporated herein by reference.

COUNT 233. A FELONY

#N_____

POSSESSION OF A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448(a)(9) of the Delaware Code.

MICHAEL KINLAW, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess or control a .32 caliber firearm, automatic firearm or a handgun, while at the same time he possessed marijuana, a controlled substance, in violation of §§ 4763 or 4764 of Title 16 of the Delaware Code.

COUNT 234. A FELONY

#N_____

POSSESSION, PURCHASE, OWN, OR CONTROL A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

MICHAEL KINLAW, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control a firearm, after having been convicted of Drug Dealing, a felony, in Case Number 1305005861, in the Superior Court of the State of Delaware, in and for New Castle County on or about July 18, 2013.

COUNT 235. A MISDEMEANOR

#N_____

RESISTING ARREST, in violation of Title 11, Section 1257 of the Delaware Code.

MICHAEL KINLAW, on or about the 4th day of May, 2015, in the County of New Castle, State of Delaware, did intentionally prevent or attempt to prevent a peace officer from effecting an arrest or detention of him/herself by use of force or violence.

COUNT 236. A FELONY

#N_____

POSSESSION, PURCHASE, OWN, OR CONTROL AMMUNITION BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

MICHAEL KINLAW, on or about the 1st day of May, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control ammunition, after having been convicted of Drug Dealing, a felony, in Case Number 1305005861, in the Superior Court of the State of Delaware, in and for New Castle County on or about July 18, 2013.

COUNT 237. A FELONY

#N_____

POSSESSION, PURCHASE, OWN, OR CONTROL A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

MICHAEL KINLAW, on or about the 16th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control a firearm, a Glock 42 .38 caliber handgun, after having been convicted of Drug Dealing, a felony, in Case Number 1305005861, in the Superior Court of the State of Delaware, in and for New Castle County on or about July 18, 2013.

COUNT 238. A FELONY

~~#N~~ F15-07-0805

#N_____ #N_____

#N_____ #N_____

#N_____ #N_____

#N_____ #N_____

#N_____ #N_____

#N_____ #N_____

CONSPIRACY SECOND DEGREE, in violation of Title 11, Section 512 of the Delaware Code.

KEVIN COLEMAN, KENNETH COLEMAN, CHARLES COLEMAN, COREY BRITTINGHAM, MIK'TRELL SPRIGGS, KEVIN GALE, ADRIN SMACK, AL-GHANIYY PRICE, CASIE HUBER, TYERIN ANDERSON, TIFFANY SMACK, MELISSA DORSEY, DESIREE MILLER, TYRONE WILLIAMS, FELICIA BROWN, ANDRE REED AND MICHAEL KINLAW, on, about, or between the 7th day of April, 2015, and the 28th day of May, 2015, in the County of New Castle, State of Delaware, when intending to promote or facilitate

the commission of the felony of Drug Dealing, as set forth throughout this Indictment, which is incorporated herein by reference, did agree with one another to commit said crimes and one, the other, or all of them did commit an overt act in pursuance of said conspiracy by engaging in conduct constituting said felonies or an attempt to commit said felonies or by committing some other substantial step in pursuance of the conspiracy.

COUNT 239. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 23rd day of March, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 240. A FELONY

#N_____

POSSESSION, PURCHASE, OWN, OR CONTROL A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

AL-GHANIYY PRICE, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control a 9 mm handgun, a firearm: after having been adjudicated delinquent in Case Number 1302017227, in the Family Court of the State of Delaware, in and for New Castle County on or about August 5, 2013 to the charge of Disregarding a Police Signal, which conduct if committed by an adult, would constitute a felony, and the defendant had not reached his 25th birthday.

COUNT 241. A FELONY

#N_____

POSSESSION OF A FIREARM BY A PERSON PROHIBITED in violation of Title 11, Section 1448(a)(9) of the Delaware Code.

AL-GHANIYY PRICE, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess or control a deadly weapon, a 9 mm handgun, while at the same time he possessed heroin, a controlled substance, in violation of § 4763 of Title 16 of the Delaware Code.

COUNT 242. A FELONY

#N_____

POSSESSION, PURCHASE, OWN, OR CONTROL A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

AL-GHANIYY PRICE, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control a .32 caliber handgun, a firearm: after having been adjudicated delinquent in Case Number 1302017227, in the Family Court of the State of Delaware, in and for New Castle County on or about August 5, 2013 to the charge of Disregarding a Police Signal, which conduct if committed by an adult, would constitute a felony, and the defendant had not reached his 25th birthday.

COUNT 243. A FELONY

#N_____

POSSESSION OF A FIREARM BY A PERSON PROHIBITED in violation of Title 11, Section 1448(a)(9) of the Delaware Code.

AL-GHANIYY PRICE, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess or control a deadly weapon, a

.32 caliber handgun, while at the same time he possessed heroin, a controlled substance, in violation of § 4763 of Title 16 of the Delaware Code.

COUNT 244. A FELONY

#N_____

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

AL-GHANIYY PRICE, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 245. A FELONY

#N_____

DRUG DEALING in violation of Title 16, Section 4754(1) of the Delaware Code.

AL-GHANIYY PRICE, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess with intent to deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 246. A MISDEMEANOR

#N_____

POSSESSION OF MARIJUANA in violation of Title 16, Section 4764(b) of the Delaware Code.

AL-GHANIYY PRICE, on or about the 28th day of May, 2015, in the County of New Castle, Delaware, did knowingly possess marijuana, a controlled substance as described and classified in 16 Del. Code §§ 4701(26) and 4714(d)(19).

COUNT 247. A FELONY #N 15-07-0806

POSSESSION, PURCHASE, OWN, OR CONTROL A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

ADRIN SMACK, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control a 9 mm handgun, a firearm: after having been adjudicated delinquent in Case Number 080801036237, in the Family Court of the State of Delaware, in and for New Castle County on or about July 15, 2009 to the charge of Robbery 2nd degree, which conduct if committed by an adult, would constitute a felony, and the defendant had not reached his 25th birthday.

COUNT 248. A FELONY #N 15-07-0807

POSSESSION OF A FIREARM BY A PERSON PROHIBITED in violation of Title 11, Section 1448(a)(9) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess or control a deadly weapon, a 9 mm handgun, while at the same time he possessed heroin, a controlled substance, in violation of § 4763 of Title 16 of the Delaware Code.

COUNT 249. A FELONY #N 15-07-0808

POSSESSION, PURCHASE, OWN, OR CONTROL A FIREARM BY A PERSON PROHIBITED, in violation of Title 11, Section 1448 of the Delaware Code.

ADRIN SMACK, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly purchase, own, possess, or control a .32 caliber handgun, a firearm: after having been adjudicated delinquent in Case Number 080801036237, in the Family Court of the State of Delaware, in and for New Castle County on or about July 15, 2009 to the

charge of Robbery 2nd degree, which conduct if committed by an adult, would constitute a felony, and the defendant had not reached his 25th birthday.

COUNT 250. A FELONY

~~PN~~ 15-07-0809

POSSESSION OF A FIREARM BY A PERSON PROHIBITED in violation of Title 11, Section 1448(a)(9) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess or control a deadly weapon, a .32 caliber handgun, while at the same time he possessed heroin, a controlled substance, in violation of § 4763 of Title 16 of the Delaware Code.

COUNT 251. A FELONY

~~PN~~ 15-07-0856

DRUG DEALING, in violation of Title 16, Section 4752(1) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver and/or possess with intent to deliver 4 grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 252. A FELONY ~~PN~~ 15-07-0811

DRUG DEALING in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess with intent to deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 253. A MISDEMEANOR ~~X~~ 15 - 07 - 0812

POSSESSION OF MARIJUANA in violation of Title 16, Section 4764(b) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of May, 2015, in the County of New Castle, Delaware, did knowingly possess marijuana, a controlled substance as described and classified in 16 Del. Code §§ 4701(26) and 4714(d)(19).

COUNT 254. A FELONY 15 - 07 - 0813

CONSPIRACY SECOND DEGREE, in violation of Title 11, Section 512 of the Delaware Code.

ADRIN SMACK AND AL-GHANIYY PRICE on, about, or between the 7th and the 28th day of May, 2015, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of the felonies of Maintaining a Drug Property, Drug Dealing and Possession of a Firearm, as set forth in counts 94-95, 240-245, and 247-252 which are incorporated herein by reference, did agree with one another to commit said crimes and one, the other, or both of them did commit an overt act in pursuance of said conspiracy by engaging in conduct constituting said felonies or an attempt to commit said felonies or by committing some other substantial step in pursuance of the conspiracy.

COUNT 255. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

JORDAN MURSON, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 256. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

JORDAN ELDRETH, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 257. A MISDEMEANOR
#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

JORDAN MURSON, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

COUNT 258. A FELONY 15-07-0814
#N

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

ADRIN SMACK, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly deliver morphine, opium, any salt, isomer or salt of an isomer thereof, or heroin as described in 16 Del. Code § 4714, or any mixture containing any such controlled substance.

COUNT 259 A MISDEMEANOR
#N

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(a) of the Delaware Code.

STEPHANIE STRATOTI, on or about the 11th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 260. A FELONY
#N

DRUG DEALING, in violation of Title 16, Section 4754(1) of the Delaware Code.

COREY BRITTINGHAM, on or about the 11th day of May, 2015, in the County of New Castle, State of Delaware, did knowingly deliver cocaine, a controlled substance as described in 16 Del. Code § 4716(b)(4).

COUNT 261, A MISDEMEANOR

#N_____

ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE OR COUNTERFEIT CONTROLLED SUBSTANCE, in violation of Title 16, Section 4763(c) of the Delaware Code.

JAMES CRAIG, on or about the 28th day of April, 2015, in the County of New Castle, State of Delaware, did knowingly possess, use, or consume heroin, a controlled substance as described in 16 Del. Code § 4714(c)(10), and the offense occurred in a vehicle.

A TRUE BILL

(FOREPERSON)

MATTHEW P. DENN
ATTORNEY GENERAL

DEPUTY ATTORNEY GENERAL

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PLEA AGREEMENT

Case No(s): 1505015401

State of Delaware v. Adrin Smack

C.A. No(s):

HABITUAL OFFENDER ELIGIBLE, Title 11 ☐ §4214(a) ☐ §4214(b) BOOT CAMP DIVERSION ELIGIBLE:
☐ Title 16, §4763 sentence –previous qualifying drug conviction
☐ Title 21:
☐ School Teacher or Administrator convicted of a crime as described in Title 11, §4101(e)
☐ Title 11, §4120, §4121 – Sex offender registration required ☐ DUI ☐ BAC: ☐ No BAC
☐ Title 11, §4336 –Sex offender notification required

DEFENDANT WILL PLEAD: GUILTY TO:

Count	C.A. No.	Charge (if LIO, indicate and include applicable citation)
36	IN-15-07-0734	Drug Dealing Heroin (Tier 4) (Class B Felony, 2-25 years)
37	IN-15-07-0735	Drug Dealing Heroin (Tier 4) (Class B Felony, 2-25 years)
39	IN-15-07-0737	Possession by a Person Prohibited (Class D Felony)
40	IN-15-07-0738	Drug Dealing Heroin (No Tier) (Class D Felony)
122	IN-15-07-0767	Drug Dealing Heroin (No Tier) (Class D Felony)
238	IN-15-07-0805	Conspiracy Second Degree (Class G Felony)

Upon the sentencing of the defendant, a *nolle prosequi* is entered on:
☒ all remaining charges on this indictment ☐ the following charges:

SENTENCE: State and Defendant request ☒ PSI ☐ Immediate Sentencing
Recommendation/Agreement: State and Defendant agree to recommend:

Defendant agrees he will request no less than 8 years of unsuspended Level V time. The State agrees it will cap its recommendation of unsuspended Level V time to 15 years.

State and Defendant agree to the following:
☐ Restitution:
☒ No contact with all indicted co-defendants.
☒ Other Conditions: Defendant agrees to forfeit his interest in the cash, firearms, vehicles, paraphernalia and drug proceeds seized pursuant to search warrants.

Is this one page the complete Plea Agreement? Yes *This plea agreement expires on March ~~25~~ 31, 2016 (SA)

DAG Sonja Augustiny (print name) (signature)
Date 2/25/2016

DEF. COUNSEL Christopher Koyste, Esq. (print name) (signature)
DEFENDANT (signature) 3/31/16 (date)

TRUTH-IN-SENTENCING GUILTY PLEA FORM

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)
v.)
_____)

ID: _____

CRA: _____

Date of Birth [redacted] Last grade in school completed_____

Have you ever been a patient in a mental hospital?	☐ Yes ☐ No
Are you under the influence of alcohol or drugs at this time?	☐ Yes ☒ No
Have you freely and voluntarily decided to plead guilty to the charges listed in your written plea agreement?	☒ Yes ☐ No
Have you been promised anything that is not stated in your written plea agreement?	☐ Yes ☒ No
Has your lawyer, the State, or anyone threatened or forced you to enter this plea?	☐ Yes ☐ No

Do you understand that because you are pleading guilty you will not have a trial, and you therefore waive (give up) your constitutional rights:

(1) to have a lawyer represent you at trial;
(2) to be presumed innocent until the State can prove each and every part of the charge(s) against you beyond a reasonable doubt;
(3) to a speedy and public trial by jury;
(4) to hear and question the witnesses against you;
(5) to present evidence in your defense;
(6) to testify or not testify yourself; and,
(7) to appeal, if convicted, to the Delaware Supreme Court with assistance of a lawyer? ☒ Yes ☐ No

TOTAL CONSECUTIVE MAXIMUM PENALTY: Incarceration: Fine:

NON-CITIZENS: Are you aware that conviction of a criminal offense may result in deportation/removal, exclusion from the United States, or denial of naturalization?	☐ Yes ☐ No
Is there a **minimum mandatory penalty**?	☐ Yes ☐ No
Is there a **mandatory revocation of driver's license or privileges** as a result of your plea?	☐ Yes ☐ No
If so, what is the **length of revocation?** _____years	
Has anyone promised you what your sentence will be?	☐ Yes ☒ No
Were you on **probation or parole** at the time of this offense? (A guilty plea may constitute a violation.)	☐ Yes ☐ No
Do you understand that a guilty plea to a felony will cause you **to lose your right to vote, to be a juror, to hold public office, to own or possess a deadly weapon,** and other **civil rights**?	☐ Yes ☐ No
Is this an offense which results in the loss of the **right to own or possess a deadly weapon**?	☐ Yes ☐ No
Are you satisfied with your lawyer's representation of you, and that your lawyer has **fully advised you of your rights**?	☐ Yes ☐ No
If this is an offense which requires **registration as a sex offender**, has your lawyer discussed those requirements with you?	☐ Yes ☐ No
Have you read and understood all the information in this form?	☐ Yes ☐ No
Are all your answers truthful?	☐ Yes ☐ No

_____ _____ _____
Defense Counsel Date Defendant

_____ _____
Print Name Print Name

Copies: Superior Court, Attorney General, Attorney for Defendant, Defendant

Revised May 21, 2015

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE) I.D. NO. 1505015401
)
v.)
)
ADRIN SMACK,)
Defendant.)

BEFORE: HONORABLE JOHN A. PARKINS, JR.

APPEARANCES:

SONIA AUGUSTHY, ESQ.
Deputy Attorney General
For the State

CHRISTOPHER S. KOYSTE, ESQ.
For the Defendant

GUILTY PLEA TRANSCRIPT
MARCH 31, 2016

LISA A. MASCIANTONIO, RPR
SUPERIOR COURT OFFICIAL REPORTERS
500 N. King Street
Wilmington, Delaware 19801
(302) 255-0769

MARCH 31, 2016
Courtroom No. 6F
9:57 A.M.

PRESENT:

As noted.

- - - - -

THE COURT: Have a seat, sir.

MS. AUGUSTHY: Good morning, Your Honor.

THE COURT: Good morning, Ms. Augusthy. How are you?

MS. AUGUSTHY: I'm doing well.

Thank you for setting time aside this morning for what has now become a plea hearing in the matter of State of Delaware versus Adrin Smack.

It is Case 1505015401.

As Your Honor is aware, this is a large Indictment. Mr. Smack has agreed to plead guilty to the following Counts: Count 36, drug dealing heroin. It is a Class B felony, Count 37, drug dealing heroin, again, a Class B felony, Count 39 should read possession of a firearm by a person prohibited, as indicted, it is a Class B felony, Count 40, drug dealing heroin, this is a Class D felony, Count 122, drug dealing heroin, a Class D

felony, and finally, Count 238, conspiracy in the second degree, a Class G felony.

The parties are requesting a presentence investigation to prepare for sentencing. However, there has been an agreement reached. Mr. Smack has agreed that he will request no less than eight years of unsuspended Level V time. In turn, the State has agreed that it will cap its recommendation of unsuspended Level V time to 15 years.

This agreement is based upon the early acceptance of responsibility.

The State would request that the Court keep the no contact with indicted co-defendants provision in place.

Further, Mr. Smack has agreed that he will forfeit his interest in the cash, firearm, vehicles, paraphernalia and drug proceeds seized pursuant to the search warrants in this case.

This plea agreement was scheduled to expire on March 25th. However, that was Good Friday and we are now before Your Honor on March 31st b[illegible] agreement of the parties.

THE COURT: Thank you.

Mr. Koyste.

MR. KOYSTE: Good morning, Your Honor.

THE COURT: Good morning.

MR. KOYSTE: That is a correct recitation of the plea.

Let me create a record as to how we got there.

I have been meeting mostly with Mr. Smack through video conferences -- this is down in Smyrna -- and our last meetings have been focusing on analyzing the evidence, but also the plea discussions because we had to have a plea document. We had a video session yesterday in which we went through the entirety of the truth in sentencing document, the entirety of the plea agreement.

Mr. Smack is aware of the aggregate statutory maximum here being 76 years. He also understands that the recommended range that the parties are asking the Court to consider is just that, a recommendation, and Your Honor has the ability to go above that recommended range, theoretically up to the statutory maximum, or below

it.

So all of the boxes on the truth in sentencing guilty plea form were checked off by me except for the bottom two which were checked off this morning by Mr. Smack as he read through the entirety of it.

THE COURT: Thank you.

MR. KOYSTE: With that being noted, Your Honor, I believe Mr. Smack is ready for the Court's colloquy.

THE COURT: Sir, would you please stand.

I must ask you a series of questions in order to determine if your plea is knowing, intelligent and voluntary.

Do you have any difficulty in hearing me or in understanding what is happening in court this morning?

THE DEFENDANT: No, sir.

THE COURT: Are you under the influence of any illegal drugs or alcohol?

THE DEFENDANT: No, sir.

THE COURT: Have you consumed any illegal drugs or alcohol within the last 24 hours?

6

THE DEFENDANT: No, sir.
THE COURT: Are you currently taking any medications?
THE DEFENDANT: No, sir.
THE COURT: Have you been prescribed any medications, Mr. Smack, which you are not taking?
THE DEFENDANT: No, sir.
THE COURT: Do you have any physical problems which you believe should keep you from being in court this morning?
THE DEFENDANT: No, sir.
THE COURT: I am going to ask Mr. Koyste to place in front of you the plea agreement.
Do you have that, sir?
THE DEFENDANT: Yes, sir.
THE COURT: Did your Counsel explain this document to you?
THE DEFENDANT: Yes, sir.
THE COURT: Did you get a chance to ask him any questions that you might have about it?
THE DEFENDANT: Yes, sir.
THE COURT: If you asked him any questions, did he answer them to your satisfaction?

7

THE DEFENDANT: Yes, sir.
THE COURT: Do you understand this document?
THE DEFENDANT: Yes, sir.
THE COURT: Is that your signature at the bottom?
THE DEFENDANT: Yes, sir.
THE COURT: Now, Mr. Smack, does this document contain the entire agreement between you and the State?
THE DEFENDANT: Yes, sir.
THE COURT: Do you have any side deals with the State which are not written down on this piece of paper?
THE DEFENDANT: No, sir.
THE COURT: The next document I would like you to take a look at is the truth in sentencing form.
Do you have that in front of you?
THE DEFENDANT: Yes, sir.
THE COURT: Once again, did Mr. Koyste explain this document to you?
THE DEFENDANT: Yes, sir.
THE COURT: Did you get a chance to ask him

8

any questions that you might have about this one?
THE DEFENDANT: Yes, sir.
THE COURT: If you asked him any questions, did he answer them to your satisfaction?
THE DEFENDANT: Yes, sir.
THE COURT: Mr. Smack, do you understand this document?
THE DEFENDANT: Yes, sir.
THE COURT: Is that your signature at the bottom?
THE DEFENDANT: Yes, sir.
THE COURT: Now, with the exception -- you'll see on this document there's a series of questions, the answers to which are checked off as yes or no.
With the exception of the last two, did Mr. Koyste check these off for you?
THE DEFENDANT: Yes, sir.
THE COURT: Did he ask you the questions and then you gave him the answers?
THE DEFENDANT: Yes, sir.
THE COURT: And when you gave him the answers, were you being truthful and complete with

9

him?
THE DEFENDANT: Yes, sir.
THE COURT: You checked off the last two. Is that correct, sir?
THE DEFENDANT: Yes, sir.
THE COURT: Are your answers truthful and complete?
THE DEFENDANT: Yes, sir.
THE COURT: Did Mr. Koyste explain to you that if I accept your plea, the Court could send you to jail for up to 76 years?
THE DEFENDANT: Yes, sir.
THE COURT: Did he also explain to you that the Court could send you to -- must send you to jail for two years?
THE DEFENDANT: Yes, sir.
THE COURT: Did he explain to you that the Court is not obligated to follow or is not bound by the recommendation that will be made by the State?
THE DEFENDANT: Yes, sir.
THE COURT: And did he also explain to you that I am not bound by the recommendation that your attorney will make?

10

THE DEFENDANT: Yes, sir.
THE COURT: Did anyone promise you, Mr. Smack, what sentence I will impose?
THE DEFENDANT: No, sir.
THE COURT: Did anyone promise you anything at all in exchange for your plea?
THE DEFENDANT: No, sir.
THE COURT: Did anyone threaten you or try to force you into making this plea?
THE DEFENDANT: No, sir.
THE COURT: Have you previously been convicted of a felony?
THE DEFENDANT: No, sir.
THE COURT: Do you understand that if I accept your plea, you will be a convicted felon?
THE DEFENDANT: Yes, sir.
THE COURT: Do you know, as a convicted felon, you may not vote, hold public office or serve on a jury?
THE DEFENDANT: Yes, sir.
THE COURT: Perhaps more importantly, as a convicted felon, you will not for the rest of your life be allowed to possess, own or control a deadly

11

weapon.
THE DEFENDANT: Yes, sir.
THE COURT: Now, do you understand that if you plead guilty, there will be no trial?
THE DEFENDANT: Yes, sir.
THE COURT: And you do realize that you have the absolute right to plead not guilty and to insist that there be a trial?
THE DEFENDANT: Yes, sir.
THE COURT: Mr. Smack, you have certain valuable Constitutional rights which are summarized near the top of the truth in sentencing form.
Did Mr. Koyste explain these to you?
THE DEFENDANT: Yes, sir.
THE COURT: Do you understand these rights?
THE DEFENDANT: Yes.
THE COURT: Do you realize that if you plead guilty, you will waive these rights?
THE DEFENDANT: Yes, sir.
THE COURT: Are you willing to waive these Constitutional rights?
THE DEFENDANT: Yes, sir.
THE COURT: Okay. What I'm going to do is

12

ask you some questions about the Counts in the Indictment to which you have decided to plead guilty. I will summarize them one at a time and I will ask you some questions about each one.
And we will begin with Count 36. This is a drug dealing charge. And the Grand Jury has alleged that on or about April the 22nd of 2015 in this County, you knowingly possessed with intent to deliver four grams or more of morphine, opium or heroin, or any mixture contained in them.
How do you plead to this, guilty or not guilty?
THE DEFENDANT: Guilty.
THE COURT: Are you pleading guilty to this, Mr. Smack, because you are, in fact, guilty?
THE DEFENDANT: Yes, sir.
THE COURT: Now, is it true, sir, that on or about April the 22nd of 2015 in this County, you possessed four grams or more of morphine or heroin?
THE DEFENDANT: Yes, sir.
THE COURT: And you knew that you possessed them at the time. Is that correct, sir?
THE DEFENDANT: Yes, sir.

13

THE COURT: And is it also true that at the time that you possessed it, you intended to deliver it to someone else?
THE DEFENDANT: Yes, sir.
THE COURT: Okay. The next Count is Count 37. This alleges that on or about April the 22nd of 2015 in this County, you knowingly possessed with intent to deliver four grams or more of morphine, opium or heroin, or any mixture containing them.
How do you plead to this, guilty or not guilty?
THE DEFENDANT: Guilty.
THE COURT: Are you pleading guilty to this because you are, in fact, guilty?
THE DEFENDANT: Yes, sir.
THE COURT: Now, is it true, sir, that on or about April the 22nd of 2015 in this County, you possessed four grams or more of heroin?
THE DEFENDANT: Yes, sir.
THE COURT: And you knew it was heroin?
THE DEFENDANT: Yes, sir.
THE COURT: And you intended to deliver it

at the time you possessed it?
THE DEFENDANT: Yes, sir.
THE COURT: Counsel, how is this Count any different than Count 36?
MS. AUGUSTHY: Your Honor, it's materially not different; however, the State, if we had gone to trial, would prove that these offenses had taken place at different times.
THE COURT: Different times of the day?
MS. AUGUSTHY: So a delivery was made, there was surveillance and then there was a subsequent delivery.
THE COURT: Mr. Smack, I want to ask you: You pled guilty to Count 36 to possessing with intent to deliver four grams or more of heroin, and in Count 47, you pled guilty to possessing with intent to deliver four grams or more of heroin. It is alleged that these offenses both occurred on April the 22nd of 2015. Did they occur at different times of the day?
THE DEFENDANT: Well, you know, yes, sir, but I'm not really knowing times, but I believe so.
THE COURT: Okay.

The next is Count 39, possession of a firearm by a person prohibited.
The Grand Jury has alleged that on or about April the 22nd and April the 23rd of 2015, in this County, you knowingly purchased, owned, possessed or controlled a firearm after having been adjudicated a delinquent in the Family Court of robbery in the second degree, which if you had been an adult, would have been a felony, and at the time of this offense, you had not reached your 25th birthday.
How do you plead to this, guilty or not guilty?
THE DEFENDANT: Guilty.
THE COURT: Are you pleading guilty to this, Mr. Smack, because you are, in fact, guilty?
THE DEFENDANT: Yes, sir.
THE COURT: Now, is it true that sometime on April the 22nd or April the 23rd, 2015, in this County, you had in your possession or you owned a firearm?
THE DEFENDANT: Yes, sir.
THE COURT: And is it also true that in

2008, you had been convicted of robbery in the second degree and declared delinquent in the Family Court?
THE DEFENDANT: Yes, sir.
THE COURT: And is it also true that as of April 22nd and 23rd of last year, you had not yet reached your 25th birthday?
THE DEFENDANT: Yes, sir.
THE COURT: Then the next Count is Count 40, and this is a drug dealing Count.
And this alleges that on or about January 29th of 2015, in this County, you knowingly delivered morphine, opium or heroin, or any mixture containing morphine, opium or heroin.
How do you plead to this, guilty or not guilty?
THE DEFENDANT: Guilty.
THE COURT: Are you pleading guilty to this, Mr. Smack, because you are, in fact, guilty?
THE DEFENDANT: Yes, sir.
THE COURT: Now, is it true that on or about January the 29th of 2015, in this County, you knowingly possessed heroin?

THE DEFENDANT: Yes, sir.
THE COURT: And at the time you possessed it, you intended to deliver it?
THE DEFENDANT: Yes, sir.
THE COURT: Okay.
The next Count is Count 122, and this is a drug dealing charge.
And this alleges that on or about April the 23rd of 2015, in this County, you knowingly delivered morphine, opium or heroin, or any mixture containing one of those.
How do you plead to this, guilty or not guilty?
THE DEFENDANT: Guilty.
THE COURT: Are you pleading guilty to this, Mr. Smack, because you are, in fact, guilty?
THE DEFENDANT: Yes, sir.
THE COURT: Now, is it true, sir, that on or about April the 23rd, 2015, in this County, you knowingly delivered morphine or heroin to someone?
THE DEFENDANT: Yes, sir.
THE COURT: All right.
And then the last Count is 238, and this is

18

a conspiracy charge.
And the Grand Jury has alleged here that you, Kevin Coleman, Kenneth Coleman, Charles Coleman, Corey Brittingham, Mik'Trell Spriggs, Kevin Gale, Al-Ghaniyy Price, Casie Huber, Tyerin Anderson, Tiffany Smack, Melissa Dorsey, Desiree Miller, Tyrone Williams, Felicia Brown, Andre Reed and Michael Kinlaw, on or about April -- between April the seventh of 2015 and May the 28th, 2015, in this County -- between April the seventh of 2015 and May the 28th of 2015, in this County, when intending to promote or facilitate the commission of the felony of drug dealing, agreed with one another to commit this crime, and that one or all of you did commit an overt act in pursuance of this agreement by engaging in the conduct which constituted drug dealing, or an attempt to commit drug dealing, or that one or all of you committed some other substantial step in pursuance of your agreement.
THE DEFENDANT: Yes, sir.
THE COURT: How do you plead, guilty or not guilty?

19

THE DEFENDANT: Guilty.
THE COURT: Are you pleading guilty to this because you are, in fact, guilty?
THE DEFENDANT: Yes, sir.
THE COURT: Now, is it true that the individuals whose names I've read and you agreed that you would commit drug dealing?
THE DEFENDANT: Yes, sir.
THE COURT: Okay. Let me reread these names for you, if you wish.
MR. KOYSTE: Your Honor, actually something that we discussed, he -- the agreement would be at least one of them.
THE COURT: At least one of them?
MR. KOYSTE: Yes.
THE COURT: The agreement with at least one of them to commit drug dealing?
THE DEFENDANT: Yes, sir.
THE COURT: And at least one of you with whom you agreed did something to commit drug dealing.
Is that true, sir?
THE DEFENDANT: Yes, sir.

20

THE COURT: Okay.
Does the State know of any reason why I should not accept this plea?
MS. AUGUSTHY: It does not, Your Honor.
THE COURT: How about you, Mr. Koyste?
MR. KOYSTE: No, Your Honor.
THE COURT: Mr. Smack, it is the judgment of this Court that your plea is knowing, intelligent and voluntary, and that there was a factual basis for your plea and, therefore, you are adjudged guilty of the felonies set forth in Counts 36, 37, 39, 40, 122 and 238.
Now, because you have pled guilty to an offense which carries with it a minimum mandatory period of incarceration of two years, your bail is revoked.
Sentencing will be set for May the 13th.
Good luck to you, sir. I'll see you then.
MR. KOYSTE: Your Honor, if I can just add on one other note on the record?
THE COURT: Yes.
MR. KOYSTE: Your Honor's recitation of what the minimum mandatory would be consistent with what

21

my position is in light of the creation of 3901 allowing concurrent sentences.
My representations to Mr. Smack is I can't be a hundred percent sure that that would be the end result, that Your Honor would reach that conclusion; there may be some subsection that we're missing; it may be a four-year minimum mandatory, but I've made Mr. Smack aware of that.
So it would be our position that --
THE COURT: Mr. Koyste, I'm a little unclear what you're telling me, and it's my fault.
MR. KOYSTE: Oh. It's that he pled guilty to drug dealing Tier IV two Counts.
THE COURT: Yes.
MR. KOYSTE: So that would mean the State could take the position it's a four-year minimum mandatory, that 3901 would not apply to that Count, so that you would need to serve each of those two-year sentences.
THE COURT: Okay.
MR. KOYSTE: We had a dialogue about this just today, and I've had a few dialogues with my client about this.

It's my position that we would argue 3901 controlled and two years would be the minimum mandatory. It very well might be an esoteric question, anyway, because I'm not going to ask the Court for anything under eight years under our plea agreement.

THE COURT: Ms. Augusthy.

MS. AUGUSTHY: Your Honor, 3901 is the amendment to the statute that allows the Court, for certain minimum mandatories, to have them run concurrent.

We did double check the statute. It appears that drug dealing is not on the list of charges for which the Court does not have discretion --

That was very poorly worded.

The Court would have discretion to make those minimum mandatory sentences concurrent, if the Court so chose, pursuant to the amendment.

THE COURT: Would you stand again, Mr. Smack?

I just want to make sure that you're aware of what we're talking about. I'll try to put it in English if I can.

And that is, that you understand that there is an argument to be made by the State, if it chooses to do so, that you would be subject to a four-year minimum mandatory sentence, not a two-year minimum mandatory sentence.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you understand that I haven't made up my mind at all about that, and it could be that I will agree with the State that the minimum mandatory is four years.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Does that cause you to wish to -- does that make you wish to withdraw your guilty pleas?

THE DEFENDANT: No, sir.

THE COURT: Very well. Thank you.

All right.

MR. KOYSTE: Your Honor, last question.

I'm looking at my schedule trying to figure out what I'm going to do in May. If I figure it out by mid next week that I need another date,

should I request by e-mailing Your Honor?

THE COURT: Yes, please, but it won't be any earlier than May the 13th.

MR. KOYSTE: Absolutely, Your Honor.

THE COURT: Okay.

MR. KOYSTE: Thank you.

THE COURT: Good luck to you, sir.

THE DEFENDANT: Thank you.

MS. AUGUSTHY: Thank you, Your Honor.

MR. KOYSTE: Thank you, Your Honor.

(Whereupon, the proceedings concluded.)

STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, Lisa A. Masciantonio, Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this 25th day of January, 2017.

/s/ Lisa A. Masciantonio
LISA A. MASCIANTONIO, RPR

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

- - - - -

STATE OF DELAWARE	:	I.D. No. 1505015401
vs.	:	
ADRIN SMACK,	:	
Defendant	:	Sentencing Hearing June 22, 2016

- - - - -

BEFORE: HONORABLE JOHN A. PARKINS, JR., JUDGE

APPEARANCES:

SONIA AUGUSTHY, ESQ.
Deputy Attorney General
For The State

CHRISTOPHER S. KOYSTE, ESQ.
For Defendant

* * *

HEARING TRANSCRIPT
JUNE 22, 2016

* * *

2

Courtroom 4C
9:14 a.m.
* * *
THE COURT: Sentencing of Adrin Smack.
MR. KOYSTE: Good morning, Your Honor.
THE COURT: Miss Augusthy.
MS. AUGUSTHY: Thank you, Your Honor.
The State formally moves the sentencing of Adrin Smack on Count 36, Drug Dealing Heroin, Count 37, Drug Dealing Heroin, Count 39, Possession of a Firearm by a Person Prohibited, Count 40, Drug Dealing Heroin, Count 122, Drug Dealing Heroin and Count 238, Conspiracy in the Second Degree.
Your Honor, pursuant to the Plea Agreement, as the Court's aware, Mr. Smack has agreed that he will request no less than 8 years of unsuspended Level V time. The State will request no more than 15 years of unsuspended Level V time.
Your Honor, by way of background in this case, during the period of time in which the FBI Task Force was intercepting Mr. Smack's phone calls, on April 18th, police intercepted a phone call between defendant and a young man named

3

Al-Ghaniyy Price. Price was just barely 18 years old at the time of this call.
During the call, Price told Smack that he was hiding something behind a radiator in his house. He told Smack that it would be in his opening behind the radiator. Mr. Smack then counselled Price to make sure that no one watched him hide the item.
Just a few minutes later, like a good soldier, Mr. Price then texted Mr. Smack back and said, "Yo, Bro, it's there."
How would Mr. Smack, who lives on 4th Street in the City of Wilmington, who lived there throughout this investigation, despite his assertions now to this court that he was homeless -- he lived there with Akia Harley (ph) and her mother and the children -- how would he transport his drugs from 4th Street to Sparrow Run and avoid detention?
As Your Honor knows, because the Court took a plea from his sister, Tiffany Smack, he would have somebody else drive him, somebody with no criminal history, who had no reason to be stopped

4

by the police.
Then, he would, because he's undeniably smart, have someone else within the community of Sparrow Run, hold on to his drugs and guns, and so, the police searched the home of Al-Ghaniyy Price, which was on Kemper Drive. Many of the allegations of drug dealing in this case took place on Heron Court, Raven Turn, Kemper Drive, a new blocks from there.
When police searched this house, this is what they found: A military style tactical vest in a trash bag outside the back door of the residence, $11,853 inside a shoe box. In a different shoe box, police found $4,255. They also found a black Taurus .9-millimeter handgun, loaded with one round in the chamber.
THE COURT: Was there any rounds in the clip?
MS. AUGUSTHY: Yes, fully loaded; a silver .32-caliber revolver.
Then, inside one duffle bag, police found 777 bundles of Heroin, and Your Honor, as long as I been doing drug cases, I'm really bad at this math.

5

That's 10,101 bags of Heroin, which amounts to 151.515 grams of Heroin.
THE COURT: Do you have any idea what the street value of that this?
MS. AUGUSTHY: Your Honor, the officers may know. I don't, off the top of my head.
I will say, Your Honor, that SENTAC has a specific category for weights of 100 grams of Heroin or more, Page 126 of SENTAC. It's what's referred to as a super weight drug, and that sentencing range is 8 to 15 years.
Inside yet another bag in this residence on Kemper Drive, police found an additional 26 bundles. So, an additional 328 bags.
DNA, of course, was run on those guns, and the result provided, quote, "strong support that Mr. Smack was a contributor to the DNA on the magazine of the Taurus."
Now, at the time of sentencing, this Court has received a letter from 73-year-old Dorothy Taylor, and she's a neighbor of Mr. Smack and affectionately refers to him as A.J. Well, He goes by a different name on the streets. He's known by

6

others as A.K.

Mr. Smack now tells this Court that he's not a drug king pin, that the police got the wrong guy. No one wants to be a drug king pin in here, in this courtroom, in the walls in which Your Honor is presiding. No one wants --

THE COURT: Did he identify for the State the king pins, so to speak?

MS. AUGUSTHY: He gave a statement to the police where he admitted to selling Marijuana only.

THE COURT: Okay.

MS. AUGUSTHY: The estimate from the Task Force officers, who are present this morning, for that Heroin is $48,750, and it's listed as a conservative estimate for the street value of those drugs.

THE COURT: Thank you.

MS. AUGUSTHY: In court, instead of wanting to be identified as a drug king pin, someone to be afraid of, he wants to be identified as someone with a difficult upbringing. He says that he's homeless. The phone calls do not support that. They simply do not. He lived on 4th Street. He

7

lived with his children. He traveled to Sparrow Run every day. It was like his job.

You know who also doesn't care about the why, and the why is the letter that's entitled by Mr. Smack to this Court? The struggling families who have to live in Sparrow Run. People who don't have the money or the resources, much like Mr. Smack's mother says in her letter to the Court, people who can't afford to live anywhere else. These are homes. There are toys outside. There's a park, and these children have to play with drug paraphernalia everywhere, and they have to play with drug dealers that carry guns on their streets.

How many shootings does this Court see? How many homicides, how many sentencings take place because of guns and drugs? And this isn't just speculation that Mr. Smack is violent.

In 2008, a 16-year-old Adrin Smack had a loaded .380 Colt automatic handgun, again, in Sparrow Run, but this was a very different Adrin Smack seven years ago. This was an Adrin Smack who was very nervous, very nervous when the police approached him after hearing shots fired. The

8

police then questioned him, and he admitted to having that gun, and he went through Family Court, where efforts were made to rehabilitate him. Unfortunately, that same year he was arrested for Robbery First Degree, the allegations are with a BB gun. Those charges were dropped.

He was later indicted in this court, again, as a juvenile on Burglary Second. The State, looking at his age, and again, hoping to rehabilitate him, sent the case back to Family Court. Mr. Smack was then sentenced to a program called the Victim Restoration & Community Mediation Program.

The next year, he was arrested for Carjacking First Degree; charges again dropped. Commonality between the Carjacking and the Robbery is that in those cases, a victim is involved, and in each case, a victim who lives in Sparrow Run.

Mr. Smack learned from his police interaction. He learned from his time in juvenile detention, but he did not learn, unfortunately, how to restore his community or turn his life around. Instead, he learned how to become a better

9

criminal.

He's heard on calls talking about surveillance, encouraging people to be mindful of the police, wondering if they're undercover cars, directing and redirecting his buyers to different locations. He was very aware of the police.

It certainly did not take long for people to learn that the legal system in the State of Delaware punishes based upon tiers and weight. The message being don't get stopped with a lot on you. Keep your drugs in a residence on Kemper Drive, where an 18-year-old lives, one who is under the radar, not known to police.

In here, Your Honor, he is stripped of his power. He's been stripped of his money, his guns and his drugs. This has been done by the long and hard work of the FBI Task Force, but they didn't just happen upon Mr. Smack. This is a person who has been known to the police for a long time.

The indictment in this case named the following people as having possessed drugs purchased from Adrin Smack: Aaron Alexander, Amy Suber, Danielle Terry, Jessie Jorge, Bryan Shahadi,

10

Casie Huber, Jesus Vasquez, Joshua Taylor, Louis Visco, Marco Acosta Medina, Michael Dorn, Robin Spicer, William Roberts, Ryan Kasees and Sherry White.

THE COURT: Count 15.

MS. AUGUSTHY: And many of the people, Your Honor, are still in Drug Diversion, they are still on probation, and the State is making all efforts to help and rehabilitate these people who have an illness. They have an addiction, and Your Honor and Judge Herlihy have heard countless stories of mothers who love these people, crying in these courtrooms about the devastation that the Heroin that these people have been addicted to has ruined their lives; children who now have parents that have been absent, and continue to be, because of their addictions.

The State is requesting that this Court use its discretion and sentence Adrin Smack to a total of 15 years at Level V.

As to Count 36, which is Criminal Action 15-07-0734, 10 years at Level V, suspended after 4 years, 2 years of which is a minimum mandatory

11

term of imprisonment.

THE COURT: Wait a second. Run that by me again.

MS. AUGUSTHY: Count 36, Your Honor, this is a Class B Drug Dealing.

THE COURT: It's a 734?

MS. AUGUSTHY: Yes.

THE COURT: Okay, and what is your recommendation?

MS. AUGUSTHY: 10 years at Level V, suspended after 4 years, 2 years of which is minimum mandatory, for 18 months at Level IV within DOC discretion.

THE COURT: Okay.

MS. AUGUSTHY: Followed by 18 months at Level III.

The State --

THE COURT: You want 36 months of probation?

MS. AUGUSTHY: Correct.

The State requests the identical sentence for Count 37, which is an identical charge, criminal action number ending 510.

THE COURT: Okay.

12

MS. AUGUSTHY: On Count 39, Possession of a Firearm by a Person Prohibited --

THE COURT: Hold on a second. Just a minute here.

MS. AUGUSTHY: Sure.

THE COURT: That's 737?

MS. AUGUSTHY: It is, 737.

The firearm charges in this State are interesting, because you're prohibited if you're a convicted felon, and it really depends on what you're convicted of.

But Mr. Smack's history, the large quantity of drugs here, he's in a different category than someone who's got a Felony Theft from 10 years ago that comes before this Court having a firearm, and the Court cannot suspend jail time on this charge; and so the State is asking a sentence of 4 years at Level V.

THE COURT: This is for 737?

MS. AUGUSTHY: Yes, Count 39.

THE COURT: Okay.

MS. AUGUSTHY: As to Count 40, which is drug dealing in Heroin, a Class D felony, again, knowing

13

that getting caught with a lot of drugs on you at one time is not smart, we're talking about each individual sale to some of those people that were referenced earlier.

Class 40, a Class D Drug Dealing, the State's seeking a sentence of 8 years at Level V, suspended after 18 months for 18 months at Level IV, followed again by 18 months at Level III.

THE COURT: All right.

MS. AUGUSTHY: The State is asking, Your Honor, to impose an identical sentence on Count 122, criminal action number ending 767. It is an identical charge, and the State asks for an identical sentence of 18 months at Level V, followed by 3 years of probation.

Finally, as to Count 238, Conspiracy in the Second Degree, the State asks, Your Honor, to sentence Mr. Smack to 2 years at Level V, suspended immediately for Level III probation.

THE COURT: Okay.

MS. AUGUSTHY: Additionally, the State asks, Your Honor, to order no contact with Sparrow Run; that he forfeit the money seized, and that all

14

Level V time imposed run consecutive, but all probation run concurrent.

THE COURT: Okay. There are some consolidation issues, are there, with the Court of Common Pleas?

MS. AUGUSTHY: Yes.

He has a pending VOP in the Court of Common Pleas, and the State would ask, if the Court is inclined, to just discharge it.

THE COURT: Okay.

Mr. Koyste.

MR. KOYSTE: Your Honor, I need to briefly discuss a few matters with Miss Augusthy and also review through the indictment before I make my presentation. Would it be appropriate to take a 5- to 15-minutes recess?

THE COURT: If that's what you would like, we'll do that.

MR. KOYSTE: Thank you, Your Honor.

THE COURT: We'll stand in recess for 10 minutes.

* * *

(Court recessed at 9:33 a.m.)

15

* * *

(Court reconvened at 9:45 a.m.)

* * *

MR. KOYSTE: Thank you very much, Your Honor.

THE COURT: Yes.

MS. AUGUSTHY: Your Honor, while Mr. Koyste looks at the indictment, if I may make a record, because there was some question during the break about the Brady obligations.

If the record could please reflect that the search warrant for Kemper Drive, referenced during the State's presentation, was provided in discovery last July. Search warrant returned from Kemper Drive was provided also in discovery. Mr. Price, the resident at Kemper Drive, invoked.

The phone calls between Mr. Smack and Mr. Price were also provided in discovery.

The DNA lab report regarding which items from those Kemper Drive guns, included and excluding Mr. Smack, was provided to Counse' :- discovery.

Additionally, in order just to satisfy any

16

additional questions, Mr. Koyste spoke directly with both Chief Investigating Officers to ask if there was any additional known to them, not shared with Counsel, regarding the items found in Kemper Drive and whether or not they belonged to anyone else, and the responses was that they have no such information.

THE COURT: Thank you, Counsel.

Mr. Koyste.

MR. KOYSTE: Yes, Your Honor, and thank you.

Perhaps the State could also -- I just also wanted clarified, I believe the State's position is within the sentencing recommendations they made for the count, for each of the individualized counts, that the -- any counts would be made concurrent in order to aggregate to an actual Level V sentence --

THE COURT: I intend -- it's my practice, in most instances, to run the Level V time concurrently and the probations -- I mean consecutively -- and the probations concurrently.

MR. KOYSTE: Understood, Your Honor.

Let me begin with, what's interesting is the way the Sentencing Hearing began, Your Honor,

17

because I come from a background where I was hanging out for 13 years over in Federal Court, and we have a concept there which -- for sentencing which is called Relevant Conduct. Relevant Conduct is where if the State can, and they have to give notice and within a Presentence Report, make an argument under preponderance of the evidence standard, then an individual is responsible for counts beyond what they were convicted of.

Relevant Conduct used to rule the day in Federal Court until the United States Supreme Court came along in 2005 and said the guidelines are just recommendations, and so, in some ways, Relevant Conduct has less meaning, but the State essentially began an argument here on Relevant Conduct of -- there was the search warrant, based upon a phone call, and then the fruit of the search warrant was a lot of different things; and that's why I wanted to inquire of the State whether there was anything that could be indicative of anyone also having a possessory interest over any of those items, and it's because Brady is an ongoing obligation. So, you don't meet Brady necessarily by just doing

18

something a year ago or six months ago. It's the kind of thing -- and that's why I'm not trying to be disrespectful. I just asked is there anything more.

THE COURT: That's perfectly --

MR. KOYSTE: And -- but the answer that we got is actually what I was thinking.

There's -- other than the phone call in which Mr. Smack is speaking to Mr. Price and directing him to hide one item, that's the only evidence that necessarily links Mr. Smack to any of the items that is found within the residence, and so --

THE COURT: Well, what about the plea?

MR. KOYSTE: The plea itself is not attenuated to the items that were found within that residence. In fact, even the firearm -- and I just double-checked it right here -- the firearm, it's a generic firearm. It's not necessarily even identifying that Taurus. I didn't expect the sentencing to flow this way with a concept relevant conduct argument. It did.

THE COURT: Okay.

19

MR. KOYSTE: And here's my response back, Your Honor.

THE COURT: Sure.

MR. KOYSTE: First off, Mr. Smack wasn't speaking out of school. He described himself not as a king pin. The totality of the record supports the conclusion that Mr. Smack is absolutely not a king pin.

Why, Your Honor? His phone calls clearly demonstrate, overwhelmingly demonstrate, he is a small-time retail Heroin salesman. That's it. That's the reason why the evidence of the individuals who were going to -- would have testified, if there was a trial, and we certainly didn't put the State to the test on that, would have been about smaller amounts of Heroin that were sold by Mr. Smack.

Now, we all have some experience with the drug culture, and it's not because we purchase Heroin, Your Honor. It's because we deal in these types of cases. So, when you have an individual whose exposure that the evidence demonstrates, rather than just conjecture, is a retail salesman,

20

there'd be no reason to be thinking that you have someone that is a wholesale salesman of the type of an individual that would have such a large amount of Heroin being stored at this residence.

Mr. -- what Mr. Smack's responsibility for, in relation to what was found in the residence, is the Taurus handgun, essentially, the firearm count that he pled guilty to, even though it's not specified. It's a generic handgun. If you have an individual who is a wholesale Heroin salesman, the last thing in the universe they're doing, especially if they're weary of law enforcement, is doing retail sales.

Retail sales is the way that most of these individuals end up getting caught, and it would be the thing that a wise person would be -- would never be doing, especially because the profit margin is low.

If Mr. Smack was a wholesale salesman of Heroin, wouldn't it have been picked up on the series of telephone calls that there were? The fact that there's nothing indicative of a wholesale sale of Heroin, there's no evidence to support

21

that, all we have is this conjecture just thrown out today, and that's why I ask Your Honor to sentence Mr. Smack for what he did.

THE COURT: Let me ask you this. Are you saying then that I cannot consider, when I sentence him, that there was in excess of $15,000 in U.S. currency found at Kemper Drive?

MR. KOYSTE: Absolutely, Your Honor. It has not been demonstrated, even under a preponderance of the evidence, that Mr. Smack is responsible for it. This is, in essence, as much as I hate to say it, Your Honor, this is sandbagging. We show up at a Sentencing Hearing, and I'm being hit with an argument that's overwhelming, that's beyond the indictment, with also, Your Honor, no time to prepare for it, and especially --

THE COURT: Are you asking me to continue this sentencing?

MR. KOYSTE: No. Well, Your Honor, I'm asking if Your Honor believes that this has not been demonstrated under preponderance of the evidence standard, and I have more argument to highlight on that, then I think we should at least

22

have the ability to proceed forward without further delay of sentencing, but if Your Honor believes that more -- perhaps a contested Evidentiary Hearing.

You know, we have a right under due process, Your Honor, to challenge the evidence. If the argument is being presented by the State, even at this lower standard, that my client is responsible for this, we should have notice of it. We should have an opportunity to subpoena witnesses. We should have an opportunity to subpoena evidence. That's what happens in Federal Court, Your Honor, when you have a Relevant Conduct argument that individuals are trying --

THE COURT: We're sitting here, and I don't know what happens in Federal Court is a result of the Federal Rules of Criminal Procedure or if it's a constitutional issue.

MR. KOYSTE: It's more of --

THE COURT: Hold on a second.

Miss Augusthy.

MS. AUGUSTHY: Your Honor, I have to correct the record.

23

There's been nothing said this morning by the State that was not included in the massive indictment that has been presented to this Court. All of the drugs that were found in Kemper Drive were charged to both Mr. Price and Mr. Smack, and I must correct the record that the law in the State of Delaware, pursuant to *Mayes vs. State*, 604 A.2d 839, which Counsel advises me he is aware of, very clearly indicates that this Court can consider the entire indictment at sentencing.

THE COURT: Is that correct?

MR. KOYSTE: I am in agreement that we can certainly consider the entire indictment at sentencing in a case such as this, where we -- where there's a broad amount of arguments that the State could be making, and the State could have insisted on a count on which Mr. Smack is taking responsibility for all the items found within that residence.

I don't think *Mayes vs. State* stands for the principle that -- especially when items given t^ the defense, as part of discovery, doesn't necessarily mean that the State, at the time of the

24

Sentencing Hearing, is going to make an argument that the individual should be responsible for that. Those are two different things.

But -- and if what we need to do, Your Honor, is to have every single phone call transcribed and to present it to the Court, I'll need a delay to do that. I'll need a delay to present every bit of evidence so that Your Honor can see what -- the only evidence that we have here, retail sales.

Let's just step back --

THE COURT: You have -- let's put it this way, to be perfectly frank with you. If it is permissible for me to consider the fact that there was $15,000 worth of U.S. currency, a loaded .9-millimeter handgun and approximately $48,750 worth of Heroin found at the place, assuming I can consider that, you're going to have a hard time convincing me that this was simply a retail situation.

MR. KOYSTE: Your Honor, then I need a continuance, Your Honor.

THE COURT: I'll give you -- I'm going --

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Counsel.

MS. AUGUSTHY: Can I have just a moment to speak to Mr. Koyste.

THE COURT: Yes, you may.

THE COURT: Do you want to step outside for a second, Counsel.

* * *

(Pause)

* * *

Sidebar Conference held as follows:

MS. AUGUSTHY: Your Honor, if Mr. Koyste feels that the State has somehow pulled the wool over his eyes, and that he is surprised by the State's recommendation of 15 years, based upon the conduct alleged in the indictment and provided through the discovery, the State will absolutely be considering its options to move this Court to withdraw the plea.

This -- what has been said about what was provided and Counsel being sandbagged by the State's presentation of a sentencing recommendation that is listed on the Plea Agreement is, quite frankly, surprising to the State and shocking; and

if this is the course that we are going to take, I just want to advise Counsel that the State will be exploring its options.

MR. KOYSTE: Your Honor, the State didn't sandbag me --

MS. AUGUSTHY: Those are your --

MR. KOYSTE: -- in relation to their recommendation. They sandbagged me by arguing, without notice, that Mr. Smack is going to be arguably --

THE COURT: Here's what I'm going to do.

MR. KOYSTE: -- responsible for all --

THE COURT: Hold on.

MR. KOYSTE: -- the evidence found --

THE COURT: That's fine. Be quiet. Be quiet.

I'm not satisfied that I can make a reasonable decision today. I don't want to -- I think, frankly, from what I have seen, the defendant is staring at a significant sentence. He's obviously staring at that just from the minimum mandatories.

I am going to give you an opportunity --

he's being held in default of bail --

MS. AUGUSTHY: He is.

THE COURT: -- bail now.

Okay. I'm going to give the defendant to present whatever argument it wishes to make in writing.

How long do you need, Mr. Koyste?

MR. KOYSTE: Your Honor, if I can make a suggestion, and here's where I'm coming from.

First off, I'm not debating the fact that Your Honor can take into consideration other information. I believe the State has the burden of proof, so --

THE COURT: That's fine, but what I want you to do is to give me authorities for what the State has the burden of proving.

MR. KOYSTE: Understood, understood.

THE COURT: How long do you need? Be reasonable to yourself.

MR. KOYSTE: Yes, Your Honor.

My thoughts are that an initial document indicating that the State has the burden of proof with case law to establish that, within 45 days.

If that's too much, Your Honor?

THE COURT: How about 30 days?

MR. KOYSTE: I can make 30 days work. I'm a little bit short-handed though, Your Honor, because I have --

THE COURT: Hold on a second.

Is 45 days agreeable to you?

MS. AUGUSTHY: Yes.

THE COURT: All right, 45.

MR. KOYSTE: If we can get over the first issue of whether the State has the burden to demonstrate, then I think it's actually the State who should first be presenting what their evidence is --

THE COURT: Okay. That's what you can raise in written materials. I don't want to have the argument now.

Then, would you like 45 days to respond?

MS. AUGUSTHY: Yes, Your Honor.

THE COURT: Okay. Let me get a new date for sentencing.

* * *

(Sidebar Conference concluded.)

* * *

MR. KOYSTE: My first argument is going to be --

THE COURT: I want you to make all of the arguments that are available to you in your first filing.

MR. KOYSTE: Well, Your Honor, and this is why if the State -- I would request Your Honor to allow me to make at the first filing that the State has the burden. Because if the State has the burden --

THE COURT: Mr. Koyste, here's what I want you to do. I want you to make, in your first filing, all the arguments that you believe are reasonable to make on behalf of your client. If after you receive the State's response you feel the need to file something else, then you can apply to the Court.

MR. KOYSTE: Understood, Your Honor. Thank you.

THE COURT: All right. Hold on a second now.

45 days from today is -- I'm going to say

August the 12th, but I'll tell you what, Mr. Koyste, that's a Friday. I'll give you the weekend, if you need it, to polish up your brief. So, I'll make it due August the 15th.

MR. KOYSTE: Thank you, Your Honor.

THE COURT: And then the State's response will be due October 3rd.

MS. AUGUSTHY: Thank you, Your Honor.

THE COURT: And we will have sentencing scheduled again for October the 21st, which is a Friday. That might change, depending on what the materials have to say.

Also, I find that there will be no speedy trial issues here because this is being done largely at the behest of the defendant, and I understand why, and also because the defendant would be serving a minimum mandatory period of incarceration anyway, so this will not prolong his sentencing -- the sentence that he would serve.

All right, Counsel, we'll see you then.

* * *

(Sentencing Hearing concluded at 10:02 a.m.)

* * *

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	:	
Plaintiff.	:	
	:	
v.	:	**ID No. 1505015401**
	:	
ADRIN SMACK,	:	
Defendant.	:	

NOTICE OF MOTION

TO: **Sonia Augusthy, Esquire**
Christina Kontis, Esquire
Timothy Maguire, Esquire
Deputy Attorney General
Department of Justice
820 N. French Street, 7th Floor
Wilmington, DE 19801

The Honorable John A. Parkins, Jr.
Superior Court
New Castle County Courthouse
500 North King Street
Wilmington, DE 19801

PLEASE TAKE NOTICE that the attached **Pre-Sentence Motion in Response to the Court's June 22, 2016 Order Regarding the Scope of Consideration at Mr. Smack's Sentencing Hearing** will be presented to the Court for consideration on a future date convenient to the Court and the parties.

Christopher S. Koyste, Esquire (#3107)
Law Office of Christopher S. Koyste, LLC
709 Brandywine Boulevard
Wilmington, Delaware 19809
(302) 762-5195

Dated: August 15, 2016

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	:	
Plaintiff.	:	
	:	
v.	:	**ID No. 1505015401**
	:	
ADRIN SMACK	:	
Defendant.	:	

PRE-SENTENCE MOTION IN RESPONSE TO THE COURT'S JUNE 22, 2016 ORDER REGARDING THE SCOPE OF CONSIDERATION AT MR. SMACK'S SENTENCING HEARING

COMES NOW, Defendant, Adrin Smack, by and through his counsel, Christopher S. Koyste, hereby responds to the Court's June 22, 2016 order as to what materials the Court may consider at Mr. Smack's sentencing hearing[1]. In support thereof, Defendant Smack asserts the following:

I. The Court has Broad Discretion to Consider Relevant Facts When Determining an Appropriate Sentencing.

1. A sentencing court has broad discretion as to what it may consider at a sentencing hearing.[2] In *United States v. Watts* the United States Supreme Court noted that "(h)ighly relevant-if not essential to [a judge's] selection of an appropriate sentence is the possession of the fullest

[1] Mr. Smack is not contesting the facts of his conduct for which he has plead guilty. Thus, he is not requesting to withdraw his guilty plea and has not in any way breached his plea agreement by requiring the State to prove facts beyond his criminal counts of conviction.

[2] *See Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992)(noting that "a sentencing court has broad discretion to consider "information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted . . . Sentencing courts are specifically entitled to rely upon information regarding other, unproven crimes).

information possible concerning the defendant's life and characteristics."[3] In *United States v. Grayson*, the United States Supreme Court held that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."[4]. Thus, Mr. Smack does not contest the scope of what the court may consider at his sentencing as it is readily apparent that the Court may even consider arguments of criminal conduct beyond which Mr. Smack has entered a plea of guilty. However, what is at issue is the burden of proof and whether direct testimony subject to cross examination is needed if the asserted facts could result in a significantly increased sentence.

II. The State has the Burden of Proving Any Factual Allegations at Sentencing by the Preponderance of the Evidence.

2. Mr. Smack contends that any factual assertions made by the State must be proven by the preponderance of the evidence for the Court to consider a particular fact when determining the appropriate sentence.

3. In 1992 the Delaware Supreme Court held that information, upon which a sentencing court relies for the purpose of sentencing a convicted defendant, must have "some minimal indicium of reliability beyond mere allegation."[5] Although the Delaware Supreme Court did not exactly describe what level of evidence is required for facts beyond those of the offense committed, subsequent federal and State of Delaware case law makes it clear that factual evidence presented at a sentencing hearing must satisfy the preponderance of the evidence standard.

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[3] *United States v. Watts*, 519 U.S. 148, 151-52 (1997) (quoting *Williams v. New York*, 337 U.S. 241 (1949)).

[4] *United States v. Grayson*, 438 U.S. 41, 50 (1978).

[5] *Mayes*, 604 A.2d at 843 (quoting *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982)); *see also United States v. Robin*, 545 F.2d 775 (2d Cir. 1976) (citing *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948)).

4. The Supreme Court of Delaware has held that the preponderance of the evidence standard is the appropriate standard of proof for the calculation of restitution at sentencing[6] and the appropriate standard for violation of probation hearings.[7] If preponderance of the evidence is appropriate for contesting simple monetary issues, unlike the deprivation of liberty, it is readily apparent that a preponderance of evidence must be the standard for facts asserted at a sentencing hearing. It has been widely recognized by federal court's that the due process clause is satisfied if facts proven at a criminal sentencing hearing are established under a preponderance of an evidence standard..[8] On point with Mr. Smack's assertion is the holding in *United States v. Watts*, where the United States Supreme Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[9] As such, the preponderance of the evidence standard must be the standard of proof for disputed facts at a Delaware criminal sentencing hearing.

III. A Defendant Who Contests Facts at Sentencing Can Require the State to Produce Live Witness Testimony Subject to Defendant's Right to Cross Examine the Witness

5. Where the claims of factual conduct are such that if the claims are believed that it could add a significant time to a sentence, due process requires that a defendant must be given the ability

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[6] *See Benton v. State*, 711 A.2d 792, 797 (Del. 1998) ("At sentencing, restitution may be based on those factors which are established by a preponderance of the evidence").

[7] *Weaver v. State*, 779 A.2d 254, 259 (Del. 2001) (The State need only prove by a preponderance that VOP occurred) (Although VOP hearings are separate hearings, in all practicality, they function as a form of re-sentencing).

[8] *United States v. Kikumura*, 918 F.2d 1084, 1099 (3d Cir. 1990) (noting that "most pertinent sentencing factors need only be established by a preponderance of evidence")(citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986)(holding that the preponderance of evidence standard is constitutional).

[9] *United States v. Watts*, 519 U.S. 148, 157 (1997).

to cross examine a witness who purports a disputed fact. In *United States v. Rosa*, the Third Circuit stated, "[t]he sentence . . . is the most critical stage of criminal proceedings, and is, in effect, the 'bottom-line' for the defendant, particularly where the defendant has pled guilty."[10] The Third Circuit went on to note "we can perceive no purpose in denying the defendant the ability to cross-examine a [] witness where such testimony may . . . add substantially to the defendant's sentence."[11] Similarly in 2013, the Third Circuit Court of Appeals upheld the district court's consideration of evidence regarding the defendant's past criminal conduct, even though it did not result in a conviction, as it was presented to the court through live testimony from an investigating officer and proven by a preponderance of the evidence.[12]

6. If the State continues to take the position that it will assert that Mr. Smack committed criminal acts beyond the offense of conviction, Mr. Smack asserts that this Court should issue an order requiring the State to present witness testimony at the upcoming sentencing hearing to establish facts of criminal conduct beyond the offense of conviction, subject to Defendant's right to cross examine said witnesses. Furthermore, the Court should permit the Defense to call witnesses at the sentencing hearing to potentially rebut the claims and/or testimony of any State's witnesses.

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[10] 891, F.2d 1074, 1079 (3d. Cir. 1989).
[11] *Id.*
[12] United States v. Zabielski, 711 F.3d 381, 391 (3d Cir. 2013).

WHEREFORE, Defendant Adrin Smack respectfully requests that this Court to require the State to prove any allegations of criminal beyond the offenses of conviction by a preponderance of the evidence, through the testimony of witnesses subject to cross examination.

Christopher S. Koyste, Esquire (#3107)
Law Office of Christopher S. Koyste, LLC
709 Brandywine Boulevard
Wilmington, Delaware 19809
(302) 762-5195

Dated: August 15, 2016

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. 1505015401
	)	
ADRIN SMACK,	)	
	)	
Defendant.	)	

NOTICE OF STATE'S RESPONSE

TO: Christopher S. Koyste, Esq.
Law Office of Christopher S. Koyste, LLC
709 Brandywine Boulevard
Wilmington, Delaware 19809

PLEASE TAKE NOTICE the State's Response to Defendant's *Pre-Sentence Motion in Response to Defendant's Memorandum Regarding Sentencing* will be presented before the Honorable John A. Parkins at a time convenient to the Court.

Respectfully Submitted,

Sonia Augusthy, I.D. 4984
Christina M. Kontis, I.D. 5770
Timothy Maguire, I.D. 5926
Deputy Attorneys General
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, Delaware 19801
(302) 577-8500

DATE: October 3, 2016

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. 1505015401
	)	
ADRIN SMACK,	)	
	)	
Defendant.	)	

STATE'S MEMORANDUM REGARDING SENTENCING

COMES NOW, the State of Delaware, by and through the undersigned Deputy Attorneys General, and responds to Defendant's Motion Regarding the Scope of Sentencing.

FACTS

Defendant was the target of an FBI Task Force investigation. After obtaining approval through this Court, the Task Force intercepted defendant's communications.[1] Eventually, the Grand Jury indicted defendant on over seventy counts of drug dealing and related offenses. With the exception of Count 40, the drug dealing charges stem from his intercepted communications. The indictment itself charges defendant with making multiple drug deals, sometimes on the same day.[2] Defendant pled guilty to two counts of Class B drug dealing of heroin, two counts of Class D drug dealing of heroin, possession of a firearm by a person prohibited, and conspiracy. The plea agreement indicates the defendant will not ask this Court for a sentence of less than eight years at Level 5. Further, the State has agreed that it will not seek a sentence that exceeds fifteen years of unsuspended Level 5 time.

On June 22, 2016, the parties appeared before this Court for sentencing. Both parties received the Court's presentence report, dated June 16, 2016. The presentence report, on page one, notes that multiple raids were conducted through this investigation and "[u]ltimately, 3

[1] A copy of the Affidavit of Probable Cause and Order for phone 302-981-6138 are attached hereto as Exhibit A.
[2] For example, see Counts 42, 46, 132 and 169 of the Indictment—all of which are offenses on April 13, 2016.

firearms, over $16,000 cash, and various quantities of heroin, crack cocaine and marijuana were located and seized . . ." These items were seized from 326 Kemper Drive and the State referenced these firearms and drugs during its presentation at sentencing, in its argument for a fifteen-year jail sentence. Co-defendant Al-Ghaniyy Price was charged and convicted of maintaining a drug property for Defendant.[3] Price and Defendant were charged with the weapons and drugs seized at Price's home, as well as a count of conspiracy, specifically related to those offenses.[4]

After receipt of the presentence investigation and the State's presentation, at the request of defendant, the matter was continued. The parties have been instructed to file briefing on the scope of material that can be considered by this Court at sentencing. Defendant has filed his submission, seeking an Order from this Court stating: (1) the State must prove anything beyond the offenses of conviction by a preponderance of the evidence, (2) requiring the State to present testimony at sentencing and (3) permitting defendant to call witnesses at sentencing. This is the State's response.

APPLICABLE LAW

Delaware Superior Court Criminal Rule 32 governs the procedure for sentencing. The rule states, in relevant part, as follows:

> The court shall afford the parties an opportunity to comment on the report and, in the discretion of the court, to present information relating to any alleged factual inaccuracy contained in it. If the comments or information presented allege any factual inaccuracy in the presentence investigation report, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. At the request of a party a written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Department of Correction.

[3] See Count 94 of the Indictment.
[4] See Counts 240-254 of the Indictment.

Our Supreme Court has addressed the scope of consideration at sentencing in *Mayes v. State,* within the context of the Due Process Clause.[5] After being sentenced by this Court, *Mayes* appealed, arguing that the State expanded the charges to which he pled guilty. The Supreme Court determined its task was to "review the disputed information."[6] The Court provided guidance on the standard of review at sentencing, noting, "reliance upon information which is materially untrue or, if not shown to be false, to be so lacking in indicia of reliability as to be of little value violates due process, and requires remand for resentencing."[7]

The Court also noted "[c]onsistent with due process the trial court may consider responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and circumstance."[8] "Sentencing courts are specifically entitled to rely upon information regarding other, unproven crimes."[9] *Mayes* challenged "the veracity and reliability of all allegations going beyond the crimes to which he pled guilty."[10] The Court held "[t]o the extent that these allegations were contained in the indictment, the sentencing court was clearly entitled to rely on them because the indictment itself provides sufficient reliability to meet the constitutional standard."[11]

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[5] 604 A.2d 839 (1992).
[6] *Id.* at *843.
[7] *Mayes,* 604 A.2d at 843 *citing United States v. Safirstein,*827 F.2d 1380, 1385 (1987).
[8] *Id.* at 844-845 (internal citations omitted).
[9] *Id.* at 842-843 (internal citations omitted).
[10] *Id.* at 844.
[11] *Id.* (internal citations omitted).

Ultimately, the Court held:

> [w]e do not find the Superior Court to have abused its discretion in the term of sentence imposed on defendant for the crimes to which he pled guilty. Nor do we find the court to have committed legal error in relying on allegations in the presentence report that defendant had committed more serious and more extensive crimes than those to which he pled guilty. The court implicitly found such allegations to be credible and reliable.

LEGAL ARGUMENT

Defendant agrees "it is readily apparent that the Court may even consider arguments of criminal conduct beyond which Mr. Smack has entered a plea of guilty." However, defendant argues the State cannot make such argument at a sentencing hearing without presenting direct testimony, subject to cross examination. He is wrong. Defendant makes a leap from the standard set forth in *Mayes*, to assert that due process requires he be given an opportunity to cross examine witnesses. Defendant has cited no Delaware authority for this position. Moreover, despite briefing this issue, defendant has not specified what facts in the presentence investigation or the State's presentation are materially untrue or lacking in reliability, as is the standard. With no specific objection, defendant's broad proposed order seeks a post-plea trial.

For support of his position, defendant cites only to *Rosa*, a decision from the Third Circuit regarding *Jencks* production at sentencing. *Rosa* is a federal decision and operates under a different procedural scheme for sentencing. Specifically, the Federal Rule sets forth a procedure for witness testimony at sentencing hearings.[12] Our Court affords counsel and the defendant "an opportunity to comment upon the presentence officer's determination and on other matters relating to the appropriate sentence." Additionally, Delaware's procedural rule entitles the defendant to present information to the Court relating to alleged factual inaccuracies. As outlined above, *Mayes* and Rule 32 are the controlling authority for this issue.

[12] See Federal Rules of Criminal Procedure Rule 32(i)(2).

Defendant is free to argue, as the State acknowledged in its own presentation, that the specific drugs referenced at his sentencing hearing were found in the home of a co-defendant. The State has made the defendant aware of comments by co-defendant Price at his own sentencing hearing.[13] It is not controverted that the basis for the search warrant for Price's home was the communication Price had with defendant, alluding to hiding items within his residence.[14] It has been the State's position, throughout this case, that this was a network of individuals distributing drugs throughout Sparrow Run. Defendant was aware the items located within Mr. Price's home were subject to consideration by the Court, by reviewing the presentence investigation report. Further, defendant's own statement to the presentence officer indicates that he is aware of the State's theory that he was a primary distributor throughout Sparrow Run, as he said "I did not solicit to sell. I was not a King Pin." Defendant asserts to the presentence office that he was a "regular 'corner boy.'"

Defendant was aware of the State's theory of his involvement in this case. *Mayes* and the procedures of this Court do not entitle him to a post-plea trial at sentencing. The procedures used by this Court for sentencing do not offend Due Process.

WHEREFORE, for the foregoing reasons the State of Delaware respectfully requests that the defendant's motion be **DENIED**.

[13] Mr. Price asserted at sentencing, on July 13, 2016, his intention to sell the drugs located within his home.
[14] See copy of search warrant for residence of 326 Kemper Drive, attached hereto as Exhibit B.

Respectfully Submitted,

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Sonia Augusthy, I.D. 4984
Christina M. Kontis, I.D. 5770
Timothy Maguire, I.D. 5926
Deputy Attorneys General
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, Delaware 19801
(302) 577-8500

DATE: October 3, 2016

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. 1505015401
	)	
ADRIN SMACK,	)	
	)	
Defendant.	)	
	)	

ORDER

SO ORDERED this _____ day of _____, 2016, the Defendant's Motion seeking an Order Requiring the State to present testimony at the upcoming sentencing hearing, subject to cross is DENIED.

Defendant's Motion to call witnesses at sentencing to rebut claims and/or testimony of State's witnesses is also DENIED.

_____
The Honorable John A. Parkins

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

v.

ADRIN SMACK,

Defendant.

I.D. 1505015401

CERTIFICATE OF SERVICE

The undersigned Deputy Attorneys General of the State of Delaware hereby certify that two (2) copies of the attached Response to Motion were served by electronic mail and by U.S.P.S. upon:

Christopher S. Koyste, Esq.
Law Office of Christopher S. Koyste, LLC
709 Brandywine Boulevard
Wilmington, Delaware 19809

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Sonia Augusthy, I.D.
Christina M. Kontis, I.D. 5770
Timothy Maguire, I.D.
Deputy Attorneys General
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, Delaware 19801
(302) 577-8500

DATE: October 3, 2016

Exhibit A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF THE APPLICATION OF THE STATE OF DELAWARE FOR AN ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS	} } } } }	**Date: 04/10/2015** **Adrin Donnell SMACK (BM[redacted]1991)** **Subscribed to: Keyona James** **1602 Valley Stream Dr, Newark, DE** **302-981-6138**

ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

Application under oath has been made before me by Kathleen Jennings, State Prosecutor, Delaware Attorney General's Office, investigative or law enforcement officers of the State of Delaware within the meaning of 11 Del. C. §2401, and therefore pursuant to 11 Del. C. §2405 authorized to apply for an Order authorizing the interception of wire communications. Applicant requests an Order authorizing the interception of wire communications pursuant to 11 Del. C. §2407, and full consideration having been given to the matter set forth herein, the Court finds:

For the reasons set forth in the Affidavit, there is probable cause to believe that the TARGET SUBJECTS have committed, are committing, and will continue to commit the following offenses enumerated in 11 Del. C. §2405 of the Delaware Code of 1974, as amended, involving:

1. Title 16 *Del. C. §* 4754:0001 (Manufactures delivers, or possesses with intent to manufacture, deliver a controlled substance)
2. Title 16 *Del. C. §* 4752: 0003 (Possesses a controlled substance in a Tier 5 quantity and there is an aggravating factor)
3. Title 16 *Del. C. §* 4752: 0001 (Manufactures, delivers, or Possession with intent to deliver a controlled substance in a Tier 4 quantity with aggravating factor(s)
4. Title 11 *Del. C. §* 512 (Conspiracy Second Degree)

There is probable cause to believe that the Target Telephone is in the possession of Adrin SMACK, as detailed in this affidavit, as a member of a drug trafficking organization;

There is probable cause to believe that the Target Telephone has been used, is being used, and will continue to be used by Smacks in furtherance of the aforementioned offenses. In particular, these communications are expected to constitute admissible evidence regarding the delivery of controlled substances, the distribution of controlled substances, the identity of the participants and conspirators of the organization, and the precise nature and scope of the illegal activity, as well as the relationship between the financiers, suppliers and distributors of the controlled substances, and the collection and distribution of monies which stem from the illegal narcotics activities and/or finance the illegal drug activities;

WHEREFORE, it is hereby ordered that the New Castle County Police, Special Agents of the FBI and additional investigators or support personnel who have either been deputized by the FBI or who will be working under the supervision of a Special Agent or Task Force Officer[1] pursuant to an application authorized by Kathleen Jennings, Department of Justice, State Prosecutor of State of Delaware and pursuant to 11 Del. C. §2405, are authorized to intercept wire communications, including text messaging to and from portable Sprint cellular telephone facilities **(302) 981-6138**, subscribed to Keyona James, 1602 Valley Stream Dr, Newark, New Castle County, Delaware, telephone with no other subscriber information through Sprint and primarily used by Adrin SMACK, 43 Heron Court, Newark, New Castle County, Delaware. Such interception(s) shall not terminate automatically after the first interception revealing the manner in which the alleged co-conspirators and others as yet unknown conduct their illegal activities, but may continue until all communications are intercepted fully revealing the manner in which the above-named persons and others as yet unknown are committing the offenses

1 All officers qualify as "investigators or law enforcement officers" within the meaning of 11 Del. C. § 2401 (11)

described herein which reveal fully the identities of their confederates, their places of operation and the nature of the conspiracy involved therein, or for a period of thirty (30) days measured from the earlier of the day on which investigative or law enforcement officers first begin to conduct an interception under this Order or ten (10) days after this Order is entered, whichever is earlier.

IT IS FURTHER ORDERED that the Authorization apply not only to communication on Sprint cellular telephone facility **(302) 981-6138**, but also to any changed telephone number subsequently assigned to the same International Mobile Subscriber Identity or Electronic Serial Number utilized by Sprint cellular telephone facility **(302) 981-6138** within the thirty (30) day period. It is also ordered that the Authorization apply to background conversations intercepted in the vicinity of the Sprint cellular telephone facility **(302) 981-6138** while the telephone is off the hook or otherwise in use.

IT IS FURTHER ORDERED that pursuant to 11 Del. C. 2407 (c), Sprint, Electronic Communication Service Provider as defined in 11 Del. C. § 2401 (6), shall furnish the Delaware State Police, New Castle Police and/or the FBI with "Call Content" and "Call Detail" information including, but not limited to, audio communication, the date, time, duration of the call, the incoming or outgoing telephone numbers or International Mobile Subscriber Identity number and cell site location for Sprint cellular telephone facility **(302) 981-6138**, without geographic limitations. Also, the "Call Content" in any and all text messages, SMS messages, picture messages, e-mail messages, messages and/or any other data sent to and from telephone facilities **(302) 981-6138**.

IT IS FURTHER ORDERED that based upon the request of the Applicant pursuant to 11 Del. C. § 2407(c), Sprint, Electronic Communication Service Provider as defined in 11 Del. C. Section 2401(6), shall furnish the New Castle County Police and/or the Federal Bureau of Investigation with all information, facilities and technical assistance necessary to accomplish the interceptions unobtrusively and with minimum

interference to the services that such provider is providing to the person whose communications are to be intercepted, and to ensure an effective and secure installation of electronic devices capable of intercepting wire communications over **(302) 981-6138**. The Service provider is to be compensated for reasonable expenses incurred in providing such facilities or assistance. The requirement for reimbursement does not apply with respect to subscriber information pursuant to 18 United State Code 2703.

IT IS FURTHER ORDERED, that for the duration of this Order and continuing for 30 days after the expiration of the Order, that Sprint and all subsidiaries, Boost Mobile, Virgin Mobile USA, Clearwire, Sprint Solutions Inc, Central Telephone and all subsidiaries to provide, within 5 business days, the New Castle County Police and/or the Federal Bureau of Investigation with the name, address, telephone number of each subscriber and all subsidiaries, and all other communication carriers shall provide the name, address, telephone number of each subscriber of both published and unpublished telephone numbers and/or International Mobile Subscriber Identity Number received to and from portable Sprint cellular telephone facility **(302) 981-6138**, with International Mobile Subscriber Identity(s) *IMSI 310120046344950, Electronic Serial Number (ESN)(s) 256691543201601656.

IT IS FURTHER ORDERED that, to avoid prejudice to the Government's criminal investigation, the provider(s) of the electronic communications service and its agents and employees are ordered not to disclose or cause disclosure of the Order or the request for information, facilities and assistance by the New Castle County Police and the Federal Bureau of Investigation and/or the existence of the investigation to any person except as necessary to carry out this Order.

IT IS FURTHER ORDERED that this Order shall be executed as soon as practicable and that all monitoring of wire communications shall be conducted in such a way as to minimize the interception and disclosure of the communications intercepted to those communications relevant to the pending investigation. The interception of wire communications must terminate upon the attainment of the authorized objectives, not to

exceed thirty (30) days measured from the earlier of the day on which investigative or law enforcement officers first begin to conduct an interception of this Order or ten (10) days after the Order is entered.

IT IS FURTHER ORDERED the investigative or law enforcement officers familiar with the facts of this case, provide to the Court a report on or about the tenth, twentieth, and thirtieth days following the date of this Order showing what progress has been made towards the authorized objectives and the need for continued interception. If any of the aforementioned reports should become due on a weekend or holiday, it is further ordered that such report become due on the next business day thereafter.

IT IS FURTHER ORDERED that no inventory or return of the results of the foregoing wire surveillance interception be required to be made, other than the above-required reports, before ninety (90) days from: 1) the date of the expiration of this Court's Order, or 2) any extension of this Order.

Monitoring of conversations must terminate immediately if and when it is determined the conversation is unrelated to communications subject to interception under 11 Del. C. Chapter 24. Interception must be suspended immediately when it is determined through voice identification, physical surveillance, or otherwise, that none of the named interceptees or any of their confederates, when identified, are participants in the conversation unless it is determined during the portion of the conversation already overheard that the conversation is criminal in nature. If the conversation is minimized, the monitoring officer shall spot check to insure that the conversation has not turned to criminal matters.

IT IS FURTHER ORDERED that, upon an ex parte showing of good cause to a Judge of competent jurisdiction, the services of the above inventory or return may be postponed for a further reasonable period of time.

IT IS FURTHER ORDERED, that the Attorney General's office, the New Castle County Police, Delaware State Police, Federal Bureau of Investigation, their officers and employees shall not disclose to any person including any court proceedings the location and/or type of any interception equipment until ordered by the issuing Judge of the Superior Court.

IT IS FURTHER ORDERED that its Order, this Application and the accompanying Affidavit and proposed Orders, and all interim reports filed with the Court with the regard to this matter be sealed until further Order of this Court, except copies of the Orders, in full or redacted form may be served on the service provider as necessary to effectuate this Order.

Richard Cooch

The Honorable Richard R. Cooch
Superior Court for the State of Delaware

Dated this 10th day of April, 2015.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF THE APPLICATION OF THE STATE OF DELAWARE FOR AN ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS	} } } } }	**Date: 04/01/2015** **Adrin Donnell SMACK BM[redacted]1991** **Subscribed to: Keyona James** **1602 Valley Steam Drive, Newark, DE** **302-981-6138**

AFFIDAVIT IN SUPPORT OF APPLICATION FOR INTERCEPTION OF WIRE COMMUNICATIONS

Your Affiants, Brian Lucas and Scott Linus being duly sworn, depose and state as follows:

Detective Brian Lucas is a New Castle County Police Officer assigned to the New Castle County Police Department Criminal Investigation Unit FBI Safe Streets Task Force. Affiant Lucas has been assigned to the criminal investigations unit for over two years and the FBI Task Force for 11 months. Affiant Lucas has been a sworn police officer for over twelve (12) years.

Affiant Lucas has been trained in conducting drug investigations at the Wilmington Police Academy. Affiant has also been training in narcotic and non-narcotic drug investigations by the Drug Enforcement Administration("DEA"). The Delaware State Police, The New Castle County Police Department and the Department of Justice. Affiant Lucas has made over three hundred drug arrests while employed as a police officer. Affiant Lucas has participated in one wiretap investigation. During this investigation affiant Lucas has acted in a surveillance and call monitoring capacity.

Affiant Detective Scott Linus, is a sworn member of the Delaware State Police. Your affiant has been employed by the Delaware State Police Since September 2007. Prior to joining the Delaware State Police, your affiant was employed by the Delaware State University Police Department from March 2006 till September 2007, as a sworn police officer. Your affiant has nine years of police experience as an investigator. Your affiant is currently assigned to FBI Violent Crimes Task Force. Your affiant is responsible for the investigation of drug activity and other

related crimes occurring in the State of Delaware. Your affiant has received training in narcotics and non-narcotics investigations from the Delaware State Police Academy. Your affiant has authored and/or assisted on numerous search warrants.

Your affiants have actively participated in investigations of criminal activity, including but not limited to the investigation of drug trafficking. During these investigations, your affiants have also participated in the execution of search warrants and the seizure of evidence relating to drug trafficking activities. As police officers in the state of Delaware, your affiants have testified under oath, sworn to applications for search and arrest warrants, and participated in and gained experience in wire intercept investigations for the enforcement of federal and state laws. Your affiants have personally conducted, supervised, and participated in investigations which have resulted in the arrest and convictions of numerous individuals responsible for trafficking narcotics and committing violent crimes.

Your affiants have also been involved in Organized Crime Drug Enforcement Task Force ("OCDETF") investigations involving drug trafficking organizations. As a result of this and other narcotics related investigations, your affiants have extensive experience in debriefing defendants, informants, participants, and various persons with direct experience on the methods used to distribute controlled substances.

Based on your affiants training and experience as a police officer, your affiants are familiar with the means and methods that narcotics traffickers use to import and distribute illicit drugs. Your affiants are acquainted with the support and assistance that narcotics organizations require to conduct their illegal activities. Your affiants have become knowledgeable about the criminal statutes of the State of Delaware, particularly criminal laws relating to violations of the narcotics, firearms, and conspiracy statutes.

As a result of this training and experience, your affiants have learned about the importation, manufacture, concealment, and distribution of controlled substances, including, cocaine, cocaine base, marijuana, heroin, and other controlled substances. Your affiants have also participated in a number of investigations of violations of Title 16 of the Delaware Criminal Code, which have resulted in the arrests and convictions of persons for violations of these laws. Your affiants have been the author/co-author on search and seizure warrants, which have led to

the seizure of narcotics, items associated with drug trafficking, and documents relating to narcotics distribution. As a result of this and other narcotics related investigations, your affiants are aware that drug traffickers use telephones to communicate. Your affiants have also gained knowledge of the patterns of activity of drug traffickers; the types and amounts of profits made by drug dealers; and the methods, language, and terms that are used to disguise the source and nature of the profits from their illegal drug dealings. Additionally, based on your affiants training and experience and participation in multiple narcotics investigations, your affiants know that it is common for drug dealers to do the following: to "front," or provide on consignment, controlled substances to their customers; to secrete contraband, proceeds of drug sales, and records of drug transactions in secure locations within their residences, vehicles, and/or their businesses for ready access; to conceal proceeds from law enforcement authorities and rival narcotics traffickers; and to routinely use cellular telephones to facilitate their drug distribution operations and to thwart law enforcement efforts to penetrate the drug dealers' communication networks. Your affiants further know that drug dealing is an ongoing operation that requires the development, use, and protection of a communication network to facilitate daily drug distribution; that narcotics traffickers frequently transmit to one another prearranged numeric code, specifically to indicate the quantity and/or price of narcotics, or a predetermined code to identify the caller or meeting location; and that narcotics traffickers commonly use "coded" language when speaking with other drug traffickers in order to thwart detection by law enforcement agents who may be intercepting their communications. Your affiants have also learned that narcotics traffickers may routinely "drop"; that is discard their telephones and acquire new devices with new numbers – their telephones or two-way radios in an effort to thwart detection by law enforcement agents who may be intercepting their communications. Your affiants have learned through training and experience that narcotics traffickers will often register cellular telephones with fictitious subscribers or not list a subscriber at all. This is done in an effort to prevent law enforcement from finding out who is utilizing the cellular telephone.

Your Affiants are "investigative or law enforcement officers" of the State of Delaware within the meaning of 11 Del. C. § 2401 and are authorized to conduct investigations and to make arrests for offenses enumerated in 11 Del. C. § 2405.

PURPOSE OF THE AFFIDAVIT

This application is for an Order pursuant to Section 2407 of Title 11 of the Delaware Code authorizing the interception of wire and electronic communications of **302-981-6138** (the "TARGET TELEPHONE") with International Mobile Subscriber Identity(s) *IMSI 310120046344950, Electronic Serial Number (ESN)(s)) 256691543201601656. The TARGET TELPHONE is a replacement telephone for SMACK's previous telephone number of 302-391-4616. Information provided by MetroPCS, the service provided for 302-391-4616, showed this telephone number was a pre-paid telephone number activated from December 1, 2014 to March 31, 2015. The call activity for 302-391-4616, in fact, confirms that this telephone number stopped making and receiving telephone calls on April 1, 2015. On the other hand the TARGET TELEPHONE, according to the call activity set forth below, commenced making phone calls on March 09, 2015. Toll records on the TARGET TELEPHONE show a consistent pattern of phone calls to the same contacts as phone number 302-391-4616.

Targets expected to be intercepted on the TARGET TELEPHONE include: (1) ADRIN SMACK, a/k/a "AK," ("SMACK"); (2) MIKTRELL SPRIGGS, a/k/a "Black" or "FREDDIE" ("SPRIGGS"); (3) COREY BRITTINGHAM, a/k/a "BG," or "Chop," ("BRITTINGHAM"); (4) JAVON CANNON, a/k/a "Wop," or "Kane," ("CANNON"); (5) MERCEDES TAYLOR, a/k/a "M7," or "Tank," ("TAYLOR"); (6) DARNELL SMALLWOOD, a/k/a "S," or "Clue," ("SMALLWOOD"), (7) DAMIERE GLENN, a/k/a "Shay," or "G," (GLENN), and others as yet unknown (hereinafter referred to collectively as the "TARGET SUBJECTS"). As described below in greater detail, these individuals are believed to be participants in a drug trafficking organization known to law enforcement as the SPARROW RUN CREW. This crew is suspected of distributing large amounts of heroin and crack cocaine in Newark, Delaware and the surrounding areas. This crew is also suspected of committing violent acts classified in 11 Del. C. §2405 to maintain their territory to support drug trafficking.

For the reasons set forth in this Affidavit, there is probable cause to believe that the TARGET SUBJECTS have committed, are committing, and will continue to commit the following offenses enumerated in 11 Del. C. §2405 of the Delaware Code of 1974, as amended, involving:

1. Title 16 *Del. C.* § 4754:0001 (Manufactures delivers, or possesses with intent to manufacture, deliver a controlled substance)
2. Title 16 Del. C. § 4752: 0003 (Possesses a controlled substance in a Tier 5 quantity and there is an aggravating factor)
3. Title 16 *Del. C.* § 4752: 0001 (Manufactures, delivers, or Possession with intent to deliver a controlled substance in a Tier 4 quantity with aggravating factor(s))
4. Title 11 *Del. C.* § 512 (Conspiracy Second Degree)

There is probable cause to believe that the Target Telephone is in the possession of Adrin SMACK, as detailed in this affidavit, as a member of a drug trafficking organization;

There is probable cause to believe that the Target Telephone has been used, are being used, and will continue to be used by the Target Subject in furtherance of the aforementioned offenses. In particular, these communications are expected to constitute admissible evidence regarding the delivery of controlled substances, the distribution of controlled substances, the identity of the participants and conspirators of the organization, and the precise nature and scope of the illegal activity, as well as the relationship between the financiers, suppliers and distributors of the controlled substances, and the collection and distribution of monies which stem from the illegal narcotics activities and/or finance the illegal drug activities;

As discussed below in more detail, normal investigative procedures have been tried and have failed, reasonably appear unlikely to succeed if continued, or are too dangerous to be used.

Since this Affidavit is being submitted for the limited purpose of securing the authorization for the interception of wire communications, your Affiants have not included each and every fact known to your affiants concerning this investigation. You affiants have set forth only the facts that your affiants believe are necessary to establish the necessary foundation for an Order authorizing the interception of wire communications.

PERSONS EXPECTED TO BE INTERCEPTED

During this investigation, your Affiants have learned the following about the Target Subject of the investigation and associates identified by information from Confidential Sources and toll records from SMACK's cellular telephones:

i. **ADRIN SMACK – Date of Birth: [redacted]1991 – SBI# [redacted]; FBI # [redacted]**, has been identified as one of the leaders of the SPARROW RUN CREW. SMACK lists 43 Heron Court in Newark, Delaware as his permanent address on official documents, such as State of Delaware Court and Department of Motor Vehicle documents. Investigation has revealed that this address is no longer valid for SMACK. The actual permanent address for SMACK is believed to be the residence of his girlfriend, Lahkia Harley, located at 1933 West 4th, Wilmington, Delaware. Investigation has revealed SMACK has access to 13 Heron Court located in Sparrow Run, and this may be the organization's current base of operations ("TARGET RESIDENCE"), where drugs are stored and from which drugs are sold. For reasons described in this Affidavit, SMACK is believed to be in possession of the TARGET TELEPHONE. SMACK's criminal record is as follows: [1]

   i. Beginning in July, 2008, SMACK was found guilty in New Castle County Delaware Family Court [hereinafter "New Castle Family Court"] of Second Degree Robbery and Possession of a Handgun by a Prohibited Juvenile. SMACK was found delinquent of these charges.

   ii. February 2013: Convicted of Criminal Impersonation. SMACK was sentenced to six months jail (suspended sentence) and six months' probation.

ii. **MIK'TRELL SPRIGGS – Date of Birth: [redacted]1993 – SBI# [redacted]; FBI # [redacted]**, has been identified as one of the leaders of the SPARROW RUN CREW in Wilmington, Delaware. SPRIGGS lists 331 Thorn Lane, apartment 8, Newark, Delaware as his permanent address on official documents, such as State of Delaware court documents. Investigation has revealed this address is no longer valid for

[1] Sentencing and court information is listed for the TARGET SUBJECTS' criminal convictions where such information was available through criminal databases or otherwise in possession of your affiant.

SPRIGGS, and his actual address is unknown to investigators. SPRIGGS is currently in State Custody awaiting further hearing on drug charges and a violation of probation hearing. SPRIGGS can released at any time, should be able to post bail on his pending charges. Your affiants are aware from training and past police experience that subjects can actively participate in illegal activities such as drug dealing while in prison. SPRIGGS' criminal history is as follows.

i. May 2013: Convicted of Possession of a Controlled Substance in a Tier 1 Quantity in New Castle County Delaware Superior Court. SPRIGGS was sentenced to eighteen months probation.

iii. **COREY BRITTINGHAM – Date of Birth: [redacted]1994 – SBI# [redacted] FBI #** [redacted] is believed to be a street level distributor of heroin and crack cocaine on behalf of the SPARROW RUN CREW. BRITTINGHAM resides at the 520 West 6th Street in Wilmington, Delaware. BRITTINGHAM's criminal history is as follows:

i. October 2014: Convicted of Manufactures, Delivers or Possession of a Controlled Substance in a Tier 2 Quantity and Second Degree Conspiracy in New Castle County Delaware Superior Court. BRITTINGHAM was sentenced to eighteen months probation.

iv. **JAVON CANNON – Date of Birth: [redacted]1989 – SBI# [redacted] FBI#** [redacted] is believed to be a street level distributor of heroin on behalf of the SPARROW RUN CREW. CANNON resides at 14 Fairway Drive, apartment 2-D, Newark, Delaware. CANNON has the following criminal history:

i. October 2014: Convicted of Manufactures, Delivers, or Possession of a Controlled Substance in a Tier 2 Quantity and Second Degree Conspiracy in New Castle County Delaware Superior Court. CANNON was sentenced to eighteen months probation.

v. **MERCEDES TAYLOR – Date of Birth: [redacted]1986 – SBI# [redacted] FBI#** [redacted], is believed to be a street level distributor of heroin on behalf of the

SPARROW RUN CREW. TAYLOR lives at 1102 Vinnings Way in Newark, Delaware. TAYLOR has the following criminal history:

i. September 2013: Convicted of Tampering with Physical Evidence and Possession of a Controlled Substance in New Castle County Delaware Superior Court. TAYLOR was sentenced two years confinement (suspended) and to one year probation.

vi. **DARNELL SMALLWOOD – Date of Birth [redacted]1993 – SBI#[redacted], FBI #[redacted]**, is believed to be a mid-level distributor of heroin for the SPARROW RUN CREW. SMALLWOOD lives at 101 Council Circle, in Newark, Delaware. SMALLWOOD has no criminal history:

vii. **DAMEIRE GLENN – Date of Birth: [redacted]1992 – SBI#[redacted] FBI#[redacted]**, is believed to be a street level distributor of heroin on behalf of the SPARROW RUN CREW. GLENN has the following criminal history:

i. May 2007: GLENN was adjudicated delinquent in New Castle Family Court of Second Degree Robbery.

ii. May 2008: GLENN was adjudicated delinquent in New Castle Family Court of Aggravated Menacing with a Weapon.

In addition to the TARGET SUBJECTS, there is also probable cause to believe that additional individuals – who have yet to be identified – have committed, are committing, and will continue to commit violations of Title 16 Del. Section 4754:0001 (Manufactures delivers, or possesses with intent to manufacture, deliver a controlled substance); Title 16 Del. Section 4752: 0003 (Possesses a controlled substance in a Tier 5 quantity and there is an aggravating factor); Title 16 Del. Section 4752: 0001 (Manufactures, delivers, or Possession with intent to deliver a controlled substance in a Tier 4 quantity with aggravating factor(s)); Title 11 Del. C. Section 512 (Conspiracy Second Degree). However, the identity of these individuals is unknown and is expected to be discovered by interception of the TARGET TELEPHONE.

TOLL AND PEN REGISTER ANYLISIS FOR (302) 391-4616

A pen register and caller identification system was installed on 302-391-4616 on February 23, 2015 (Misc. No. 15-36).

Call Analysis for telephone number 302-391-4616

United States Magistrate Judge Mary Pat Thynge signed an order authorizing a pen register trap and trace device be installed on 302-391-4616 on February 23, 2015 (Misc. No. 15-36) Telephone call records to and from this number were collected from January 19, 2015 through April 1, 2015 as the result of an administrative subpoena. Those records revealed the following contacts:

GLENN: 183 calls were placed between 302-391-4616 and GLENN at 302-333-3847. CS-9 provided 302-333-3847 to interviewing agents as the contact number for GLENN on February18, 2015.

BRITTINGHAM: 39 calls were placed between 302-391-4616 and BRITTINGHAM at 302-442-8086. CS-9 provided 302-442-8086 to interviewing agents as the contact number for BRITTINGHAM on February 18, 2015.

CANNON: 26 calls were placed between 302-391-4616 and CANNON at 302-690-4709. CS-1 provided 302-690-4709 to interviewing agents as the contact number for CANNON on February 13, 2015.

SPRIGGS: 14 calls were placed between 302-391-4616 and SPRIGGS at 302-602-5844. CS-6 provided 302-602-5844 to interviewing agents as the contact number for SPRIGGS on February 12, 2015.

TOLL ANYLISIS FOR TARGET TELEPHONE (302) 981-6138

Call Analysis for the TARGET TELEPHONE

Telephone call records to and from number 302-981-6138 were collected from March 9, 2015 through April 07, 2015 as the result of an administrative subpoena. Those records revealed the following contacts:

GLENN: 128 calls were placed between 302-981-6138 and GLENN at 302-333-3847. CS-9 provided 302-333-3847 to interviewing agents as the contact number for GLENN on February18, 2015.

BRITTINGHAM: 0 calls were placed between 302-981-6138 and BRITTINGHAM at 302-442-8086. CS-9 provided 302-442-8086 to interviewing agents as the contact number for BRITTINGHAM on February 18, 2015. It should be noted BRITTINGHAM was arrested by NCCPD on March 23, 2015 for drug dealing charges. NCCPD seized his phone upon his arrest and is still in possession of same. BRITTINGHAM was released on bail and his new number is not known.

CANNON: 17 calls were placed between 302-981-6138 and CANNON at 302-690-4709. CS-1 provided 302-690-4709 to interviewing agents as the contact number for CANNON on February 13, 2015.

SPRIGGS: 0 calls were placed between 302-981-6138 and SPRIGGS at 302-602-5844. CS-6 provided 302-602-5844 to interviewing agents as the contact number for SPRIGGS on February 12, 2015. It should be noted SPRIGGS was arrested by NCCPD on March 23, 2015. SPRIGGS phone was seized upon his arrest. SPRIGGS is still in custody at this time.

THE NEED FOR WIRE INTERCEPTION

Based upon your affiants training and experience (as well as the experience of participating FBI Special Agents, as well as state and local police officers), and based upon all of the facts set forth herein, it is our belief that the interception of wire and electronic communications is the only available technique that has a reasonable likelihood of securing the evidence necessary to prove beyond a reasonable doubt that the TARGET SUBJECTS and others, including the SPARROW RUN CREW's source(s) of supply, are engaged in the above-described offenses.

The goals of the investigation have not been attained and, as demonstrated herein, are unlikely to be attained without the interception of wire and electronic communications over the TARGET TELEPHONE. Those goals include uncovering the source(s) of supply for the SPARROW RUN CREW, learning the disposition of drug proceeds, and discovering any additional locations which may be used to store heroin and cocaine for sale and distribution throughout Wilmington. In addition, while investigators have identified some of SMACK's distributors and customers, additional information regarding the drug weights and pattern of dealings is required to be able to charge these individuals. Also, investigators have been unable to identify SMACKS's distributors and customers because of their inability to identify telephones associated with SMACK. Additionally, while interviews conducted early in the investigation indicated that the TARGET RESIDENCE was the primary place where the SPARROW RUN CREW distributes narcotics, more recent surveillance and location data from the TARGET TELEPHONE indicate that SMACK is not presently utilizing the TARGET RESIDENCE for drug distribution activity, perhaps because of their observation of frequent police activity near the TARGET RESIDENCE. Thus, interception of the TARGET TELEPHONE is necessary to identify the new location(s) where the SPARROW RUN CREW are storing and selling drugs and drug proceeds. As a result, the interception of the TARGET TELEPHONE is requested.

The following investigative procedures, which are usually employed in this type of criminal investigation, have been attempted and have either failed to accomplish the goals of the investigation, reasonably appear to be unlikely to succeed, or are too dangerous to employ under

the circumstances of this investigation.

ALTERNATIVE INVESTIGATIVE TECHNIQUES

A. Physical Surveillance

1. Physical surveillance has been conducted on numerous occasions during this investigation.
2. On November 03, 2014, your affiants conducted surveillance of SPRIGGS in the area of 331 Thorn Lane, Newark, Delaware. During the surveillance, a vehicle known to be operated by SPRIGGS was located parked in the street in front of the apartment known to be registered to Keyierra Dollard, SPRIGGS's girlfriend. While law enforcement was conducting the surveillance, SPRIGGS was observed exiting the apartment building and entering the vehicle. Surveillance units followed SPRIGGS until traffic conditions rendered surveillance unproductive.
3. During the course of this investigation, numerous surveillances of residences associated with SMACK have been conducted. The residence listed on SMACK's Delaware identification indicates SMACK lives at 43 Heron Court, Newark, Delaware. Public source information indicates this residence is a rental property and is currently occupied by individuals not associated with SMACK. CS-6 has provided information to interviewing agents indicating SMACK stays in Wilmington, Delaware. The location that was provided by CS-6 indicates that SMACK was staying in the apartments located at West 4th Street and Union Street, Wilmington, Delaware. Surveillance in the area of West 4th and Union Street have been ineffective at locating SMACK or any residence associated. Historical police reports containing information pertaining to vehicles operated by SMACK indicate he drives a blue Jeep bearing Delaware registration PC413018. This vehicle is registered to Yolanda Reynolds, aka Yolanda Smack, the mother of SMACK. This vehicle is no longer used by SMACK as the vehicle has been observed at her residence in Seaford, Delaware.
4. On November 10, 2014, surveillance was conducted by members of the FBI Task Force. The surveillance was conducted in the vicinity of 331 Thorn Lane, Newark, Delaware. During the surveillance, a vehicle known to be operated by SPRIGGS was observed parked in front of the apartment complex. During the surveillance, SPRIGGS was observed exiting the apartment complex and approaching a light green colored Ford Taurus occupied by three

white females. The Ford Taurus departed the area after meeting with SPRIGGS. SPRIGGS was observed returning to the apartment building. The Taurus was followed from the area by surveillance units. After observing several traffic infractions, the vehicle was stopped by police units with emergency equipment. The occupants of the vehicle consented to a search of the vehicle, during which no drug evidence other than paraphernalia was discovered.

5. On March 10, 2015, physical surveillance was conducted on SMACK at the residence of Lahkia Harley at 1933 West 4th Street, Wilmington, Delaware. During the surveillance, a green Honda CRV bearing Delaware temporary registration XD108754 was observed parked in the parking lot in the rear of the apartment building. When agents attempted to verify the temporary registration of the vehicle, SMACK was observed standing next to the vehicle with an unidentified Hispanic male. SMACK observed surveillance, and surveillance units were forced to terminate surveillance to reduce risk of alerting SMACK to law enforcement presence. Due to the counter-surveillance activities of SMACK in this instance, surveillance units have been unable to observe SMACK except from significant distance, which has rendered surveillance unproductive.

6. Multiple other surveillances have been conducted regarding SMACK and SPRIGGS. These surveillances are complicated by the fact that SMACK and SPRIGGS and other members of the SPARROW RUN CREW operate multiple vehicles, including numerous rental vehicles. Vehicles registered to relatives and girlfriends of SMACK and SPRIGGS have been identified through surveillance activities conducted by law enforcement. Vehicles associated with the SPARROW RUN CREW have been passed around to various members of the organization. For example, a green Honda Accord Delaware temporary license XD104712 was originally identified as being operated by SPRIGGS. This vehicle was utilized by the SPARROW RUN CREW to facilitate drug transactions on two (2) occasions with CS-5. This vehicle has been observed at the apartment complex known to be the residence of JAVON CANNON. In February 2015, law enforcement observed this vehicle being operated by BRITTINGHAM.

7. Surveillance attempts conducted in the area of the Sparrow Run neighborhood are complicated through the use of individuals acting as "look-outs" for the SPARROW RUN CREW. The location of the neighborhood is further complicated due to its design of one single entrance and exit. The SPARROW RUN CREW is known to place "look-outs" in

position to see all incoming traffic to the neighborhood and alert members of incoming law enforcement. During controlled drug transactions conducted with members of the SPARROW RUN CREW, SMACK has instructed cooperating sources to relocate to areas of Sparrow Run which will allow look-outs to identify surveillance vehicles.

8. Multiple vehicles have been utilized by SMACK in order to avoid detection by law enforcement. CS-5 advised interviewing agents that SMACK has paid heroin users with heroin for the use of their vehicles. This change in vehicles by SMACK is an example of an attempt to avoid surveillance by law enforcement.

9. The investigation has also disclosed that SMACK and SPRIGGS spend a significant amount of time at the TARGET RESIDENCE, which is located on a cul-de-sac and has access from the front and rear of the residence. This location of the TARGET RESIDENCE makes surveillance of SMACK and SPRIGGS and their activities at the TARGET RESIDENCE difficult.

10. Toll analysis has revealed multiple telephone calls between SMACK and telephone numbers with a 267 area code. Area code 267 services Philadelphia, Pennsylvania, and the surrounding vicinity. TAYLOR, a member of the SPARROW RUN CREW, has made regular trips between Chester, Pennsylvania and Newark, Delaware to visit his children and his children's mother. Physical surveillance alone will not be able to determine the nature or activity associated with the travel and the contact with individuals from the Philadelphia, Pennsylvania area. Additionally, a frequent caller on the TARGET TELEPHONE is a phone with a 410 area code. Area code 410 services Baltimore, Maryland and the surrounding vicinity. The phone is a pre-paid cellular telephone with no subscriber and could be located in any state, thereby making surveillance of that caller impossible.

11. Although it has proven helpful in identifying some activities and some associates of the TARGET SUBJECTS, in this case, physical surveillance not used in conjunction with electronic surveillance is of limited value. For example, SMACK has access to multiple vehicles through his willingness to provide heroin to users for the use of their vehicles. This limits law enforcement's ability to utilize electronic surveillance in order to determine the pattern of SMACK and the extent of his drug trafficking organization.

12. Additional physical surveillance, even if successful, will not succeed in gathering sufficient evidence of the criminal activity under investigation. Physical surveillance of the alleged

conspirators has not established conclusively the elements of the violations and has not and most likely will not establish conclusively the identities of various co-conspirators. In addition, continued surveillance is not expected to lead to significant new information such as the source(s) of supply or the full nature and scope of the TARGET OFFENSES. Rather, prolonged or regular surveillance of the movements of the TARGET SUBJECTS would most likely alert them to law enforcement interest, causing the TARGET SUBJECTS to become more cautious in their illegal activities, to flee to avoid further investigation and prosecution, to cause a real threat to the safety of the informants, and/or to otherwise compromise the investigation.

13. The New Castle County Police have provided access to investigating officers for pole cameras located in the Sparrow Run neighborhood. The pole cameras are currently operational; however, they has been insufficient in helping to identify the sources of supply or other significant members of the organization or to determine the full nature and scope of the TARGET OFFENSES. The effectiveness of the pole cameras is limited because of the nature of SMACK to instruct callers to change location several times prior to meeting them. The location of the pole cameras are not conducive to observe the target residence and observe the number of subjects who are seen going in and out of the TARGET RESIDENCE and because no overt drug transactions have been witnessed outside the target location, in view of the pole cameras.

B. Use of Attorney General Subpoenas

Based upon your Affiants experience and conversations with Deputy Attorneys General who have experience prosecuting violations of criminal law, your Affiants believe that issuing subpoenas for persons believed to be involved in this conspiracy and their associates would not be successful in achieving the stated goals of this investigation. If any principals of this conspiracy, their co-conspirators and other participants were called to testify they would most likely be uncooperative and invoke their Fifth Amendment privilege against self-incrimination. It would be unwise to seek any kind of immunity for these people because the granting of such immunity might foreclose prosecution of the most culpable members of this conspiracy. Additionally, the service of Subpoenas upon the principals of the conspiracy or their co-

conspirators would only alert them to the existence of this investigation, causing them to become more cautious in their activities, to flee to avoid further investigation or prosecution, to threaten the lives of the cooperating individuals and undercover officers, or to otherwise compromise the investigation.

C. Confidential Informants and Cooperating Sources

Reliable confidential informants and cooperating sources have been developed and used – and will continue to be developed and used – in this investigation. However, for the reasons that follow, the requested wiretap interception is still necessary to accomplish the goals of the investigation. First, these informants have not had direct contact with all members of the organization. Facilitating contact with other organization members (such as GLENN and CANNON) is virtually impossible because the informants have no need to communicate with such individuals. Further, the information provided by the confidential informants – if the informants agreed to testify – would not, without the requested electronic surveillance, result in successful prosecution of all of the conspirators.

For example, prior to CS-5's cooperation with law enforcement, CS-5 did not have any knowledge of BRITTINGHAM, CANNON, or GLENN. During all of his/her controlled drug purchases, CS-5 has met at in the same vicinity in Newark, Delaware. Based on physical surveillance of SMACK and SPRIGGS, your affiant believes that SMACK and SPRIGGS' preference of location for drug transactions is due to their feeling of comfort with the area and with individuals present at that location. To date, SPRIGGS has never requested CS-5 travel to the TARGET RESIDENCE to make any purchases. This demonstrates a lack of trust between SPRIGGS and CS-5 and does not allow for CS-5 to further identify other members of the criminal organization. During two of the controlled drug transactions, SPRIGGS has had one of his associates contact CS-5. CS-5 has had initial contact with SPRIGGS during the first of the completed transactions, and, during the transaction on March 13, 2015, CS-5 informed SMACK that he/she did not trust SPRIGGS because SPRIGGS sent others to conduct the transaction.

During the controlled drug transaction between CS-1 and SMACK on January 29, 2015, SMACK instructed CS-1 to wait in the middle of an open area adjacent to the Sparrow Run neighborhood. This demonstrates a lack of trust between SMACK and CS-1 and does not allow

for CS-1 to further identify other members of the criminal organization.

Your affiants, along with other FBI Special Agents and local law enforcement officers, have interviewed a number of individuals who have made drug purchases from the SPARROW RUN CREW. All individuals, with the exception of CS-1 and CS-5, have also either refused or been unable to make consensually monitored drug purchases directly from SMACK or SPRIGGS. Their refusal has occurred out of fear for their safety due to the violent history of SMACK and SPRIGGS and their associates. While CS-5 has stated that he/she is willing and able to conduct a controlled purchase from SMACK, such a controlled purchase or purchases will not be sufficient to uncover the full extent of the drug trafficking activities and members of the SPARROW RUN CREW. Additionally, your affiants have significant concerns for CS-5's safety, should he/she conduct such a purchase and should SMACK learn about CS-5's cooperation. Electronic surveillance, if conducted simultaneously with such a controlled purchase, would mitigate those concerns. For these reasons, the use of confidential informants will not be adequate to identify other members of the organization and its source(s) of supply.

Indeed, this fear of retaliation is consistently expressed by CS-1, CS-2, CS-3, CS-4, CS-5, CS-6, CS-7, CS-8, and CS-9. These confidential sources all expressed a high level of concern with providing any assistance to law enforcement regarding SMACK and SPRIGGS. These confidential sources have explained that SMACK and SRIGGS are believed to be violent and the perpetrators of numerous shootings within Newark, Delaware. All the confidential sources further believed that SMACK and SPRIGGS would retaliate against anyone that they believed was cooperating with law enforcement against them.

D. Undercover Agents

SMACK and SPRIGGS have also displayed an extreme cautiousness in having direct involvement in drug transactions and will only do so with individuals with whom they are very familiar. Most often, SMACK and SPRIGGS will direct individuals to other co-conspirators to conduct the transactions. SPRIGGS has had contact with CS-1 because of their close personal association and mutual friends; however the contact between SMACK and CS-1 has been very limited. During the controlled drug transaction between CS-1 and SPRIGGS on January 23, 2015, an undercover officer was present in the vehicle operated by CS-1. During the actual

transaction, SPRIGGS met CS-1 away from the vehicle and questioned CS-1 who the additional occupant of the vehicle was. CS-1 indicated the undercover officer was a relative. SPRIGGS paid no attention to the undercover officer and made no attempt to engage in conversation with the officer. During the controlled drug transaction on January 29, 2015, SMACK went to great lengths to make sure that CS-1 was alone and had not sent anyone else to conduct the transaction. SMACK went so far as to have CS-1 stand in the middle of a field alone to make sure that CS-1 was alone. On the whole, the SPARROW RUN CREW has also displayed an extreme distrust in dealing with individuals that they do not know, which would make the introduction of an undercover agent extremely difficult. Also, due to the aforementioned violent nature of the SPARROW RUN CREW, it would also prove dangerous for the undercover agent.

E. Interviews of Subjects or Associates

Based upon my experience, your affiants believe that interviews of the TARGET SUBJECTS and/or their known associates would be insufficient to identify the source(s) of supply and other members of the organization, the locational source of the drugs, the present location of the drugs, and other pertinent information regarding the named crimes. For example, based on the arrest of CS-2 resulted in the search of the residence of SPRIGGS on November 20, 2014. During the search of the residence located at 331 Thorn Lane, Apartment 8, Newark, Delaware, crack cocaine was seized. Based on this seizure, SPRIGGS was arrested and charged with possession of narcotics and drug dealing. The post-arrest interview of SPRIGGS on November 20, 2014, yielded no actionable information to further this investigation. During the interview, SPRIGGS was unwilling to admit that he was involved in trafficking crack cocaine and made no indications that he was willing to identify any associates. I also believe that, due to fear of retaliation on the part of the interviewees, any responses to the interviews may contain a significant number of untruths, which would divert and frustrate the investigation with false leads. Additionally, such interviews may also alert the members of the conspiracy to law enforcement interest, which could compromise the investigation and result in the destruction or concealment of documents and other evidence, and which could pose harm to the cooperating sources whose identities might become known or whose cooperation could otherwise be compromised. In addition, SMACK and SPRIGGS have also changed their phone numbers and vehicles and have discontinued contact with associates that they know have had police contact.

F. Search Warrants

The execution of search warrants in this matter has been considered. However, use of such warrants would, in all likelihood, not yield a considerable quantity of narcotics or relevant documents, nor would the searches be likely to reveal the total scope of the illegal operation, source(s) of supply, and other membership of the SPARROW RUN CREW. It is unlikely that all, or even many, of the principals of this organization would be at any one location when a search warrant was executed. If executed at this time, not in conjunction with electronic surveillance, they would be likely to compromise the investigation by alerting the principals to the investigation and allowing other unidentified members of the conspiracy to further insulate themselves from detection.

On November 29, 2015, a search of the residence of Hakeem King was conducted by the New Castle County Police Department. King is a known member of the SPARROW RUN CREW. The search was the result of a surveillance of a drug transaction between King and Latoya Airall. After observing the drug transaction, officers from the New Castle County Police Department stopped Airall, who admitted purchasing marijuana from King. A warrant for the arrest of King charging drug dealing was entered by the New Castle County Police Department and King was arrested when he exited the residence located at 225 Aukland Drive, Newark, Delaware. Based on this information a search warrant was executed at 225 Aukland Drive, Newark, Delaware. During the search of the residence, marijuana and a .380 caliber handgun were recovered. Members of the FBI Violent Crimes Task Force attempted to interview King regarding the weapon and his association with the SPARROW RUN CREW but King refused to speak with law enforcement and invoked his right to counsel.

The utility of search warrants is further limited because of the large number of people who have access to the TARGET RESIDENCE. In addition, investigation has revealed that, at times, the SPARROW RUN CREW has substantial amounts of drugs in the TARGET RESIDENCE and, at other times, there are little or no drugs in the TARGET RESIDENCE. The interception of wire and electronic communications is necessary to determine the exact time a search warrant should be executed so as to maximize the acquisition of evidence and contraband. There is, however, no confidential source available to law enforcement that is close enough to

the inner workings of the SPARROW RUN CREW to have access to such information. Electronic surveillance of the targets would make it possible to acquire such information.

G. Pen Register/Toll Records

Pen register information has been used in this investigation, including a pen register on the TARGET TELEPHONE and on the phone numbers of other members of the SPARROW RUN CREW. The pen register information has verified frequent telephone communication between the TARGET TELEPHONE and other telephones associated with the organization. Pen registers, however, do not record the identity of the parties to the conversation, cannot identify the nature of substance of the conversation, and cannot differentiate between legitimate calls and calls for criminal purposes. A pen register cannot identify the source or sources of the controlled substances, nor can it, in itself, establish proof of the conspiracy. Telephone toll information, which identifies the existence and length of telephone calls placed from TARGET TELEPHONE to other telephones, has the same limitations as pen registers. For these reasons, pen registers are insufficient to identify the source(s) of supply and other members and workings of the SPARROW RUN CREW.

H. Trash Pulls

The identified possible residences of SMACK and SPRIGGS are located in apartment buildings. Due to the nature of the apartment buildings, residence trash is co-mingled and the actual owner of the trash cannot be determined. Additional trash pulls have not been conducted in the Sparrow Run neighborhood because if law enforcement presence was detected at the residence, the investigation could be thwarted. If the TARGET SUBJECTS were to become aware of law enforcement interest in the SPARROW RUN CREW and their drug distribution activities at the TARGET RESIDENCE, it is likely that they would shut down operations and relocate. This action would stall the investigation until their new base of operations could be discovered. Additionally, while trash pulls may yield evidence of the criminal enterprise, they will not fully identify other members and associates of the SPARROW RUN CREW.

Based upon the foregoing, it is your affiant's belief that the interception of wire and electronic communications is an essential investigative means in obtaining evidence of the TARGET OFFENSES in which the TARGET SUBJECTS and others as yet unknown are

involved.

PROFILES OF CONFIDENTIAL INFORMANTS

Your Affiants are aware of information from confidential informants (hereinafter referred to as "CI"), who are past proven reliable as indicated, who have given information indicating that the persons whose communications are to be intercepted are involved in an on-going criminal enterprise that is distributing large quantities of heroin and cocaine while using the telephone to facilitate their enterprise and commission of crimes.

1. In December 2014, law enforcement interviewed a confidential source hereinafter referred to as "CS-1." CS-1 has been motivated to assist law enforcement for monetary reasons. Information from CS-1 has been corroborated by other investigative techniques, including analysis of subpoenaed records, debriefings of other confidential informants, and government records. Your affiants believe that information from CS-1 is credible and reliable. CS-1 has a criminal history that includes convictions for the following offenses:[2]

    i) Juvenile: Adjudicated delinquent of Second Degree Assault in March, 1994

    ii) July 2001: Convicted of theft of property of $1000 or more in New Castle County Delaware Superior Court. CS-1 was sentenced to two years suspended sentence and two years probation.

2. In November 2014, law enforcement officers interviewed a confidential source hereinafter referred to as "CS-2". CS-2 was motivated to assist the FBI for considerations regarding pending charges. Information from CS-2 has been corroborated by other investigative techniques, including analysis of subpoenaed records, debriefings of confidential informants, and government records. Your affiants believe that information from CS-2 is credible and reliable. CS-2 has no criminal history except pending charges for possession of drug paraphernalia and possession of controlled substances in misdemeanor quantities.

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2 Specific date and court information is not included with regard to the confidential sources' criminal convictions so as to protect the sources' identities.

3. In August 2014, law enforcement officers interviewed a confidential source hereinafter referred to as "CS-3." CS-3 was motivated to assist the FBI Task Force for monetary compensation. Information from CS-3 has been corroborated by other investigative techniques, including analysis of subpoenaed records, debriefings of confidential informants, and government records. Your affiants believe that information from CS-3 is credible and reliable. CS-3 has a criminal history that includes convictions for the following offenses:

    i) February 2015: Convicted of Identity Theft in New Castle County Superior Court. CS-3 was sentenced to one year probation.

4. In October, 2014, law enforcement officers interviewed a confidential source hereinafter referred to as "CS-4." CS-4 was motivated to assist the FBI Task Force in exchange for consideration of a lesser sentence regarding his/her pending charge. Information from CS-4 has been corroborated by other investigative techniques, including analysis of subpoenaed records, debriefings of confidential informants, and government records. Your affiants believe that information from CS-4 is credible and reliable. CS-4 has a criminal history that includes convictions for the following offenses:

    i) April, 2011: Convicted of Delivery of a Narcotic Schedule II Controlled Substance in New Castle County Delaware Superior Court. CS-4 was sentenced to sentenced to six months confinement.

    ii) October, 2013: Convicted of Tier 2 Possession of Narcotics in New Castle County Delaware Superior Court. CS-4 was sentenced to six months suspended sentence and one year probation.

5. In January, 2015, the FBI Task Force developed a confidential source hereinafter referred to as "CS-5." CS-5 was motivated to assist the FBI Task Force for monetary reasons. Information from CS-5 has been corroborated by other investigative techniques, including surveillance and examination of government records. Based on this investigation, your affiants believe that information from CS-5 is credible and reliable. CS-5 has no criminal

history.

6. In February, 2015, the FBI Task Force developed a confidential source hereinafter referred to as "CS-6". CS-6 was motivated to assist the FBI Task Force for consideration regarding pending charges. Information from CS-6 has been corroborated by other investigative techniques, including surveillance, including analysis of subpoenaed records, debriefings of confidential informants, and examination of government records. Based on this investigation, your affiants believe that information from CS-6 is credible and reliable. CS-6 has a criminal history that includes convictions for the following offenses:

   i) Juvenile: Adjudicated delinquent of charges of Second Degree Burglary.

   ii) July, 2007: Convicted of Third Degree Burglary, Theft of a Firearm, and Failure to Observe Police Signal in New Castle County Superior Court. CS-6 was sentenced to two years confinement, eighteen months suspended and probation.

7. In February, 2015, the FBI Task Force developed a confidential source hereinafter referred to as "CS-7". CS-7 was motivated to assist the FBI Task Force for consideration regarding pending charges. Information from CS-7 has been corroborated by other investigative techniques, including surveillance, including analysis of subpoenaed records, debriefings of confidential informants, and examination of government records. Based on this investigation, your affiants believe that information from CS-7 is credible and reliable. CS-7 has a criminal history that includes convictions for the following offenses:

   i) March 2008: Convicted of Resisting Arrest in New Castle County Superior Court. CS-7 was fined as a result of this misdemeanor conviction.

   ii) September 2013: Convicted of Possession of Drug Paraphernalia in New Castle County Superior Court. CS-7 was fined as a result of this misdemeanor conviction.

8. In February, 2015, the FBI Task Force developed a confidential source hereinafter referred to as "CS-8". CS-8 was motivated to assist the FBI Task Force for consideration regarding pending charges. Information from CS-8 has been corroborated by other investigative techniques, including surveillance, including analysis of subpoenaed records, debriefings of confidential informants, and examination of government records. Based on this investigation, your affiants believe that information from CS-8 is credible and reliable. CS-8 has no criminal history.

9. In February, 2015, the FBI Task Force developed a confidential hereinafter referred to as "CS-9". CS-9 was motivated to assist the FBI Task Force for consideration regarding pending charges. Information from CS-9 has been corroborated by other investigative techniques, including surveillance, including analysis of subpoenaed records, debriefings of confidential informants, and examination of government records. Based on this investigation, your affiants believe that information from CS-9 is credible and reliable. CS-9 has no criminal history.

10. In April, 2015, the FBI Task Force developed a confidential hereinafter referred to as "CS-10". CS-10 was motivated to assist the FBI Task Force for consideration regarding pending charges. Information from CS-10 has been corroborated by other investigative techniques, including analysis of subpoenaed records, debriefings of confidential informants, and examination of government records. Based on this information, your affiants believe that information from CS-10 is credible and reliable. CS-10 has no criminal history.

INVESTIGATION AND PROBABLE CAUSE

Your Affiants can state that during this investigation several confidential reliable individuals, hereafter referred to as CI's, have made controlled purchases of controlled substances. To protect the confidentiality of the individuals and to ensure the safety of the individuals and the integrity of the controlled purchases, the below procedures were followed on all controlled purchases stated in this Affidavit:

a. Surveillance was initiated on the CI, and a thorough briefing was presented to surveillance officers advising the officers of the CI's appearance.

b. A search was conducted on the CI for any contraband and/or currency prior to sending them to make the controlled purchase.

c. The CI was given official funds.

d. The CI was briefed as to what to do and say during the transaction and where to meet following the transaction.

e. Arrangements were made to meet or pick up the CI after the transaction.

f. The CI was searched after the transaction for contraband, money and / or drugs. Any evidence was secured.

g. A statement was taken from the CI about the transaction, with emphasis on details about what occurred while the investigating officer was out of sight and / or hearing of the CI.

In this Affidavit, your affiants have not included a complete recitation of the entire investigation completed into this organization but has instead limited this Affidavit to those facts which your affiant believes, based on our training and experience, demonstrate that the TARGET TELEPHONE is being used in furtherance of the drug trafficking conspiracy.

A. Case Background

Beginning in or around August 2014, the FBI Task Force began investigating a violent drug trafficking organization known as the SPARROW RUN CREW. This organization operates in Newark, Delaware and the surrounding areas. Individuals identified as members of the SPARROW RUN CREW have been involved with violent acts in order to maintain territory for the purpose of drug trafficking. SMACK is a person of interest in a homicide investigation conducted by the New Castle County Police. The homicide occurred on June 30, 2014 during which the victim, Dwayne Barfield, was shot nine times by a .22 caliber handgun at 47 Heron Court, Newark, Delaware, located in the Sparrow Run neighborhood. SMACK was reported to be at the scene and is believed to have ordered the homicide. SMACK was in the company of SPRIGGS and [redacted] a juvenile, was charged for the homicide. Investigation to date has indicated the homicide is the result of a drug dispute.

Evidence obtained during the investigation indicates that this organization is responsible for distributing heroin and cocaine base to a wide network of distributors and sub-distributors. The heroin is distributed by SMACK in quantities ranging from multiple bundles to multiple logs[3] per transaction. The cocaine base is distributed by SPRIGGS in quantities ranging from grams to ounce quantities. Law enforcement believes that SMACK and SPRIGGS are co-leaders of the organization and that they pool money to buy heroin and cocaine from source(s) of supply. It is believed that SMACK and SPRIGGS have their own distribution networks, though those networks may share some common links.

The following TARGET SUBJECTS have been identified by informants, surveillance, toll records, and information from various law enforcement agencies as being members of the SPARROW RUN CREW: SMACK, SPRIGGS, BRITTINGHAM, CANNON, TAYLOR, SMALLWOOD, and GLENN. These members distribute heroin in Newark, Delaware, and/or commit acts of violence in furtherance of the distribution of that heroin. The investigation has uncovered evidence that the SPARROW RUN CREW is led by SMACK and SPRIGGS and that the other TARGET SUBJECTS – to include BRITTINGHAM, CANNON, TAYLOR, SMALLWOOOD, and GLENN – are participants in the SPARROW RUN CREW's drug distribution conspiracy.

Several sources, including CS-5, have reported that the SPARROW RUN CREW has had sources of supply for heroin based in Wilmington, Delaware. However, investigators have not yet been able to identify either a cocaine or heroin source of supply for the SPARROW RUN CREW.

Summary of Information Provided by Cooperating Sources 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 Regarding SPARROW RUN CREW.

On December 17, 2014, law enforcement officers interviewed CS-1, who has purchased cocaine from SPRIGGS before and thus was able to provide information based on their personal

3 A "bundle" of heroin typically contains 13 individually packaged baggies, each containing a single dose (usually between .01-.02 grams) of heroin. A "log" of heroin typically contains 10 bundles of heroin or 130 bags of heroin.

knowledge and personal communications relating to the SPARROW RUN CREW. CS-1 explained to law enforcement that he/she met SPRIGGS in the area of Raven Turn in the Sparrow Run housing complex, Newark, Delaware. He/she said that SPRIGGS sells controlled substances in that area; however, SPRIGGS will occasionally meet CS-1 at locations close to the Sparrow Run neighborhood. CS-1 has observed SPRIGGS with ounce quantities of crack cocaine during previous transactions CS-1 has conducted with SPRIGGS. CS-1 has observed SPRIGGS in the company of SMALLWOOD during drug transactions. CS-1 informed federal agents that SPRIGGS began selling heroin in the Sparrow Run neighborhood in recent months. CS-1 has conducted two (2) monitored and recorded drug transactions with SPRIGGS at the direction of law enforcement. CS-1 has conducted one (1) monitored and recorded drug transactions with SMACK at the direction of law enforcement.

On November 10, 2014, law enforcement officers interviewed CS-2, who has been buying crack cocaine from SPRIGGS for a period of approximately six months. CS-2 was interviewed by law enforcement officers after they observed SPRIGGS meet with a vehicle and conduct what appeared to be a drug transaction. CS-2 was interviewed post-arrest after being stopped for a traffic violation and admitting to law enforcement that he/she was in possession of crack cocaine. In a post-Miranda statement, CS-2 stated he/she knows SPRIGGS as "Black" and initially met SPRIGGS in the Sparrow Run neighborhood. CS-2 provided telephonic contact information for SPRIGGS to interviewing agents. CS-2 stated if contact with SPRIGGS was initiated in the morning hours, SPRIGGS would meet CS-2 at the BJ's Wholesale Club on Rt 72 and Rt 4, Delaware. If CS-2 contacted SPRIGGS in the afternoon hours, SPRIGGS instructed CS-2 to meet in the Sparrow Run neighborhood. CS-2 stated during this interview that he/she contacted SPRIGGS for the purpose of purchasing $100 worth of crack cocaine and SPRIGGS instructed CS-2 to meet at the BJ's Wholesale Club. During the transaction, CS-2 observed SPRIGGS with a large amount of crack cocaine. CS-2 observed SPRIGGS remove an amount of crack cocaine from the bag and provide it to CS-2. This information is based on CS-2's personal knowledge and personal communications with members of the SPARROW RUN CREW.

On August 26, 2014, law enforcement officers interviewed CS-3. CS-3 advised interviewing officers that members of the SPARROW RUN CREW congregate on Raven Turn in the Sparrow Run neighborhood. This information is based on CS-3's personal knowledge and

personal communications with the SPARROW RUN CREW. CS-3 advised SMACK sells heroin in Sparrow Run and TAYLOR is actively selling heroin for SMACK. TAYLOR sells heroin for SMACK for $35 a bundle. SMACK was observed recently in possession of a firearm, along with TAYLOR.

On August 26, 2014, law enforcement officers interviewed CS-4, who is a close associate of members of the SPARROW RUN CREW. CS-4 stated he/she is very familiar with SMACK and has a long term relationship with him. CS-4 stated SMACK is getting three hundred (300) bundles of heroin approximately every two days. CS-4 stated SMACK is selling heroin to other dealers and users. SMACK sells heroin for up to $40 a bundle and $280 to $300 for a log of heroin. CS-4 advised SMACK is selling heroin with the stamp "Mike Tyson" and "Bugs Bunny". CS-4 stated the stamp for the heroin that SMACK is selling changes monthly. CS-4 observed SMACK with a .40 caliber handgun in June, 2014 and advised SMACK is usually armed. CS-4 stated SMACK has connections to the west side of Wilmington, Delaware, and is closely associated with JAVON CANNON. This information is based on CS-4's personal knowledge and personal communications with members of the SPARROW RUN CREW.

On February 6, 2015, law enforcement officers interviewed CS-5. CS-5 stated SMACK and SPRIGGS are best friends. CS-5 advised SMACK would provide a bundle of heroin to a female known to CS-5 to borrow her car for a day so that he could conduct heroin transactions in a vehicle that was not associated with him. CS-5 stated SMACK has white customers wait for him in the Glasgow Trailer Court and walks to them from the Sparrow Run neighborhood. CS-5 has observed SMACK in possession of three or four logs of heroin at a time. CS-5 stated SPRIGGS is selling crack cocaine for $20 a rock and has observed SPRIGGS in possession of ¼ ounce to ½ ounce quantities. CS-5 stated SPRIGGS would "break off" the requested amounts from customers in front of the customer during transactions. CS-5 stated SPRIGGS has his customers wait for him at the Royal Farms located at the entrance to the Sparrow Run neighborhood. CS-5 stated SPRIGGS and SMACK are dangerous and know where some of their customers live. CS-5 expressed fear of SMACK and SPRIGGS because they are known to be armed. This information is based on CS-5's personal knowledge and personal communications with members of the SPARROW RUN CREW.CS-5 has conducted

one (1) monitored and recorded drug transactions with SPRIGGS and two (2) monitored and recorded drug transactions with BRITTINGHAM at the direction of law enforcement.

On February 12, 2015, law enforcement officers interviewed CS-6. CS-6 was arrested after being observed in possession of heroin and paraphernalia. The heroin that CS-6 was in possession of was stamped "Sweet Dreams." In a post-Miranda statement, CS-6 indicated he/she has had a long term relationship with SMACK. During the statement, CS-6 indicated the heroin that CS-6 was in possession of came directly from SMACK. CS-6 provided a contact number of 302-391-4616 for SMACK. CS-6 was charged $35 for the bundle of heroin. CS-6 identified additional members of the SPARROW RUN CREW, to include SPRIGGS, TAYLOR, and SMALLWOOD. CS-6 stated SMACK uses a residence located on Kemper Court in the Sparrow Run neighborhood as a stash location. CS-6 indicated the residence belongs to an unidentified black female. CS-6 state SMACK would provide heroin to CS-6 for rides into Wilmington, Delaware to the area of West 4th Street and Union Street, an area where CS-6 believes SMACK to live. CS-6 has observed SMACK in possession of several weapons, most recently a black and silver handgun. CS-6 was unable to identify SMACK's source of supply, but stated SMACK has a secondary source of supply located in the Wilton neighborhood in Newark, Delaware. CS-6 stated the source of supply is a cousin to TAYLOR. This information is based on CS-6's personal knowledge and personal communications with members of the SPARROW RUN CREW.

On February 18, 2015, law enforcement officers interviewed CS-7. CS-7 identified SMACK as the person CS-7 knows as "AK". CS-7 stated SMACK is using telephone number 302-391-4616. CS-7 was provided a photo line-up of known members of the SPARROW RUN CREW. In addition to SMACK, CS-7 identified BROWN, CANNON, TAYLOR, BRITTINGHAM, SMALLWOOD, and GLENN. This information is based on CS-7's personal knowledge and personal communications with members of the SPARROW RUN CREW.

On February 18, 2015, law enforcement officers interviewed CS-8. CS-8 was arrested for possession of heroin and drug paraphernalia. The heroin that CS-8 was in possession of was stamped "Sweet Dreams". During a post-Miranda statement, CS-8 stated the heroin was purchased from a male that CS-8 knows as "BLACK". CS-8 stated he/she also purchased $20 worth of crack cocaine from BLACK during the transaction. CS-8 stated he/she met BLACK at

the Glasgow Trailer Court earlier on this date. CS-8 advised BLACK began selling heroin several months ago. CS-8 had a long term relationship with SMACK for heroin but had a disagreement and began buying heroin from BLACK. CS-8 stated BLACK had only sold crack for a long time but had recently also started selling heroin. CS-8 identified a photograph of SPRIGGS as the male CS-8 knows as BLACK. CS-8 identified additional stamps of heroin that CS-8 has purchased from SMACK and SPRIGGS as "King Kong", "Nyquil", and Sweet Dreams". CS-8 stated he/she would drive SMACK to the Riverside housing complex in Wilmington in order for SMACK to get more heroin for his organization. CS-8 also identified an additional source of supply in the Glenville neighborhood in Newark, Delaware that SMACK would use. CS-8 has observed SMACK in possession of 100 bundles of heroin at a time regularly. CS-8 stated SMACK and other members of the SPARROW RUN CREW use a house on the north side of Heron Court in Sparrow Run as a stash house. CS-8 knows SMACK and SPRIGGS to use young males to sell heroin and crack cocaine for them. CS-8 avoids the young males due to their violent tendencies. CS-8 has observed SMACK, SPRIGGS and SMALLWOOD in possession of weapons, to include handguns and assault rifles. CS-8 identified SMACK, SPRIGGS, BRITTINGHAM, SMALLWOOD, CANNON, and GLENN as members of the SPARROW RUN CREW. CS-8 provided telephone numbers for the following:

i) SPRIGGS – 302-442-1478
ii) CANNON – 267-457-9544
iii) BRITTINGHAM – 302-442-8086
iv) SMALLWOOD – 302-602-5862
v) GLENN – 302-333-3847

This information is based on CS-8's personal knowledge and personal communications with members of the SPARROW RUN CREW.

On February 18, 2015, law enforcement officers interviewed CS-9. CS-9 was arrested for possession of heroin and resisting arrest. The heroin that CS-9 had was stamped "Sweet Dreams". In a post-Miranda statement, CS-9 stated he/she purchases heroin from a male known as "AK". CS-9 would call AK at 302-391-4616 and confirm that AK had heroin for sale. CS-9

would then drive to the Sparrow Run neighborhood and call AK again to arrange a meet location. CS-9 indicated the meeting would usually take place on Raven Turn. CS-9 would purchase five bundles of heroin from AK for $35 each. CS-9 has purchased log quantities of heroin from AK on multiple occasions in the past. CS-9 identified a photograph of SMACK as the male CS-9 knows as AK. CS-9 stated SMACK had young black males named Rahmir and Kaseem that would deliver heroin to his customers. CS-9 stated SMACK is no longer using Rahmir and Kaseem for deliveries and they are now working for SPRIGGS. CS-9 has observed SMACK in possession of handguns on multiple occasions. CS-9 described the handguns as .40 caliber, 9mm and .25 caliber. This information is based on CS-9's personal knowledge and personal communications with members of the SPARROW RUN CREW.

On April 9, 2015, law enforcement officers interviewed CS-10. CS-10 stated he/she had contacted a person known to CS-10 as "Lamar" or "Lamont" at the TARGET TELEPHONE. CS-10 indicated to law enforcement that the TARGET TELEPHONE was contacted through voice and text. CS-10 stated to law enforcement that the TARGET TELEPHONE was contacted for the purpose of arranging a drug transaction. During the interview of CS-10, CS-10 positively identified a photograph of ADRIN SMACK as "Lamar" or "Lamont".

B. SMACK's DRUG DISTRIBUTION ACTIVITIES USING 302-391-4616, THE PRIOR TARGET TELEPHONE

In addition to the information provided by CS-7 and CS-9 in February, 2015, on January 29, 2015, at 2:27pm, CS-1 placed a monitored and recorded call to 302-391-4616. During the call, CS-1 requested a log of heroin and $50 worth of crack cocaine. SMACK agreed to the sale and instructed CS-1 to meet in the Glasgow Trailer Court on Frederick Street. At 2:40pm, CS-1 was provided with a recording device, transmitter, and $450 in drug evidence purchase funds. At 2:44pm, CS-1 contacted SMACK at 302-391-4616 to inform him that he/she is on Frederick Street. During the call, SMACK instructed CS-1to change locations to Curlew Drive in the Sparrow Run neighborhood. At 2:52pm, CS-1 contacts SMACK at 302-391-4616 and informs him that he/she is on Curlew Drive. At 2:55pm, CS-1 places another call to SMACK, during the call, SMACK instructs CS-1 to walk into the field adjacent to Curlew Drive and stand with his/her hands above his/her head. SMACK informs CS-1 that he wanted to make sure that CS-1

did not send anyone else in CS-1's place. During the transaction, SMACK informed CS-1 that he did not have any crack cocaine at this time and was only able to provide a log of heroin. At 2:58pm, CS-1 was debriefed at a pre-determined location. CS-1 advised SMACK walked from the area of Heron Court to the field adjacent to Curlew Drive. During the transaction, SMACK informed CS-1 that future prices for a log of heroin would be $350 if CS-1 was to purchase log quantities. CS-1 observed an additional male that was present during the transaction that appeared to be acting as a lookout for SMACK. The heroin that was purchased from SMACK tested positive for the presence of heroin.

On February 25, 2015, at 2:05pm, CS-1 placed a monitored and recorded telephone call to SMACK at 302-391-4616. During the call, SMACK indicated to CS-1 that he was "not around." Based on this conversation, CS-1 understood that SMACK was unable to sell CS-1 heroin because he was not in possession of heroin to sell. Since this date, SMACK has refused to answer calls from CS-1.

On March 13, 2015, at 2:08pm, CS-5 placed a monitored and recorded telephone call to 302-442-1478, the telephone known to be used by SPRIGGS for the purpose of conducting a monitored and recorded drug transaction. CS-5 arranged to meet SPRIGGS, or one of his representatives in the Sparrow Run neighborhood. At 2:30pm, CS-5 entered the Sparrow Run neighborhood; CS-5 observed SMACK in the Sparrow Run neighborhood and engaged SMACK in conversation. CS-5 left SMACK in order to conduct the drug transaction, CS-5 placed a call to 302-442-1478 and advised he/she was in the area. , CS-5 was instructed to drive to Egret Court in the Sparrow Run neighborhood. When CS-5 parked on Egret Court, an unidentified individual not previously known to CS-5, approached CS-5 and sold CS-5 4.12 grams of a rock-like substance which tested positive for the presence of cocaine. After the controlled drug transaction, CS-5 attempted to locate SMACK in the Sparrow Run neighborhood. At approximately 2:48pm, CS-5 located SMACK on Raven Turn and continued the previous conversation. During the conversation, SMACK inquired whether CS-5 was able to get what he/she needed. CS-5 advised SMACK that he/she did not trust the individuals that CS-5 was talking with because they would switch phones and CS-5 did not know who he/she was dealing with. SMACK asked for CS-5's telephone number and provided 302-391-4616 as a contact for

SMACK. SMACK also indicated to CS-5 that he was selling only crack cocaine at the moment and CS-5 should call him directly.

On March 24, 2015 at 2:00pm, CS-5 placed a monitored and recorded phone call to SMACK at phone number 302-391-4616 and requested an "eight ball of crack". SMACK indicated to CS-5 that he was "dry" and he did not know where to go get it. CS indicated to SMACK he/she would call back. SMACK indicated he would call CS-5 when he had crack cocaine to sell.

C. SMACK's DRUG DISTRIBUTION ACTIVITIES USING THE TARGET TELEPHONE

On April 9, 2015, at 4:06pm, CS-5 placed a monitored and recorded telephone call to the TARGET TELEPHONE. During the call, CS-5 requested an "eight-ball of crack". SMACK questioned CS-5 what CS-5 had paid when SMACK had encountered CS-5. CS-5 responded $300. SMACK indicated to CS-5 that he would charge CS-5 $260. SMACK agreed to meet CS-5 at the Christiana Mall in several minutes in order to conduct the transaction. Shortly after concluding the call, SMACK, using the TARGET TELEPHONE, contacted CS-5. During the call, SMACK indicated to CS-5 that he had Xanax pills for sale also. CS-5 indicated to SMACK that he/she would be interested in purchasing the pills in addition to the crack cocaine. At 4:13pm, CS-5 was searched for contraband with negative results. CS-5 was provided $300 in drug evidence purchase funds, a recording device and transmitter. CS-5 was observed by law enforcement traveling to the Christiana Mall in order to meet SMACK. At 4:28pm, CS-5 received a call from SMACK instructing CS-5 to meet at the food court area of the mall. At 4:30pm, CS-5 arrived at the mall and parked in front of the food court entrance. At 4:35pm, CS-5 placed a call to SMACK at the TARGET TELEPHONE, informing SMACK that CS-5 was parked in the lot. SMACK informed CS-5 that he was arriving shortly. At 4:37pm, CS-5 exited their vehicle and entered the mall. CS-5 conducted the drug transaction with SMACK in the restroom of the mall. At 5:12pm, CS-5 was debriefed by law enforcement and drug evidence collected. The drug evidence consisted of a clear plastic bag containing an off-white rock-like substance and sixteen (16) round blue pills bearing the letter R and numbers 031. All recording equipment was removed and CS-5 and CS-5 vehicle was checked for contraband with negative

results. During the debrief of CS-5, CS-5 stated SMACK entered the mall near Macy's and was accompanied by his girlfriend and her children. CS-5 stated the drug transaction took place in the restroom of the mall. CS-5 described SMACK as being dressed in black. The drug evidence collected from CS-5 that was purchased from SMACK tested positive for the presence of cocaine and drug identification sources indicate the pills purchased from SMACK are Alprazolam, a generic form of Xanax.

Based on your affiants knowledge derived from the investigation referenced above, your affiants believe that the TARGET TELEPHONE is either in SMACK's possession otherwise under his dominion and control.

AUTHORIZATION REQUEST

Based on the foregoing, it is our opinion that the interception of wire and electronic communications occurring over the TARGET TELEPHONE is essential to uncover and prove the full scope of the illegal activity described herein. Therefore, it is requested that this Court authorize the interception of wire communications and electronic communications. It is therefore requested that this Court issue an Order directing Sprint, a wire and electronic communications service provider as defined in Section 2407 of Title 11, Delaware Code , as well as their agents, employees, and subcontractors, or any other wire and wire service provider, to furnish the monitoring agents with all information, facility, and technical assistance necessary to accomplish the interceptions unobtrusively and with a minimum of interference with the services that such wire and electronic communications service provider is according the persons whose communications are to be intercepted, and

Authorization is also sought to intercept digital text message communications, including text messages (SMS, MMS, picture messages, and video messages) to and from the TARGET TELEPHONE by directing Sprint, the phone carrier, to provide content to include header and footer information for text messaging and/or short message services, pen register information, trap and trace information, and all incoming and outgoing digits.

Authorization is further sought to intercept wire and electronic communications not only of the TARGET TELEPHONE, but also of any other telephone number subsequently assigned to or used by the instrument bearing the same ESN used by the TARGET TELEPHONE, within the thirty-day period. The authorization is also intended to apply to the TARGET TELEPHONE referenced above regardless of service provider, and to background conversations intercepted in the vicinity of the TARGET TELEPHONE while the telephone is off the hook or otherwise in use.

Your affiants are also seeking authorization to continue to intercept background conversations in the vicinity of the TARGET TELEPHONE, and that the authorization apply and extend to the continued interception of contemporaneous voicemail messages occurring or played back on the TARGET TELEPHONE, and

In connection with the telecommunication companies that provide service for the TARGET TELEPHONE, all interceptions over the TARGET TELEPHONE will automatically be routed to Wilmington, Delaware regardless of where the telephone calls are placed to or from. Monitoring will be conducted by Task Force Officers and Special Agents of the FBI and by additional investigators or support personnel who have either been deputized by the FBI or who will be working under the supervision of a Special Agent or Task Force Officer[4].

It is further requested that the Court issue an Order authorizing the monitoring agents to ascertain the physical location of the TARGET TELEPHONE, including but not limited to E-911 Phase II data or other precise location information concerning the TARGET TELEPHONE (the "Requested Location Information"), during the authorized period of interception. The basis for this request is to assist the investigators monitor the movements of the TARGET SUBJECTS. As previously noted, during the investigation it has proven difficult to monitor and observe the movements of these individuals without being detected. Moreover, it is essential to the investigation to know the locations of the TARGET SUBJECTS as they discuss pending or current drug deals.

It is further requested that the Court issue an Order that Sprint disclose the Requested

4 All officers qualify as "investigators or law enforcement officers" within the meaning of 11 Del. C. § 2401 (11)

Location Information concerning the TARGET TELEPHONE to the monitoring agents during the authorized period of interception, initiate a signal to determine the location of the TARGET TELEPHONE on the service provider's network or with such other reference points as may be reasonably available and at such intervals and times as directed by the law enforcement agent serving the proposed order, and furnish the information, facilities, and technical assistance necessary to accomplish the acquisition unobtrusively and with a minimum of interference with such services as that provider accords the user(s) of the TARGET TELEPHONE, at any time of day or night, owing to the potential need to locate the TARGET TELEPHONE outside of daytime hours.

It is further requested, pursuant to 11 Del. C. § 2402 (2) that service of notice of the acquisition of the Requested Location Information be delayed until such time as the inventory required under 18 U.S.C. § 2518(8)(d) is served.

PREVIOUS APPLICATIONS FOR WIRE AND ORAL COMMUNICATIONS

Affiants are not aware of any prior applications to intercept or for approval of interception of, wire, oral, or electronic communications involving any of the same persons, facilities, or places specified in this application for portable Sprint cellular telephone **(302) 981-6138.**

A previous application was submitted to the Court on April 1, 2015 for Smack's previous telephone (302) 391-4616, no longer in use.

MINIMIZATION

Based on the facts set forth herein, it is believed that the activity to be intercepted pursuant to the Court's Order sought herein represents a continuing criminal conspiracy, and evidence will be obtained on a continuing basis. In order to detect and identify all of the individuals who are expected to be involved, continuous interceptions will be required. Therefore, it is requested that these interceptions not terminate when the described type of

communications are first obtained, but that authority to intercept continue until the attainment of the authorized objectives or, in any event, at the end of thirty (30) days.

Your Affiants can state monitoring of conversations will terminate immediately if and when it is determined that none of the named interceptees and/or any subsequently identified co-conspirators, accomplices or participants, the conversation does not relate to the specified objectives of the Order, or is non-criminal in nature. Such minimized conversations will be spot-monitored to determine if they have become criminal in nature. The monitoring of the intercepted electronic communications will be conducted by employees of the Federal Bureau of Investigation (FBI) working with local law enforcement officers of the state of Delaware. Additionally all employees of the FBI and local law enforcement officers will be trained by members of the Attorneys General Office on the proper application of minimization instructions to include the protected communication and non-pertinent communications.

Based upon the information contained in this Affidavit, particularly the failure of other investigative techniques to produce significant admissible evidence against the aforementioned persons who your Affiants believe have committed and are now committing the offenses described herein, your Affiants believe that the interception of electronic communications is necessary.

Affiants:

#2752

Detective Brian Lucas

1264

Detective Scott Linus

SWORN AND SUBSCRIBED, this 10th day of April, 2015

The Honorable Richard R. Cooch
Superior Court for the State of Delaware

Exhibit B

IN THE MATTER OF:
Al-Ghaniyy Price [redacted]97, BMN
SBI #[redacted]
326 Kemper Drive (Sparrow Run)
Newark, New Castle County, DE 19702
And all curtilage therein

THE NEW CASTLE COUNTY
SUPERIOR COURT
IN THE STATE OF DELAWARE
DAYTIME SEARCH WARRANT
32-15-035067

THE STATE OF DELAWARE TO: Det. Scott Linus IBM #1264 of the Delaware State Police and Det. Brian Lucas #2752 of the New Castle County Police Department, with the assistance of any police officer or constable or any other necessary or proper person or persons or assistance.

GREETINGS:
Upon the annexed affidavit and application or complaint for a search warrant, as I am satisfied that there is probable cause to believe that certain property, namely **The Body of Al-Ghaniyy Price [redacted]97, BMN), Heroin, any other controlled substances, scales, and packaging equipment/materials, any drug paraphernalia, any and all firearms and/or ammunition, United States Currency (USC, Money), business records and or documents indicative of drug transactions and or USC transactions and or USC transactions, any electronic communication devices, photographs of USC and/or any physical evidence of illegal drug use and or sales, and any evidence of the crimes of Maintaining a Drug Property and Drug Dealing;** described in the annexed affidavit and application or complaint; and that search of the premise(s) in the daytime is necessary in order to prevent the escape or removal of the person or property to be searched for:

NOW THEREFORE, YOU ARE HEREBY COMMANDED within ten (10) days of the date hereof to search the above-named person, persons, house, conveyance or place for the property specified in the annexed affidavit and application, and to search any occupant or occupants found in the house, place, or conveyance above-named for such property, serving this warrant and making the search in the daytime, or in the nighttime if the property to be searched is not a dwelling house, and, if the property, papers, articles or things, or any part thereof, be found there, to seize it, giving to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken, or leaving the copy and receipt at the place from which the property was taken and to prepare a signed inventory of the goods seized in the presence of the person from whose possession or premises the property was taken, if they are present, or, if they are not present, in the presence of a least one witness, and to return this warrant, accompanied by the written inventory, to me forthwith.

DATED the 27th day of May A.D. 2015

This search warrant is sealed until further order of this Court

Richard R. Cooch

The Honorable Richard R.Cooch
Superior Court for the State of Delaware

IN THE MATTER OF:
Al-Ghaniyy Price [redacted]97, BMN
SBI # [redacted]
326 Kemper Drive (Sparrow Run)
Newark, New Castle County, DE 19702
And all curtilage therein

THE NEW CASTLE COUNTY
SUPERIOR COURT
IN THE STATE OF DELAWARE
DAYTIME SEARCH WARRANT

STATE OF DELAWARE COUNTY OF NEW CASTLE	DATE OF APPLICATION 05-27-2015	COMPLAINT NO. 32-15-035067

****

NAME(S) OF AFFIANT(S):
Det Scott Linus #1264 of The Delaware State Police, and Det. Brian Lucas #2752 of the New Castle County Police Department, personally appeared before me, and being duly sworn (affirmed) according to law, depose(s) and say(s) that there is probable cause to believe that certain property is evidence of, or the fruit of a crime, or is contraband, or is unlawfully possessed or is otherwise subject to seizure, and is located at particular premises or places or in the possession of a particular person(s) as described below:

Identify item(s) to be searched for and seized:
The Body of Al-Ghaniyy Price [redacted]97, BMN), **Heroin, any other controlled substances, scales, and packaging equipment/materials, any drug paraphernalia, any and all firearms and/or ammunition, United States Currency (USC, Money), business records and or documents indicative of drug transactions and or USC transactions and or USC transactions, any electronic communication devices, photographs of USC and/or any physical evidence of illegal drug use and or sales, and any evidence of the crimes of Maintaining a Drug Property and Drug Dealing.**

Specific description of premises and/or place(s) and/or vehicle(s) and/or person(s) to be searched:
Single Family Dwelling, known as 326 Kemper Drive, Newark, DE, in New Castle County, in the development of Sparrow Run, brick front 1st floor, tan siding on 2nd floor, dark green shutters, wood front door with 326 displayed to the right of the front door.

Name of owner(s), occupant(s), or possessor(s), of premises and/or place(s) to be searched:
Owner: Affordable Homes LLC (Rental Property)
Occupant: Dom Price (Tenant, Father), Al-Ghaniyy Price (Tenant)

Violation of (describe conduct or specify statute):
DE TITLE 16 CHAPTER 4752 0001, Drug Dealing Class B Felony

PROBABLE CAUSE BELIEF IS BASED ON THE FACTS AND CIRCUMSTANCES SET FORTH IN THE HEREIN ATTACHED PROBABLE CAUSE SHEET CONSISTING OF 3 PAGES.

Det [signature] OSP 1264
[signature] OF NCCPD 2752
(SIGNATURE OF AFFIANT) (AGENCY/DEPARTMENT) (IBM)

SWORN AND SUBSCRIBED BEFORE ME, THIS 27th DAY OF May 2015

[signature]
The Honorable Richard R. Cooch

New Castle County Superior Court
(COURT)

TO LAW ENFORCEMENT OFFICER(S): WHEREAS, facts have been sworn to or affirmed before me, by written affidavit(s) attached hereto, from which I have found probable cause, I do authorize you to search the herein described premises and/or place(s) and/or vehicle(s) and/or person(s) and to seize, secure, inventory and make return in accordance to the DELAWARE Code, the herein described items.

****

(✓) This warrant should be served no later than 10:00 (A.M.)/P.M. 6-3, 2015, and shall be executed only during the DAY TIME hours. ISSUED UNDER MY HAND THIS 27th day of May, 2015, at 10:50 (A.M.)/P.M. o'clock
(ISSUE TIME MUST BE STATED)

Judge Noble
(Signature of Issuing Authority)

****

STATE OF DELAWARE) SEARCH WARRANT
COUNTY OF NEW CASTLE) APPLICATION AND AFFIDAVIT

****

PROBABLE CAUSE SHEET

DATE OF APPLICATION: 05-26-2015 COMPLAINT NO.: 32-15-035067

****

1) Your affiant, Det. Scott Linus/1264, is a sworn member of the Delaware State Police. Your affiant has been employed by the Delaware State Police Since September 2007. You affiant has 7 years of police experience as an investigator. Your affiant is currently assigned to FBI Safe Streets Task Force. Your affiant is responsible for the investigation of drug activity and other related crimes occurring in New Castle County in the State of Delaware. Your affiant has received training in narcotics and non-narcotics investigations from the Delaware State Police Academy. Your affiant has made numerous drug related arrests. Your affiant has authored and/or assisted on numerous search warrants which have resulted in arrests and convictions.

2) Co-affiant, Det. Brian Lucas #2752, is a sworn police detective with the New Castle County Police Department (NCCPD) currently assigned to the Criminal Investigations Unit, Federal Bureau of Investigation (FBI) Safe Streets Task Force. The FBI Safe Streets Task Force is primarily responsible for the investigation of violent crimes, to include, but not limited to drug and gang related crimes, as well as robbery, assault and homicide. Your affiant is a plain clothes detective and operates in an undercover capacity. Your affiant has been trained in narcotics and non-narcotics investigations by the (DEA) Drug enforcement Administration, Wilmington Police Department, Delaware State Police and the New Castle County Police Department. Your affiant has made numerous drug related arrests. Your affiant has authored and/or assisted on numerous search warrants which have resulted in arrests and convictions.

3) The probable cause set forth in this affidavit is based upon your affiant's personal knowledge and observations, experience and training, as well as through information derived from investigators of the New Castle County Police Department, Delaware State Police, and the FBI Safe Streets Task Force.

4) Beginning in or around August 2014, the FBI Task Force began investigating a violent drug trafficking organization known as the SPARROW RUN CREW. This organization operates in Newark, Delaware and the surrounding areas. Individuals identified as members of the SPARROW RUN CREW have been involved with violent acts in order to maintain territory for the purpose of drug trafficking.

5) Evidence obtained during the investigation indicates that this organization is responsible for distributing heroin and cocaine base to a wide network of distributors and sub-distributors. The heroin is being distributed by Adrin Smack (bmn [redacted]1991) and other associates, in quantities ranging from multiple bundles to multiple logs per transaction. The cocaine base is distributed by Smack and other associates in quantities ranging from grams to ounce quantities. Smack is known to distribute heroin and cocaine base in the development of Sparrow Run, which is located in Newark, DE, which was confirmed through numerous controlled drug transactions by the FBI Safe Streets Task Force. Smack is also known to distribute heroin and cocaine base outside Sparrow Run development, which was confirmed through numerous controlled drug transactions by the FBI Safe Streets Task Force.

6) On April 10, 2015 Delaware Superior Court Resident Judge Richard R. Cooch signed an affidavit of probable cause authorizing law enforcement to intercept wireless communication to and from cellular telephone 302-981-6138, which is utilized by Adrin Smack.

7) On April 16, 2015 at approximately 1948 hours, a phone call was intercepted between phone numbers 302-981-6138, which is utilized by Adrin Smack, and 302-257-9949, which is utilized by Al-Ghaniyy Price. A confidential source provided the FBI Safe Streets Task with Al-Ghaniyy Price's cellular phone number and identified an image of Price known to the source as "Monster". During intercepted phone calls between Smack and Price, he is identified as "Monster".

8) During their phone conversation Price asks Smack if he was going to be around on 04/17/15. Price proceeds to ask Smack, "you going to get have any more jiggas." Your affiant through training, knowledge and experience with this wire tap, jiggas is a word used for Xanax pills, which are a schedule 4 controlled substance. Smack informed Price he has a little bit left, then Price asked if Smack would save him one. Smack stated he was by his crib and can buy one, then save it for tomorrow.

9) On April 18, 2015 at approximately 1118 hours, a phone conversation was intercepted between Smack (302-981-6138) and Price (302-257-9949). During the phone conversation Smack asked where Price is at that time, and was informed he was walking back from Heron Court to Kemper Drive. Price advised Smack he was hiding something behind the radiator in his "crib", and it will be in an opening behind the radiator. Smack informed Price to make sure no one is watching him hide the object behind the radiator.

10) At approximately 1126 hours, a text message was intercepted from Price to Smack advising, "Yo bro it's there." There was no reply back from Smack to Price. Through my training, knowledge and experience its known that drug dealers use other individual(s), or family members to hold/store their contraband/weapons/drugs. Through our investigation we have received information from several confidential sources that heroin and cocaine (crack) are being hidden outside vacant residences in the Sparrow Run Development. This allows numerous dealers to serve illegal drugs without carrying the product on their person, in case they would be stopped by a law enforcement officer.

11) Al-Ghaniyy Price currently resides at 326 Kemper Drive, Newark, DE, located in the Development of Sparrow Run, in New Castle County. All Price's state and court documents list the 326 Kemper Drive as his perminant residence.

12) Your affiant is aware Price has one non-violent felony conviction on 08/03/2013, Disregarding a Police Officer Signal and one prior drug conviction on 09/28/2011, for possession of marijuana.

13) Your affiant is aware on May 26, 2015, Al-Ghaniyy Price [redacted]/97, BMN), was indicted by a State of Delaware, New Castle County Grand Jury for one count each of Drug Dealing (De Title 16/4752) and Conpiracy 2nd (De Title 11/512).

14) Your affiant(s) have learned through training and experience that persons who sell illegal drugs usually maintain business records and/or transaction notation of their illegal drug sales.

15) Your affiant(s) have learned through training and experience that the drug selling business is primarily a cash business and person(s) who sell controlled substances must maintain on-hand large amounts of USC in order to maintain and finance their ongoing business of illegal drug distribution.

16) Your affiant(s) has learned through training and experience that person(s) usually possess guns, and/or weapons to protect their drugs from the police and their competition.

17) Your affiant(s) are aware through training and experience that persons involved in illegal drug sales utilize electronic communication devices such as beepers and cellular phones to facilitate their business.

18) Your affiant(s) have learned through training and experience that person(s) who sell controlled substances often possess drug paraphernalia such as but not limited to packaging materials and scale.

19) Your affiant(s) have learned through training and experience that subjects involved in the drug trade utilize their vehicles for transporting and/or concealing illegal drugs.

20) Your affiant(s) pray that a daytime search warrant be signed for the body of the black male known as Al-Ghaniyy Price [redacted]/97, BMN), and the residence known as, 326 Kemper Driver, Sparrow Run Development, in Newark, New Castle County, DE 19702.

Law Office of Christopher S. Koyste, LLC
709 Brandywine Boulevard
Wilmington, Delaware 19809
(302) 762-5195 Fax (302) 762-1919

October 11, 2016

The Honorable John A. Parkins, Jr.
Superior Court
New Castle County Courthouse
500 North King Street
Wilmington, DE 19801

Re: Pre-Sentence Filings and Sentencing hearing in State v. Adrin Smack (ID: 1505015401)

Dear Judge Parkins:

On October 5, 2016, I received a copy of the State's Memorandum in Response to Mr. Smack's Pre-Sentence Motion in Response to the Court's June 22, 2016 Order Regarding the Scope of Consideration at Mr. Smack's Sentencing. After reviewing the State's submission, it is apparent that the Parties only agree that Your Honor has broad discretion to consider all relevant facts when considering the appropriate sentence.[1]

The State asserts that *Mayes v. State*[2] established the relevant burden of proof for sentencing hearings.[3] As was noted in Mr. Smack's Pre-Sentence Motion[4], *Mayes* provides that "the due process clause of the Fifth Amendment prohibits a criminal defendant from being sentenced on the basis of information which is either false or

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[1] State's Memorandum Regarding Sentencing at 4 (hereinafter "State's Memo at _.").
[2] *Mayes v. State*, 604 A.2d 839 (Del. 1992).
[3] State's Memo at 3, 4.
[4] Mr. Smack's Pre-Sentence Motion in Response to the Court's June 22, 2016 Order Regarding the Scope of Consideration at Mr. Smack's Sentencing Hearing at 2 (hereinafter "Pre-Sentence Motion at __.").

which lacks minimal indicia of reliability"[5] and that the information relied upon by a sentencing court must have "some minimal indicium of reliability beyond mere allegation."[6] Although not mentioned in *Mayes*, Defendant asserts that the due process clause of the 5th Amendment is made applicable to the States through the 14th Amendment. While the Delaware Supreme Court has not expressly found that this phrase from *Mayes* should be interpreted as being a preponderance of evidence, Mr. Smack has already demonstrated in his pre-sentence motion that modern United States Supreme Court, Third Circuit, and Delaware State case law makes it clear that the burden of proof for disputed facts at a sentencing hearing is now a preponderance of the evidence.[7] Thus, in light of the Delaware Supreme Court's reliance in Mayes on the 5th Amendment, federal case law is certainly applicable and the State cannot ignore that its burden of proof for disputed facts is a preponderance of the evidence. Defendant Smack requests that this court make this finding.

An issue of great importance is that the Parties disagree whether the Defense has the ability at sentencing, even if the State presents only documents and argument with no "live" testimony, to present testimonial evidence to rebut and/or argue that the State's purported evidence should be given less weight and that the State has failed to prove the disputed facts by a preponderance of the evidence. In support of its position, the State characterizes Mr. Smack's pre-sentencing motion as a request for a "post-plea trial."[8] This characterization is incorrect. Mr. Smack contests the State's argument of facts beyond the counts of conviction for which the State asserts Mr. Smack bears responsibility. As such, any contention that Mr. Smack is seeking a "post-plea trial" is erroneous, since the conduct relating to the counts of conviction is not being contested and it is the State that is seeking to expand the relevant facts

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[5] 604 A.2d at 843.

[6] *Id.* (citing *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982); *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971)).

[7] Pre-Sentence Motion at 2-3 (citing *United States v. Watts* 519 U.S. 148, 157 (1997) (holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence"); *United States v. Kikumura*, 918 F.2d 1984, 1099 (3d Cir. 1990) (noting that "most pertinent sentencing factors need only be established by a preponderance of evidence"); *Weaver v. State*, 779 A.2d 254, 259 (Del. 2001) (noting that the State need only prove by a preponderance of the evidence that a VOP occurred); *Benton v. State*, 711 A.2d 792, 798 (Del. 1998) (holding that "at sentencing, restitution may be based on those factors which are established by a preponderance of the evidence")).

[8] State's Memo at 3 and 5.

in this case beyond the counts of conviction.

As Mr. Smack's sentencing is currently scheduled for Wednesday, October 19, 2016, Mr. Smack hereby requests Your Honor to schedule a chambers conference as soon as possible to discuss the contested issues, Mr. Smack's ability to rebut the affidavits of Detective Brian Lucas and Detective Scott Linus which were attached to the State's submission,[9] as well as whether a continuance will be needed to allow sufficient time after Your Honor's ruling for both parties to prepare for the hearing.

Respectfully Submitted:

Christopher S. Koyste

cc: Sonia Augusthy, Esquire
Christina Kontis, Esquire
Timothy Maguire, Esquire
Mr. Adrin Smack
Prothonotary

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	:	
	:	
v.	:	
	:	
ADRIN D. SMACK	:	1505015401

BEFORE: THE HONORABLE JOHN A. PARKINS, JR.

APPEARANCES:

DEPARTMENT OF JUSTICE
SONIA AUGUSTHY, ESQUIRE
for the State

CHRISTOPHER S. KOYSTE, ESQUIRE
for the Defendant

- - - - - - - - - - - - - - -

ORAL ARGUMENT TRANSCRIPT
NOVEMBER 9, 2016

- - - - - - - - - - - - - - -

JAMES C. PAVONE, RPR
SUPERIOR COURT OFFICIAL REPORTERS
500 North King Street - Suite 2609
Wilmington, Delaware 19801-3725
302.255.0564

Wednesday, November 9, 2016
Courtroom No. 4E
9:00 a.m.

PRESENT:

As noted.

- - - -

THE COURT: Okay. Mr. Koyste.

MR. KOYSTE: Thank you, Your Honor.

THE COURT: Is Mr. Smack here? He need not be, but is he here?

THE BAILIFF: He is here, Your Honor.

THE COURT: Okay. Bring him in, please.

(Defendant brought into courtroom.)

THE COURT: Let me tell you the -- my understanding of the purpose of today's hearing: And that is solely to determine what information I may or may not consider when imposing a sentence on Mr. Smack. It is not my intention to impose sentence today but, rather, to rule today on what I may or may not consider and then I'll -- that will

give you -- and then I'll schedule a sentencing and that will give you an opportunity to make whatever arguments you want then. All right?

Let me hear from the State first on what you believe I can consider.

MS. AUGUSTHY: Your Honor, the State submitted its briefing on October 3rd, 2016 and therein laid out essentially what the Mayes case tells the Court and is essentially the sentencing procedure that's followed in every case that comes before the Superior Court on almost every Friday of the month.

And the State, in its submission, noted that it has not been made clear what exactly the issue in this particular case is, factually speaking. It's not clear what factual assertions were made at the June hearing specifically that Mr. Smack is disputing. And so even if Your Honor were to find that testimony or documentary evidence needs to be submitted to ensure due

process -- which the State does not believe is the standard under Mayes, it's not clear on what issues or points we would be tailoring those arguments. And so that's kind of a preliminary issue.

After the State submission, the Supreme Court decided the Davenport decision on October 21st. And Your Honor did set oral argument and the specific question that Your Honor asked the parties is what -- whether or not the Court can consider the affidavits of probable cause, both for the search warrant of Mr. Price's house and the application for the wiretap that was granted by Judge Cooch.

THE COURT: And I think the -- I think, specifically, I wanted to know whether those had the minimum indicia of reliability that's required.

MS. AUGUSTHY: And Davenport speaks to that absolutely directly on Page 7. In its holding, the Court addresses what this Court looked at and in addressing an argument made by Davenport says that Davenport

singularly focused on the culmination of the Superior Court's discussion of specific evidence that was presented during the sentencing hearing. In the sentencing statement, the Superior Court noted a series of incidents involving the parties.

And then in Footnote 22, the Supreme Court says, Davenport also argued some of his conduct with Wilson that the Superior Court refers to was supported by insufficiently reliable evidence that was, quote, unknown or, quote, vague.

That's essentially what we have here. Appellant's opening brief at 28: Due process requires that information used in sentencing meet a, quote, minimal indicia of reliability beyond mere allegations standard, end quote. The evidence the Superior Court considered regarding Davenport's past domestic abuse and violence toward Wilson was sufficiently reliable and, again, the Supreme Court reaffirms the standard for Mayes and then cites to this Court's reliance at

sentencing on arrest warrants and affidavits, which is exactly what we have here.

THE COURT: Okay. Mr. Koyste.

MR. KOYSTE: Thank you, Your Honor.

Our system of jurisprudence with case law is set up to give us guidance. We look at an opinion, we look at the facts that a Court cites to in driving a factual determination. We look at the -- the prior case law that a Court cites and how it examines it and it's to give us guidance on what to be doing in the now. And so --

THE COURT: I'm familiar with that process, yeah.

MR. KOYSTE: But what's important in looking at case law is to look at what it is not saying. Because quite often, there can be a large gap, especially, when it comes to analysis of what a Court is saying.

First, I think the confusion that comes about from the citation to Mayes is what minimum indicia of reliability standard is. It is a post-conviction standard of

review. The Delaware Supreme Court has never came out and said that that is the burden of proof for a trial Court to use in deciding whether something is an aggravating factor or not.

I conceded -- as I would have to -- that under operation of law, conduct beyond what an individual is convicted of can be considered by a sentencing court. It's -- it's the law of the land. However, it being the law of the land, what we're really debating upon is how do you go about proving that. And if you stop and you look at some of the words and you start to break down the individualized words of Mayes, even though they're not coming out and saying that it is a preponderance of the evidence standard, I think, reading between the words, they are. And here's what I mean by that --

THE COURT: Well, let me ask you this: I think what you are telling me is that the standard to be imposed on me is a preponderance of the evidence, but the

Supreme Court will only review it for a minimum indicia of reliability.

MR. KOYSTE: That very well could be the standard. The standard could be higher --

THE COURT: Well --

MR. KOYSTE: -- depending on whether it is a mixed question of fact or law.

THE COURT: But didn't the Supreme Court just say it's a minimum indicia of reliability? I'm lost here.

MR. KOYSTE: Yeah, that -- we asked for the continuance also to be able to read the Davenport briefs, to be able to read the sentencing hearing. They never -- we had a hearing in which wasn't being ever discussed is what the burden of proof was.

I mean, imagine you had a baseball game and there were no rules. If you didn't know whether -- what the standard was for whether someone's safe, what the standard was for a strike, how do you -- how do you even

make a determination?

So in Davenport, I -- I can't assert that that standard, the minimum indicia of reliability, would be the appropriate standard because it would depend upon the arguments being made by defense counsel. And I have to say, I think Delaware defense counsel, historically -- probably since before Mayes -- has really been dropping the ball on this issue here of saying, hey, Judge, first let's discuss what the standard is for going ahead and making that argument.

So to answer your question, Your Honor, I would assert, most likely in most cases, the minimum indicia of reliability would be the standard of proof. But Davenport has a lot of flaws because they never even argued what the burden of proof was and then on appeal, they didn't argue an error under the applicable standard of review. They just adopted the -- well, an error under the burden of proof pursuant to

the standard of proof.

THE COURT: I don't mean to cut you off, but I am satisfied that it -- the Supreme Court has said, again, that the standard is the minimum indicia of reliability, at least on -- as you -- and your point of view is, at least for purposes of appeal. I am going to apply that here. I decline to require proof by a preponderance of the evidence or some other standard.

MR. KOYSTE: Your Honor, do I have an opportunity to make my record? I understand Your Honor has ruled.

THE COURT: You've made your record. You should have in writing. Okay?

MR. KOYSTE: Well, your Honor, I -- I didn't in writing, Your Honor, and if Your Honor is not going to allow further --

THE COURT: I don't need it is what I'm telling you. And if you've made your record in writing, that's sufficient.

The next question I have is -- and I don't mean to cut you off, but I -- because

I read the materials and to have you repeat what you told me is --

MR. KOYSTE: Well, Your Honor, I wouldn't repeat what I told you. It -- I think there's some persuasive, nuancing ways of looking at this that --

THE COURT: Then why wasn't that put to me in writing?

MR. KOYSTE: Well, I would say, Your Honor, the purpose of oral argument is to perhaps compare and contrast. I have yet to --

THE COURT: No, you could have put this in writing and the -- and, in fact, you're not entitled to oral argument.

MR. KOYSTE: You're correct, Your Honor.

THE COURT: And I'm just doing this as a courtesy, but I'm not going to allow you to develop arguments at oral argument that weren't provided to the State in advance so that they could prepare.

The next question I have for you

is, do you contest that the affidavit used before Judge Cooch contains the minimum indicia of reliability under the case law?

MR. KOYSTE: Your Honor, yes, I do. And if I can explain.

THE COURT: Yes.

MR. KOYSTE: First, when a judicial officer is reviewing factual information that's presented to the judicial officer, what that means is -- especially in a case like this, there can be a lot of factual assertions -- a Court looks at the four corners of the assertions to determine whether any combination of factors being presented to it meets a probable cause standard, so there is not a specific finding by a judicial officer when they sign a search warrant what --

THE COURT: Which of those is true.

MR. KOYSTE: Which of those is true.

And so all it means is that some of these assertions a Court's finding probable

cause for. So --

THE COURT: As long as those assertions are made under oath; is that correct?

MR. KOYSTE: They're made under oath, Your Honor, but there's also not -- they're made in vacuum. And here's what I mean by that: They're made at a point in time when further information could completely rebut some of the assertions that are being made in the search warrant. That's why relying on a document -- a document which is containing allegations prior to a search of a dwelling rather than relying on assertions after an investigation is completed, which now the -- now the moving party -- the witness -- is saying I believe these to be correct. I would say that is a better way for a tribunal to be making a factual finding.

And then also what we have, Your Honor, what would be our right to be able to dispute those -- those claims and how we

would go about disputing those claims.

THE COURT: Now, do you contend that I would be precluded from considering your client's prior arrest record?

MR. KOYSTE: Well, if you're saying arrest record or meaning convictions, Your Honor?

THE COURT: Arrest record.

MR. KOYSTE: Arrest record. Well, Your Honor, the arrest record would be aspects of his history that have not been found by conviction.

THE COURT: Is your answer to that yes?

MR. KOYSTE: I would say, Your Honor, only to the extent that -- and our position is it's still a preponderance of the evidence -- only to the extent that there is adequate information to allow a Court to make a preponderance of the evidence determination of some fact.

THE COURT: Okay. All right. Your contention is that you should be entitled to

a hearing to rebut whatever information is contained in the documents that I would consider?

MR. KOYSTE: Yes, Your Honor.

THE COURT: Okay.

MR. KOYSTE: And it's interesting of -- the State is citing some State rules. And if Your Honor tracks the State rule of 32 and the Federal rule of 32, they are practically identical at numerous points concerning how to resolve a dispute.

One component that -- and it deals with the Court can do a couple different things: The Court could say here is a factual -- a fact that's at dispute that the State is claiming is relevant. The State could say, I'm not going make a determination on that factor, I'm -- I'm not going to rely upon it in sentencing. And if the Court does that, then there's no need to rule upon that. That is something that is within the Federal rule and that is something within the State rules.

Your Honor, the State rules -- if I can have a moment to look at my notes here, Your Honor. The State rules indicate the Court shall allow the parties an opportunity to comment on the report. Well, that's one of the -- a little bit of an issue that we have here, Your Honor, is that there is not a presentence report that is containing State's allegations of what specific conduct they're claiming meets the standard of proof.

I would think that they've -- they've presented quite a few facts, they presented this affidavit. I think, procedurally, Your Honor should require the State to provide a summary of what it is that they're claiming is applicable to Mr. Smack as far as additional criminal conduct.

At the discretion of the Court, it says: The parties -- the Court shall provide the parties an opportunity to comment on a report and, in the discretion of the Court, to present information relating to any factual -- any alleged factual inaccuracy

contained in it. If the comment or information presented allege any factual inaccuracy -- that's when the Court is -- would have to do a few things, because the language is "shall." The Court shall, as to each matter controverted make, one, a finding as to the allegation; or, two, a determination that no finding is necessary because the matters controverted will not be taken into account at sentencing.

That tracks the Federal rules. The difference is, Your Honor, it sort of looks like the State rules adopted the Federal rules but they didn't take into consideration what would be the procedural mechanism to be resolving that. And under the Federal rules, there is a subsection which is Subsection 2 under (i), which is the sentencing, 32(i)(2): Introducing Evidence, Producing a Statement. The Court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2 (a) through (d) and (f) applies, which would mean

that -- the Jencks Act.

So the Federal rules are dealing with the -- how to go about resolving. It is at the Court's discretion how to present evidence, whether we would -- whether, under fairness, we should be able to cross-examine individuals making assertions about Mr. Smack's conduct and that's something Your Honor would have to rule upon.

But I think the best way to do that is to first have the State -- and normally it would be done in the presentence report -- but the State make their arguments, indicate what supports it and then I would have an opportunity to respond and indicate whether cross-examination is needed in order to be able to adequately respond to it.

THE COURT: All right. Here's what I'm going to do -- let me hear from the State. And I understand your position and I am going to require the State to advise you in writing of the documents it intends to rely upon at sentencing.

MR. KOYSTE: And, Your Honor, in requiring the State to do that, is the State going to be asked to identify, if the document is large, the specific portions if it's only portions of it?

THE COURT: I don't know yet.

MR. KOYSTE: Okay. Thank you, Your Honor.

THE COURT: Okay. Let me hear from the State. And, specifically, what -- I'm interested in two things: What should you provide in terms of information to the defendant in advance of the sentencing; and, two, what opportunity, if any, does the defendant have to contest that information?

MS. AUGUSTHY: Well, Your Honor, as the State has already said, both in writing and today, the State is not at all clear on exactly what facts the defense wishes to contest at sentencing. And the reason the State says that is because the State actually -- Your Honor may recall -- in June went through its entire sentencing procedure

and argument.

In addition to that, there was the presentence investigation that not only references the very same things that the State referenced at sentencing, meaning the drugs, the money, the guns that were all found in Mr. Price's home, so it's the State's position that all of that was made known to defendant prior to the June hearing. There was no assertion when we began that hearing in June that there were any issues specifically with factual assertions either in the presentence investigation or specific factual assertions that were made during the State's sentencing presentation. And so the State is in a position where it's being asked to provide documentary proof to everything that it said without any real indication of, well, we're conceding that, yes, in fact, the State provided us with a DNA report and that the DNA report did say that.

THE COURT: Really, what I'm saying to you is, is it your intention to rely upon

the indictment as well as the affidavit submitted in support of the application for the search warrants?

MS. AUGUSTHY: That, Your Honor, and as -- and I should put this on the record, that I advised Mr. Koyste that at Mr. Price's sentencing hearing, that Mr. Price indicated that he intended to sell those drugs that were within his home. And Mr. Koyste indicated to me that he had someone present from Mr. Price's hearing, that he had a transcript of Mr. Price's statement.

So it's unclear -- is that what he's contesting, that what was found in Mr. Price's home is, in fact, Mr. Price's? It's unclear if that's what he's contesting. Is he contesting that he made the 77 drug deals that were included in the indictment? The State is at a complete and utter loss and that's why the State says, essentially, what we're asking for is a trial at sentencing. The State would not know where to begin.

THE COURT: Okay.

Mr. Koyste, what is it that you are contesting, based upon what Ms. Augusthy stated at her -- at the original sentencing?

MR. KOYSTE: Your Honor, our position is that the State has the burden of persuasion and proof to establish --

THE COURT: But are you disputing --

MR. KOYSTE: -- criminal conduct beyond the offense of conviction.

THE COURT: Are you disputing any of the factual assertions that she made about the ownership, the sales? Are you disputing the possession?

MR. KOYSTE: Okay. I really don't understand the sales, whether they were Mr. Price's sales or Mr. Smack's sales that are being disputed.

THE COURT: Counsel.

MS. AUGUSTHY: He's the one that's raising the dispute. How is the State ever supposed to respond? I don't know what he's

contesting.

MR. KOYSTE: I don't know if they're saying -- is that -- are they indicating that they're 77 sales from Mr. Smack?

THE COURT: Are you saying that Mr. Smack engaged in 77 sales or are you saying that Mr. Price did it on behalf of Mr. Smack?

MS. AUGUSTHY: The State's saying that each count of drug dealing for which Mr. Smack is specifically named as the defendant is supported by probable cause. The grand jury returned the indictment --

THE COURT: There you have it.

MS. AUGUSTHY: -- and that's the State's reliance.

MR. KOYSTE: Your Honor, if I can have one moment.

MS. AUGUSTHY: And that's entirely appropriate under Mayes.

(Counsel conferring with defendant.)

MR. KOYSTE: Your Honor, I -- being put on the spot, I can say this much: I'd like to be able to go through the indictment with Mr. Smack. My expectation is the -- the vast majority of any of the drug deals, which are small drug deals that are outlined within the indictment, is something that Mr. Smack would take responsibility for.

It is the assertion of the other uncharged aspects, such as Mr. Price's residence and what is found in Mr. Price's residence that we dispute. We're disputing the conduct beyond conviction. Now, if we're asked the question of, okay, what about these additional counts that Mr. Smack did not plead to within the indictment, I think I need to meet with Mr. Smack, go over that and I can respond in writing --

THE COURT: Well, here's the issue: You say you're put on the spot, but I recall distinctly that Ms. Augusthy recited in considerable detail at sentencing essentially what she just said now, even in more detail.

How can you say that you're put on the spot when you heard this weeks ago?

MR. KOYSTE: Well I didn't know that I was going to need to provide an answer to that specific question right now before Your Honor and I'd like to have the dialogue with Mr. Smack about that before I make a -- an agreement with the State's position regarding those facts.

THE COURT: Okay. All right.

MS. AUGUSTHY: Your Honor, this case has been pending for 18 months.

THE COURT: I know.

MS. AUGUSTHY: A plea was entered on March 31st. Sentencing was scheduled and began in June. This particular hearing has been continued several times. The State is asking for this to be resolved.

THE COURT: I will give you an opinion probably by this time next week and I am going to schedule sentencing for two weeks from today. Is that -- yes, that's a workday.

All right. We'll stand in recess.

(Court in recess.)

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November 11, 2016

The Honorable John A. Parkins
Superior Court of Delaware
New Castle County Courthouse
500 North King Street
Wilmington, Delaware 19801

Re: Adrin Smack, 1505015401

Dear Judge Parkins,

The Court is presently considering briefing and oral argument, conducted on November 9, 2016 in the matter of State v. Adrin Smack. Near the conclusion of oral argument, defendant acknowledged that he was not disputing the "vast majority" of the indicted drug dealing offenses. The facts disputed by defendant are limited to what was recovered from Mr. Price's home. As Your Honor and counsel are aware, Mr. Price asserted, for the first time, at his own sentencing, that he intended to sell the drugs found in his home. As to this factual dispute, the State will not ask the Court to consider those drugs at sentencing. Accordingly, it is the State's position that the matter is moot and can proceed to sentencing without further delay. Your Honor has set November 23, 2016 as the date for sentencing.

On November 23, 2016, the State intends to make argument in support of its request for a sentence within the guidelines set forth on the plea agreement; that is, defendant's agreement not to request less than eight years and the State's agreement not to request more than fifteen years at Level 5.

I am available at the Court's convenience to address any questions or concerns that may arise regarding this matter.

Respectfully submitted.

Sonia Augusthy
Deputy Attorney General

cc. Christopher Koyste
Criminal Prothonotary

File Copy

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November 18, 2016

The Honorable John A. Parkins Jr.
Superior Court of Delaware
New Castle County Courthouse
500 North King Street
Wilmington, DE 19801

Re: Response to the State's November 11, 2016 letter in State v. Adrin Smack, ID No.: 1505015401

Dear Judge Parkins:

As Your Honor ruled that the burden of proof, for purposes of considering aggravating facts/factors at sentencing, is a minimum indicium of reliability, not a preponderance of the evidence as asserted by Mr. Smack, I am writing to Your Honor and the State regarding Mr. Smack's position on this Court's consideration of indicted counts, which Mr. Smack was not convicted of, as aggravating facts/factors for purposes of sentencing. Mr. Smack does not contest the Court's consideration at sentencing, under the minimum indicium of reliability burden of proof, any of the indicted counts that Mr. Smack was not convicted of, with exception to:

Count 248: Possession of a Firearm by a Person Prohibited;
Count 249: Possession, Purchase, Own, or Control a Firearm by a Person Prohibited;
Count 250: Possession of a Firearm by a Person Prohibited;
Count 251: Drug Dealing;
Count 252: Drug Dealing;
Count 253: Possession of Marijuana;
Count 258: Drug Dealing.

Under a minimum indicium of reliability there is insufficient evidence for this Court to find that these indicted counts are aggravating facts/factors for purposes of

sentencing. Count 248 alleges that Mr. Smack unlawfully possessed a 9mm firearm while also possessing heroin on May 28, 2015. A review of the discovery reveals that there is nothing demonstrating a contemporaneous possession of the 9mm firearm and heroin. Thus, under a minimum indicium of reliability, there is insufficient evidence for this Court to find that indicted Count 248 is an aggravating fact/factor for determining Mr. Smack's sentence.

Counts 249 and 250 allege that Mr. Smack unlawfully possessed a .32 caliber handgun on May 28, 2015. A review of the discovery reveals that Mr. Smack was arrested at 48 Heron Court in Newark, Delaware on May 28, 2015. A search incident to arrest revealed that Mr. Smack was not in possession of the .32 caliber handgun or any illegal substances. As Mr. Smack was not physically in possession of the .32 caliber firearm nor in constructive possession of the firearm, there is insufficient evidence under a minimum indicium of reliability for this Court to find these indicted counts admissible as aggravating facts/factors for determining Mr. Smack's sentence.

Counts 251, 252, 253, and 258 allege that Mr. Smack knowingly possessed the illegal controlled substances of heroin, cocaine, and marijuana. As was noted above, Mr. Smack was arrested at 48 Heron Court and was found to not possess of any of the above listed substances. Additionally, there is nothing in the police reports demonstrating that Mr. Smack was in constructive possession of any of the illegal substances seized from 48 Heron Court or from the home of Mr. Price.[1] Therefore, there is insufficient evidence for This Court to find that these indicted counts are admissible as aggravating facts/factors for determining the appropriate sentence for Mr. Smack.

Respectfully Submitted:

Christopher S. Koyste, Esquire

cc: Criminal Prothonotary
Sonia Augusthy, Esquire
Mr. Adrin Smack

[1] The State, in their November 11, 2016 letter, agreed to "not ask the Court to consider those drugs at sentencing" due to "Mr. Price assert[ing], for the first time, at his own sentencing, that he intended to sell the drugs found in his home."

1

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

- - - - - - - - - - - - - -

STATE OF DELAWARE : ICR ID No. 1505015401

v. :

ADRIN D. SMACK :

- - - - - - - - - - - - - -:

BEFORE THE HONORABLE JOHN A. PARKINS, JR., J.

- - - -

[redacted]

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2

APPEARANCES:

BY: **SONIA AUGUSTHY, ESQUIRE**
Deputy Attorney General
for the State of Delaware

- - -

BY: **CHRISTOPHER S. KOYSTE, ESQUIRE**
Attorney for the Defendant,
Adrin D. Smack

- - - -

3

INDEX

DIRECT CROSS REDIRECT RECROSS

WITNESSES

- - - -

4

Wednesday, 23 November 2016
Courtroom 6C
10:00 a.m.

PRESENT

AS NOTED:

THE COURT: Good morning.

Counsel, I assume you have received my letter on my rulings on certain legal issues.

What are the issues which -- well, never mind. I think I have resolved most of them for you, I hope, unless you have any questions.

MS. AUGUSTHY: The State does not, Your Honor.

MR. KOYSTE: No further questions in relation to that, Your Honor.

THE COURT: Miss Augusthy.

MS. AUGUSTHY: Your Honor, the State did make a presentation on the sentencing I think back in June, and at that time asked Your Honor to impose a 15 year sentence. That comes from the plea agreement.

The plea agreement indicates that

Mr. Smack has pled guilty to two offenses, each of which require a two-year minimum mandatory sentence.

Pursuant to the plea agreement, Mr. Smack has agreed to request no less than eight years here today, and the State has agreed that it will ask for no more than 15, which the State has done previously, and continues to do today.

That number is within the guidelines.

On each of the Tier IV drug dealing charges, it is within the guidelines for those offenses.

On the first, the SENTAC Guidelines are two to ten, and on the second they are two to five.

Additionally, the remaining Drug Dealing counts, which are no tier weight, are guidelines up to two years;

The Firearm charge is up to one year;

The Conspiracy charge is up to one year, all at Level V.

And, so, the State's recommendation is

within the guidelines on the Tier IV charges alone; the higher end, but within the guidelines.

As far as the SENTAC aggravating factors are concerned, Mr. Smack has one prior violent offense that was listed in the presentence report. It is a juvenile conviction; however, because he was 17 at the time SENTAC does allow this Court to consider it.

That offense was for robbery and for a handgun charge. And, according to SENTAC, specifically Page 133, that is why his initial drug dealing charge, the presumptive is a two to ten.

At other sentencings for this case, Your Honor has asked the State to put the particular defendant at the bar in context with other sentences. If the Court would like, I can do that again here.

THE COURT: I appreciate that.

MS. AUGUSTHY: Mr. Smack has, certainly, the vast majority of the drug dealing charges in this indictment, but, somewhat comparable,

are Mr. Brittingham. Well, I guess it would really be Mr. Brittingham.

He received an eight year sentence from Your Honor, followed by probation.

Admittedly, Mr. Brittingham was on probation at the time that he committed these new offenses. However, the State would distinguish that in that Mr. Brittingham has no firearm charges at all. He didn't plead to any, and he wasn't indicted for any; and, so, he is a bit distinguishable, in the State's mind, because having a firearm is, certainly, more violent.

Additionally, Mr. Spriggs was also indicted on several counts of drug dealing; specifically, three. But, he was also on probation. Your Honor sentenced him to eight-and-a-half years at Level V, including the violation of probation.

Similarly, Mr. Spriggs was not alleged to have had a handgun in any of the charges in this indictment.

And, so, the State's position is that a

15 year sentence is appropriate for Mr. Smack, followed by probation.

THE COURT: Okay.

Good morning, Mr. Koyste. How are you, sir?

MR. KOYSTE: I am doing well, Your Honor.

Sentencing is what do we do now in light of what took place in the past; where Mr. Smack is hoping to go in life, and reflecting upon unique characteristics that are innate to Mr. Smack.

As Your Honor is aware from reading the Presentence Report, Mr. Smack has been involved in a long-term relationship with one woman. He has three children with that woman; no other children.

Mr. Smack is someone who, when he was out on the street trying his best to exist, was having difficulty.

There was not an abundance of jobs. In fact, incredibly difficult for him to be able to find a job.

So Mr. Smack gravitated to something which is unfortunate and why he is paying a price. But he gravitated to something for at least an understandable reason, which is he needs to support himself, he needs to support his loved ones.

This Court has many different type of people that come before it for different criminal matters.

We have fraud cases in which people are raised and they live their life in a middle class environment and they will steal money in order to be able to take vacations, drive bigger cars, live in a bigger house.

Mr. Smack didn't own a home.

In fact, Your Honor, as you break down facts in this case, he didn't even have a car. He would be, at times, having other individuals, such as his sister, drive him.

And I think it paints a picture of, and it was helping putting in, I'm not sure of this concept, it wasn't mentioned today, so the whole kingpin concept.

Mr. Smack was no kingpin. He was a retail drug dealer, like other people were in Sparrow Run, or whatever name you have for it; if you remember it as Brookmont Farms. And he should pay a price for that, and we are expecting that, and he recognizes that.

He, certainly, wasn't happy about what he was doing. It wasn't something that he would brag about; it was something he was ashamed about.

He wasn't a supplier of other individuals.

And, in fact, to be candid, Your Honor, the flaw of Operation Smack Down is that, generally, in drug cases the goal is to get to the supplier, what is called to move up the ladder.

These drugs were coming from some other city.

They were coming, most likely, from Philadelphia, from down south in Baltimore.

There was nothing that identified who the major players were that were supplying the

area.

In fact, what we don't often talk about or read about in the newspaper, have things changed over in Sparrow Run? And, realistically, they haven't, Your Honor. And people who are the retail users of heroin are buying heroin.

THE COURT: Just from somebody else.

MR. KOYSTE: Just from someone else.

But, the people who are supplying, who are really making a good living, more than a subsistence living like Mr. Smack are, they haven't been, to anybody's knowledge, apprehended.

If they would have been, Your Honor, we understand that the criminal justice system is also about promoting what happens as a disincentive to individuals. Even the newspaper indicating who was caught as far as the person supplying it.

So, Mr. Smack is a retail drug dealer, as is outlined by the hours of phone calls that were intercepted, because this was a

wiretap case.

There was no indication at all that Mr. Smack being any supplier to anyone else.

THE COURT: Let me interrupt you for just one moment.

You are not contending that Mr. Smack was simply selling to support his own habit?

MR. KOYSTE: Oh, no.

No.

THE COURT: He was a entrepreneur.

MR. KOYSTE: If he was an entrepreneur, Your Honor, he would have been pretty much been a failure because, as I noted, he didn't even have a car.

It's hard to be considering yourself a successful entrepreneur if you don't have a vehicle to be getting yourself around.

He was trying to pay his, what we would all consider life, everyday bills, such as maybe gravitating to a point at some point where he would be able to have a vehicle and insurance, and other things of that nature.

Mr. Smack wasn't arrested with expensive

jewelry, or clothing.

So there is nothing to be indicative here that we have anyone who was any type of a successful drug dealer. He was covering his expenses.

And, Your Honor, I ask Your Honor to keep that in consideration when viewing everyone else, because Mr. Smack, he is a charismatic individual.

He is someone who shouldn't be here

In different environments, Your Honor, he very well wouldn't be here.

He is just as much of a victim of the disadvantage of being in the poor class compared to the middle class because of the gap between his ability to, at age eight, or nine, or ten, he doesn't have a PC, he doesn't have a laptop. His ability to be able to compete has really been stunted.

And that is part of what we often don't talk about within our society, is how do people end up getting here.

We don't have a community where, for

example, it was discussed at one point in Wilmington having free Internet service for the entire City, which would have been something that would have been able to advantage the poorest people within our City in order to gain information and gain knowledge. And, perhaps, if we would have got something like that, there would have been grant programs for $200 laptops so that every person who is disadvantaged would be able to at least compete with the middle class kids.

THE COURT: I understand that, and I am not here to engage in a philosophical debate about poverty, and the causes of poverty and the causes of crime.

I fully believe that Mr. Smack probably came into this life with two strikes against him, and he lives in an environment where it is difficult to succeed.

But what I don't believe is that this gives him license to prey on other people and make their lives even worse than his.

MR. KOYSTE: There is no disagreement,

Your Honor, from myself or from Mr. Smack, who I believe is deeply ashamed of what he did.

Mr. Smack and I have spoken about what to do in the future.

And someone like Mr. Smack, who is intelligent, who is also strong and hard-working, I have been telling him, Man, get some plumbing training, because plumbers are going to need someone like you, at least initially, to break open that concrete to be able to dig down and get that pipe. And plumbing is not the most difficult thing in the world, especially if you have the right person teaching you how to do it.

He has the mental acumen and the physical acumen to be with, I would say within a three-year time period, if he was able to get that type of a job, to be earning $30 an hour.

So, in trying to prep for this and find out about the programs, I found out that -- it's either yesterday or the day before -- vocational rehabilitation programs have been

suspended.

They don't have any employees to be able to teach the programs.

And I am saying this, Your Honor --

THE COURT: I understand that. But, again, I would prefer to talk about this case.

The fact that the Department of Correction, through its limited budget, has limited opportunities to teach individuals is something that I share your concern, but it is not relevant to the sentencing.

MR. KOYSTE: Well, Your Honor, it is relevant from one component.

THE COURT: All right.

MR. KOYSTE: He is trying to be able to equip himself so as to not recidivate.

THE COURT: But what did he do before his arrest to try to improve his situation?

MR. KOYSTE: Well, he looked for jobs, Your Honor.

He actually stopped drug dealing at various different points and times. He wasn't to be able to support himself, and gravitated

back towards it.

I mean, my hope, Your Honor, in mentioning the fact, and my head was spinning when I heard that. I don't know how many prisons there are in the United States that are built as being, you know, large facilities to help reduce recidivism and they don't have any active vocational rehabilitation programs happening.

THE COURT: Okay, I understand that. We need to move away from that now.

MR. KOYSTE: We have somebody who has the desire and has the motivation to not repeat his mistakes.

He also has the understanding that if he does this again he is going to have back time, he is going to be looking at more new charges, and he would be looking at exactly what he does not want to happen.

The fact that he is someone, Your Honor, that has a family, three children, the same woman. She is not here, Your Honor. She lives down in Sussex County and it would have

been an incredible hardship to be able to have her travel. But we submitted for Your Honor sentencing letters.

THE COURT: I saw that.

MR. KOYSTE: So, the State's position of 15 years -- there is a saying used in federal courts, and I am going to say it because it makes sense:

A sentence no more than what is needed to provide for adequate punishment.

And, Your Honor, 15 years is a lot, considering Mr. Smack, although he did some time for a juvenile conviction, this is his first time within the State system for a correctional opportunity, and a higher end of this guideline looks like over-sentencing at this point of time.

There is no allegations that Mr. Smack was shooting a firearm.

There is no allegations of violence along with his conduct.

It is what it is.

He is a --

THE COURT: You tell me about punishment, but isn't there also an issue about deterrents?

In other words, I don't want -- I know that sentencing Mr. Smack will not clean up the drug problems anyway. But, I mean, somewhere along the line there may be somebody who says, you know, "I have a gun, and if I deal extensively in drug sales I could spend a lot of time in jail, maybe I won't do that."

MR. KOYSTE: Well, Your Honor, eight years is a long time in jail.

Eight years is a considerable sentence.

And this is part of when we were negotiating the disposition of this case, in speaking to Mr. Smack about this, my position in advocating this was eight years was a significant amount of punishment;

That there is a possibility that the Court would agree that that would provide the kind of sufficient punishment for Mr. Smack in relation to his crimes.

So, we are asking you to consider what

we presented to the Court as mitigating circumstances.

Mr. Smack did not use up more resources to be able to contest this matter at a trial.

In fact, Your Honor asked the defense, with the State's request, as far as what we believed would be conduct that he would take responsibility for. And I responded, Your Honor, and I outlined all of the counts that we believed would meet the minimum indicia of reliability standard.

I think what Your Honor needs to do is hear from Mr. Smack and hear what is within his heart in deciding what the appropriate sentence is.

THE COURT: Mr. Smack, I am going to give you the last chance to speak, but I have some questions for the prosecutor.

Do you wish to comment on Mr. Koyste's observation that Mr. Smack was not a kingpin?

MS. AUGUSTHY: Your Honor, I think if you can gather sufficient evidence to charge 77 counts of drug dealing in two months of

intercepted phone calls, that would suggest that that is certainly a full-time job. And that suggestion is backed up by all of the cases that Your Honor has sentenced.

Your Honor has sentenced numerous people, not only for purchasing drugs in this case, but in wrapping up all of their other cases.

So, Your Honor actually is in such a unique position to have seen individuals who were committing other crimes in order to feed their drug habit, and has such a unique picture on the, sort of, global problem that this was creating.

And the General Assembly has seen that to charge, to enable the court to give higher minimum mandatories, or enable the prosecutors to ask for higher minimum mandatories when there is a greater quantity of drugs.

But, having seen those faces, Your Honor knows, and the State knows, and certainly Mr. Smack ought to know, that when you are directly supplying an addict, this is someone

who becomes known to you.

And, so, many of the problems that Your Honor heard about, many of the mothers who came in with their children at sentencing, many of the loved ones speaking of children who are affected by their loved one's heroin abuse are, certainly, people who maybe weren't known to Mr. Smack, but he knew them as people.

And, so, is there a statutory difference in the way that we treat people who supply large quantities of heroin and profit the most? Yes.

But, there is something different about the act of supplying daily heroin to a person with a family that is counting on them, as opposed to showing up at a parking lot with a trunk full of heroin and dropping it off as a distributor.

Yes, they are punished differently; absolutely.

Moving lots of weight and profiting in great amounts is certainly something that the

State sees as a significant problem.

But we can't minimize seeing the same people again and again.

And, again, they are on the indictment, people who bought on a regular basis from Mr. Smack.

And, so, the State's position is as it always has been. He is a significant drug dealer.

THE COURT: Summarize for me precisely what the aggravating circumstances the State is relying upon.

MS. AUGUSTHY: Pursuant to SENTAC, the aggravator is his prior violent criminal conduct, which is the violent offense of robbery, and the handgun.

He is 25, and those were committed when he was 17.

THE COURT: The prior violent conduct was, what, eight years ago?

MS. AUGUSTHY: Yes.

But the Court is not bound by SENTAC. And this is a unique case, because it is a

wiretap --

THE COURT: Is there any other aggravating circumstances?

MS. AUGUSTHY: Not that fits neatly within the SENTAC guidelines, no.

But, as Your Honor knows, Administrative Directive 76 allows the court, whenever they find a particular sentencing standard inappropriate in a particular case because of the presence of aggravating, or mitigating, or other relevant factors need not impose a sentence in accordance with the standards, but the judge shall set forth with particularity the reasons for the deviation using the forms appropriate.

THE COURT: Mr. Smack, please stand up, sir.

- - - -

(WHEREUPON, the Defendant, ADRIN SMACK, rises)

- - - -

MR. KOYSTE: Your Honor, would I have an opportunity to respond?

THE COURT: Yes.

Why don't you sit down, and I will give Mr. Koyste time to respond.

Mr. Koyste.

MR. KOYSTE: Your Honor, we don't have a definition of what kingpin is. It's not something that the General Assembly has described.

But I think what the State is, essentially, making an argument is that the street-level dealer is more of an aggravating person than the individual who is the nefarious, more shadowy wholesaler supplier and the people above them.

First, 77 drug deals that are recorded within a two month time period, Your Honor, that is relatively -- first off, it's indicative of retail sales, which is he how was he indicted.

If you step back and look at it, it's --

THE COURT: As opposed to the wholesale dealer?

MR. KOYSTE: Exactly.

That's, actually, a small amount of

deals.

I have been driving in the City so many years, and driving around on Pine Street, around 9th, and 10th, and 11th, and I have watched many of the same type of drug dealers who have been in that neighborhood within just blocks of our courthouse for many years.

What we are talking about, slightly more than one heroin deal per day over a two month time period.

Your Honor, that's not even a reasonably high-level retail dealer as far as what retail sales would be.

Individuals at a corner, if we step back, are we expecting that they only make two sales within a day, or less than two sales within a day?

So, I think this characterization is completely undermined by the irrefutable facts of what the State knows.

Secondarily, the danger is not the street corner individuals.

Whenever we want to use the resources,

we can, rather easily, arrest the street corner dealers.

They are the fungible individuals.

When you arrest an open market, they move into houses in which the people need to enter them. That hasn't been happening in Wilmington for some years. But it happens in other cities, such as Baltimore, making it harder for individuals to be able to arrest them.

The reason why the term "up the ladder" and why the DEA are always looking for the suppliers is because those are the individuals that are the tougher people to be able to catch.

Without those individuals, they are not supplying multiple logs to retail street-level dealers to be able to make their way over to the subsistence users who are buying the drugs.

THE COURT: But, Mr. Smack would have known who the people up the ladder are.

MR. KOYSTE: Well, Your Honor, I think

multiple people would have known who was supplying them with drugs.

And the way that these type of situations can work, you might have had one individual who may have been supplying multiple individuals within that neighborhood heroin. But there was probably multiple of those individualized suppliers.

Those individualized suppliers may have been going up to Aramingo Avenue or West Philadelphia to be able to purchase their heroin.

THE COURT: But didn't Mr. Smack find it more important to protect his source than to come clean?

MR. KOYSTE: I think there is numerous individuals who, for sake of safety, Your Honor, did not give information on who were their suppliers.

I don't think that turns Mr. Smack into an aggravating situation. I think it would have been the opposite. If he would have done that, it would have been a mitigating-type of

a situation.

But what we have here, essentially, Your Honor, is the State's argument of him being a kingpin is the fact that he is a retail drug dealer.

They are mixing terminology. And they are providing no support for this theory that the retail drug dealer is considered a greater evil than the wholesale individuals that are supplying them.

In fact, the SENTAC system itself, that is based upon weight. That undermines the State's position.

THE COURT: Okay. Thank you.

Now, Mr. Smack, would you please stand, sir?

- - - -

(WHEREUPON, the defendant, ADRIN SMACK, rises)

- - - -

THE COURT: What would you like to tell me?

MR. ADRIN SMACK (THE DEFENDANT):

I come here before the Court, I also

want to thank you for letting me speak.

THE COURT: One moment, please. Mr. Koyste, would you please move the microphone over?

You don't have to bend over, Mr. Smack. I just want to hear you a little better.

MR. ADRIN SMACK (THE DEFENDANT):

I said I want to thank you for letting me speak on my behalf because it's, like, the prosecutor is making me seem like a person that really I'm not.

And, um, I was really out there. I was selling drugs. I was selling the drugs to drug dealers. But she was saying that I was doing a large amount of -- some large amount drugs here and there. I wasn't, you see what I'm saying?

I was trying to -- I was really trying to make it happen because I've never had nothing.

It all started from sleeping in the streets, sleeping in abandoned apartments. It was moving house-to-house, sleeping from motel

to motel.

So, it's, like, at a point a person would get fed up of living that type of lifestyle, you know what I'm saying?

Like, you live as patience is the key.

Like, you can be patient but for so long, you understand what I'm saying? So, now it's time for the next step.

I got a robbery, I got a shoplifting on my background. So, when a job look at that, they see that he's not -- like, he's a thief, basically. So, it's hard. So, basically, they put you the back burner.

So, now, I got three kids. I had no other choice.

So, if the drug -- I'm not calling them up and telling them to come see me. They come down the neighborhood, and I'm right there.

So, this, like -- basically, I had to just make a way for me and my kids to live, you know what I'm saying?

And, like you said, I knew what I was doing. I was sacrificing myself. But, at the

same time, like, my kids -- like, we just had to live.

We didn't have a spot to have Christmas and Thanksgiving, like how you go home to your Thanksgiving.

We didn't.

We had to go sleep at a motel.

I had to go sleep in an abandoned apartment building.

Like, I just wanted always to be a good father. So, that's all I can say.

THE COURT: I am going to ask you a question that is probably pretty obvious, but why did you have a firearm?

MR. ADRIN SMACK (THE DEFENDANT):

It's not necessary I had a firearm. It was in my indictment. But, at the same time, it was, like, in a range of it was trial or it was take this plea. So, basically, I was stuck in the middle.

People go to trial and just lose.

I really had no firearm. But, at the time -- like, to my knowledge, I knew at the

time of the firearm, you know what I'm saying?

So, I don't -- I don't carry a firearm every day.

THE COURT: Okay. But, why would you have one?

MR. ADRIN SMACK (THE DEFENDANT): Sometimes -- now, on the streets you have people try to rob you, kill you. So, basically, it's for protection.

THE COURT: Okay. I understand that. I understand what you are telling me.

Anything else?

I don't mean to cut you off.

I am anxious to hear what you want to say.

MR. ADRIN SMACK (THE DEFENDANT): No, sir.

THE COURT: Okay.

Have a seat for just a second, sir.

Miss Augusthy, what was Mr. Spriggs' sentence again?

MS. AUGUSTHY: Your Honor, I have it as a total of eight-and-a-half years at Level V,

including the violation of probation.

THE COURT: And in this case, obviously, there was no violation of probation.

MS. AUGUSTHY: Correct.

Mr. Spriggs has three counts of drug dealing cocaine, no tier, in this indictment.

THE COURT: Refresh my recollection. How many counts was he indicted for?

MS. AUGUSTHY: Mr. Spriggs?

THE COURT: Yes.

Do you know?

MS. AUGUSTHY: I believe three, but I'm not -- I believe three.

I looked at it this morning in preparation and I noted three. But it may be that he pled to three, I'm not sure.

THE COURT: Mr. Koyste, did my questions cause you any further comments?

MR. KOYSTE: Your Honor, I would indicate that it is interesting of how this -- when this case was approached, Mr. Smack was labeled a kingpin early on in the investigation before there was any opportunity

to tabulate and gather information.

Indicted counts, Your Honor, don't necessarily indicate what level of criminal activity individuals have.

THE COURT: Well, we have had this discussion, and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts.

I am not going to punish him for that, I can't do that, but I can consider it; don't you agree?

MR. KOYSTE: Under the standards that Your Honor has expressed, I agree that you could.

So, essentially, my answer would be the fact that some individuals may have only have had three counts of indictment, three indicted counts, does not necessarily mean that their involvement in retail sales in Sparrow Run or other parts of Wilmington was lesser or greater than Mr. Smack.

I think a true analysis of what

someone's impact and activities were would allow the Court to have that information, but it hasn't been presented to the Court.

THE COURT: Okay. Thank you.

Crafting sentencing is always difficult.

I fully understand Mr. Smack's contentions and Mr. Koyste's contentions, essentially that, through no real fault of his own, Mr. Smack lives in an environment where he has really no means of supporting himself other than illegal conduct.

I can understand that.

I understand that Mr. Smack did not choose to be born into the life in which he has lived.

But on the other side of the coin is, I think of all of the victims of his crime. And not only the people who purchased the drugs which he sells, but also their loved ones and families.

I think about all of the lives that he has destroyed.

I think about the fact that he has

willingly destroyed them because it provides him with money.

And I believe that, in addition to the value of punishment, there is also here a need to try to defer others from doing this. And, also, frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.

I have to balance those.

The General Assembly has, in the large part, done that balancing for me by specifying the realm of the sentences to be imposed.

Mr. Smack, would you please stand.

- - - -

(WHEREUPON, the Defendant, ADRIN SMACK, rises)

- - - -

THE COURT: With respect to IN15070734, Drug Dealing, Tier IV:

You are placed in the custody of the Department of Correction at Supervision Level V for a period of 20 years suspended after six years for 24 months at Supervision Level IV, DOC discretion, suspended after six months for

18 months at Supervision Level III.

You should be held at Supervision Level V until the arrangements can be made for you at Supervision Level IV.

With respect to IN15070735, which is Drug Dealing, Tier IV:

You are placed in the custody of the Department of Correction at Supervision Level V for a period of 20 years, suspended after six years for 24 months at Supervision Level III.

Is that 18 months is my limit for Drug Dealing?

I think it is.

MS. AUGUSTHY: On probation?

THE COURT: Yes.

MS. AUGUSTHY: I believe so, Your Honor.

THE COURT: With respect to the sentence that I imposed on 0734, Drug Dealing, Tier IV, the probation will be six months of Supervision Level IV, DOC discretion, followed by 12 months at Supervision Level III.

With respect to 15070735:

I just imposed 20 years suspended after six years for 18 months at Supervision Level III.

The first two years of both of those sentences are mandatory.

With respect to 15070738:

You are placed in the custody of the Department of Correction at Supervision Level V for a period of eight years, suspended after one year for 18 months at Supervision Level III.

With respect to 15070767, Drug Dealing:

You are placed in the custody of the Department of Correction at Supervision Level V for a period of eight years, suspended after one year at Supervision Level V for 18 months of Supervision Level III.

With respect to Possession of a Firearm by a Person Prohibited:

You are placed in the custody of the Department of Correction at Supervision Level V for a period of two years, suspended for 18 months at Supervision -- 12 months at

Supervision Level III.

With respect to Conspiracy Second:

You are placed in the custody of the Department of Correction at Supervision Level V for a period of two years, suspended for one year at Supervision Level III.

The Level V sentences that I have imposed will run consecutively, the probation will run concurrently.

You will provide us with a DNA sample.

You will forfeit any interest you may have had in the property which was seized from you.

As a condition of your probation, you will either obtain a GED diploma, or -- strike that.

Pursuant to -- strike the GED diploma.

With respect to the prior sentences in the Court of Common Pleas in 1407019189 and 14080976 -- this is the same case -- pursuant to Senate Bill 50, that is consolidated, and you are discharged as unimproved.

In Superior Court 1505015401, which is

IN15070734:

There is an outstanding capias, and that is going to be withdrawn immediately.

Good luck to you, sir.

MR. KOYSTE: Thank you, Your Honor.

MS. AUGUSTHY: Thank you, Your Honor.

THE COURT: I appreciate both of your submissions that you made to me at my request on the sentencing issues.

Thank you.

- - - -

CERTIFICATE OF COURT REPORTER

I, Lisa J. Amatucci, RPR, CSR, Official Court Stenographer of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me, in the Superior Court of the State of Delaware, in and for New Castle County, in the case herein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action, nor interested in the outcome thereof.

This certification shall be considered null and void if this transcript is disassembled and/or copied and/or distributed in any manner by any party without authorization of the signatory below.

WITNESS my hand this 8th Day of February 2017.

/S/Lisa J. Amatucci, RPR, CSR
Lisa J. Amatucci, RPR, CSR
Official Court Reporter

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

ADRIN D SMACK

Alias: See attached list of alias names.

DOB: [redacted]1991
SBI: [redacted]

CASE NUMBER:
N1505015401

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:
IN15-07-0734
DDEAL TIER 4(F)
IN15-07-0735
DDEAL TIER 4(F)
IN15-07-0738
DRUG DEALING(F)
IN15-07-0767
DRUG DEALING(F)
IN15-07-0737
PFBPP PABPP(F)
IN15-07-0805
CONSP 2ND(F)

COMMITMENT
Nolle Prosequi on all remaining charges in this case
CONSOLIDATED-CASE

SENTENCE ORDER

NOW THIS 23RD DAY OF NOVEMBER, 2016, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN15-07-0734- : TIS
DDEAL TIER 4

Effective June 17, 2015 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for 20 year(s) at supervision level 5

- Suspended after 6 year(s) at supervision level 5

- For 6 month(s) supervision level 4 DOC DISCRETION

- Followed by 12 month(s) at supervision level 3

STATE OF DELAWARE
VS.
ADRIN D SMACK
DOB: [redacted]1991
SBI: [redacted]

- Hold at supervision level 5

- Until space is available at supervision level 4 **DOC DISCRETION**

- The first two years of this sentence are mandatory per Statute.

AS TO IN15-07-0735- : TIS
DDEAL TIER 4

- The defendant is placed in the custody of the Department of Correction for 20 year(s) at supervision level 5

- Suspended after 6 year(s) at supervision level 5

- For 18 month(s) supervision level 3

- The first two years of this sentence are mandatory per Statute.

Probation is concurrent to criminal action number IN15-07-0734 .

AS TO IN15-07-0738- : TIS
DRUG DEALING

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

- Suspended after 1 year(s) at supervision level 5

- For 18 month(s) supervision level 3

Probation is concurrent to criminal action number IN15-07-0735 .

AS TO IN15-07-0767- : TIS
DRUG DEALING

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

- Suspended after 1 year(s) at supervision level 5

- For 18 month(s) supervision level 3

Probation is concurrent to criminal action number IN15-07-0738 .

STATE OF DELAWARE
VS.
ADRIN D SMACK
DOB: [redacted]1991
SBI: [redacted]

AS TO IN15-07-0737- : TIS
PFBPP PABPP

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 12 year(s) at supervision level 3

Probation is concurrent to criminal action number IN15-07-0767 .

AS TO IN15-07-0805- : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 3

Probation is concurrent to criminal action number IN15-07-0737 .

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
ADRIN D SMACK
DOB: [redacted]1991
SBI: [redacted]

CASE NUMBER:
1505015401

This is a Senate Bill 50 consolidated Order. The Case no.(s) on the front of the sentence order is/are consolidated with this case. See notes for all lower court and/ or Superior Court case no(s) that are hereby discharged with financials to be paid under this case.

If there is an outstanding capias in the case(s) consolidated it is to be withdrawn immediately. All financials are to be transferred to this case in Superior Court. A copy of this order is to be mailed and/or faxed to the Court(s) that consolidation effects.

Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

NOTES

Lower Court Probation Consolidation:

This is a Senate Bill 50 consolidated Order with the New Castle County Court of Common Pleas case ID#1407019189, CRA# MN14-08-0976. That case is discharged as unimproved, and any financial obligations are now to be collected as part of the sentence imposed in the New Castle County Superior Court case ID# 1505015401, CRA# IN15-07-0734. If there is an outstanding Capias in the NCC CCP case, it is to be withdrawn immediately. A copy of this Order is to be provided to the NCC CCP Prothonotary and filed in the respective case file.

Forfeit interest in the following property seized by police:
-cash,firearms, vehicles, paraphernalia, any/all drug proceeds

---

Unless DOC Classification guidelines prohibit such, defendant's participation in all education, job training,

STATE OF DELAWARE
VS.
ADRIN D SMACK
DOB: [redacted]1991
SBI: [redacted]

and substance abuse or mental health evaluation/treatment shall begin at L5, and continue at lower levels as necessary.

JUDGE JOHN A PARKINS JR.

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
ADRIN D SMACK
DOB: [redacted]/1991
SBI: [redacted]

CASE NUMBER:
1505015401

SENTENCE CONTINUED:	
TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF. FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	6.00
DELJIS FEE ORDERED	6.00
SECURITY FEE ORDERED	60.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	90.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	
TOTAL	362.00

APPROVED ORDER 6 December 22, 2016 13:58

LIST OF ALIAS NAMES

STATE OF DELAWARE
VS.
ADRIN D SMACK
DOB: [redacted]1991
SBI: [redacted]

CASE NUMBER:
1505015401

ADRIAN D SMACK

EFiled: Apr 21 2017 11:42PM EDT
Filing ID 60506383
Case Number 601,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADRIN SMACK,	:	
	:	
Defendant-Below,	:	
Appellant,	:	**No. 601,2016**
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	**Case below No. 1505015401**
Plaintiff-Below,	:	
Appellee.	:	

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Federal Cases

State Cases

United States Constitution

Delaware Constitution

Delaware Statutes

Federal Rules

Delaware Court Rules

United States Sentencing Guidelines

NATURE OF PROCEEDINGS

On May 26, 2015, Adrin Smack was indicted on one count of Giving a Firearm to a Person Prohibited, five counts of Drug Dealing in violation of 16 *Del. C.* § 4752(1), sixty-six counts of Drug Dealing in violation 16 *Del. C.* § 4754(1), one count of Possession of Marijuana, two counts of Conspiracy Second Degree, two counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448(a)(9), and three counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448. (A1-4, DE3). On March 31, 2016, Mr. Smack pled guilty to two counts of Drug Dealing in a Tier 4 Quantity, two counts of Drug Dealing, one count of Possession of a Firearm by a Person Prohibited, and one count of Conspiracy Second Degree. (A10, DE35).

On June 22, 2016, Mr. Smack's sentencing was continued to allow for briefing on the issue of what the Superior Court's scope of consideration is when determining Mr. Smack's sentence. (A11, DE38-39). On August 16, 2016, Mr. Smack filed his Pre-Sentence Motion in Response to the Court's June 22, 2016 Order Regarding the Scope of Consideration at Mr. Smack's Sentencing Hearing. (A12, DE 43). The State filed their response on October 3, 2016. (A12, DE44). On October 11, 2016, Mr. Smack filed a letter requesting that oral argument be held (A12, DE45), which was subsequently held on November 9, 2016. (A12, DE46).

On November 17, 2016, the Superior Court issued an order finding that Mr. Smack was not entitled to an evidentiary hearing and that the Court may consider information that met a minimal indicia of reliability.[1] (A13, DE48).

On December 21, 2016, Mr. Smack was sentenced.[2] For the one count of Drug Dealing in a Tier 4 Quantity, Mr. Smack received a sentence of 20 years at Level V, suspended after 6 years, for 6 months at Level IV DOC Discretion, followed by 12 months at Level III. Ex. B at 1-2. For the second count of Drug Dealing in a Tier 4 Quantity, Mr. Smack received a sentence of 20 years at Level V, suspended after 6 years for 18 months at Level III. *Id.* at 2. For each count of Drug Dealing, Mr. Smack received a sentence of 8 years at Level V, suspended after 1 year for 18 months at Level III. *Id.* For the Possession of a Firearm by a Person Prohibited, Mr. Smack received a sentence of 2 years at Level V, suspended for 12 years at Level III. *Id.* at 3. For Conspiracy Second Degree, Mr. Smack received a sentence of 2 years at Level V, suspended for 1 year at Level III. *Id.*

A timely notice of appeal was filed on December 23, 2016. This is Mr. Smack's Opening Brief on Appeal.

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[1] The Superior Court's November 17, 2016 order is attached hereto as Exhibit A.

[2] The Superior Court's sentencing order is attached hereto as Exhibit B.

SUMMARY OF THE ARGUMENTS

1. The Superior Court abused its discretion by applying the minimum indicia of reliability burden of proof at Mr. Smack's sentencing hearing. In making this ruling, the Superior Court ignored the controlling United States Supreme Court case law establishing that Due Process requires the burden of proof at sentencing to be a preponderance of the evidence. The Superior Court further erred by relying on the State's presentation of aggravating factors outside the counts of conviction, which had not been proven by a preponderance of the evidence, to determine Mr. Smack's sentence. As such, this Court must reverse Mr. Smack's conviction and remand this case for a new sentencing hearing with instructions that the burden of proof for disputed facts is a preponderance of the evidence.

2. The Superior Court abused its discretion by denying Mr. Smack's request for an evidentiary hearing at sentencing. This denial precluded Mr. Smack from having an opportunity to rebut the State's presentation of contested aggravating factors at the sentencing hearing in violation of Mr. Smack's Due Process rights under the Fourteenth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution. Thus, this Court must reverse Mr. Smack's conviction and remand this case for a new sentencing hearing with instruction that

Mr. Smack to be permitted to present testimony and other evidence to rebut the State's presentation of contested aggravating factors.

STATEMENT OF FACTS

On or around August 2014, an FBI Task Force began investigating a drug trafficking organization known as the Sparrow Run Crew.[3] "Evidence obtained during the investigation indicate[d] that this organization [was] responsible for distributing heroin and cocaine base to a wide network of distributors and sub-distributors. The heroin [was] distributed by [Mr. Smack] in quantities ranging from multiple bundles to multiple logs per transaction." (A170). Law enforcement believed that Mr. Smack and his Co-Defendant, Miktrell Spriggs, were "co-leaders of the organization and that they pool[ed] money to buy heroin and cocaine from source(s) of supply." (A170). The FBI Task Force's investigation included the use of confidential sources to conduct controlled purchases, as well as to enable law enforcement to monitor phone calls between Mr. Smack and these confidential sources. (A170-78).

On April 10, 2015, Resident Judge Richard R. Cooch signed an order authorizing law enforcement to intercept the wireless communications to and from Mr. Smack's cell phone. (A139-44). On April 18, 2015, a phone call between Mr.

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[3] This background information is taken from the affidavit of probable cause to obtain a wiretap on Mr. Smack's cell phone (*See* A145-81) and the affidavit of probable cause to obtain a search warrant for Co-Defendant Al-Ghaniyy Price's residence; *see* A186-88. Both of these affidavits were attached as exhibits to the State's Response to Mr. Smack's pre-sentence motion.

Smack and his Co-Defendant, Al-Ghaniyy Price, was intercepted. (A187). During this call, Mr. Price informed Mr. Smack that he was hiding something behind a radiator in Mr. Price's residence. (A187). In response, Mr. Smack advised Mr. Price to make sure that no one saw him hide the object behind the radiator. (A187). Later on that day, law enforcement intercepted a text message from Mr. Price to Mr. Smack advising that "Yo bro it's there." (A187).

A subsequent search of Mr. Price's residence revealed a military style tactical vest, $16,108, a loaded black Taurus .9-millimeter handgun, and 803 bundles of heroin. (A116).

On May 26, 2015, Adrin Smack was indicted on one count of Giving a Firearm to a Person Prohibited, five counts of Drug Dealing in violation of 16 *Del. C.* § 4752(1), sixty-six counts of Drug Dealing in violation 16 *Del. C.* § 4754(1), one count of Possession of Marijuana, two counts of Conspiracy Second Degree, two counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448(a)(9), and three counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448. (A1-4, DE3).

On March 31, 2016, Mr. Smack agreed to enter a guilty plea. Mr. Smack pled guilty to: two counts of drug dealing heroin, a class B Felony; two counts of drug dealing heroin, a class D felony; one count of possession of a firearm by a person prohibited; and one count of conspiracy second degree. (A53). After a colloquy, the

Superior Court accepted Mr. Smack's plea as knowing, intelligent and voluntary. (A57). A critical component of the plea agreement from the defense perspective was that the State at the June 22, 2016 sentencing hearing would not request a sentence greater than 15 years. (A53).

From the outset of the June 22, 2016 sentencing hearing, the State sought to characterize Mr. Smack as a drug king pin/criminal mastermind. More specifically, the State asserted:

> Your Honor, by way of background in this case, during the period of time in which the FBI Task Force was intercepting Mr. Smack's phone calls, on April 18th, police intercepted a phone call between defendant and a young man named Al-Ghaniyy Price. Price was just barely 18 years old at the time of this call.
>
> During the call, Price told Smack that he was hiding something behind a radiator in his house. He told Smack that it would be in his opening behind the radiator. Mr. Smack then counseled Price to make sure that no one watched him hide the item.
>
> Just a few minutes later, like a good soldier, Mr. Price then texted Mr. Smack back and said, "Yo, Bro, it's there."
>
> How would Mr. Smack, who lives on 4th Street in the City of Wilmington, who lived there throughout this investigation, despite his assertions now to this court that he was homeless – he lived there with Akia Harley (ph) and her mother and the children – how would he transport his drugs from 4th Street to Sparrow Run and avoid detection?
>
> As Your Honor knows, because the Court took a plea from his sister, Tiffany Smack, he would have somebody else drive him, somebody with no criminal history, who had no reason to be stopped by the police.
>
> Then, he would, because he's undeniably smart, have someone else within the community of Sparrow Run, hold on to his drugs and guns, and so, the police searched the home of Al-Ghaniyy Price, which was on Kemper Drive. Many of the allegations of drug dealing in this

> case took place on Heron Court, Raven Turn, Kemper Drive, a few blocks from there.
>
> When the police searched this house, this is what they found: a military style tactical vest in a trash bag outside the back door of the residence, $11,853 inside a shoe box. In a different shoe box, police found $4,255. They also found a black Taurus .9-millimeter handgun, loaded with one round in the chamber.

(A116). The State further described to the Superior Court that law enforcement had located a total of 803 bundles of heroin inside the Kemper Drive address. (A116). The State, therefore, sought to have Mr. Smack sentenced to a total of 15 years at Level V, in accordance with the terms of the plea agreement. (A118).

In response to the State's presentation, Counsel asserted:

> The totality of the record supports the conclusion that Mr. Smack is absolutely not a king pin.
>
> Why, Your Honor? His phone calls clearly demonstrate, overwhelmingly demonstrate, he is a small-time retail Heroin salesman. That's it. That's the reason why the evidence of the individuals who were going to – would have testified, if there was a trial, and we certainly didn't put the State to the test on that, would have been about smaller portions of Heroin that were sold by Mr. Smack.
>
> Now, we all have some experience with the drug culture, and it's not because we purchase Heroin, Your Honor. It's because we deal in these types of cases. So, when you have an individual whose exposure that the evidence demonstrates, rather than just conjecture, is a retail salesman, there'd be no reason to be thinking that you have someone that is a wholesale salesman of the type of an individual that would have such a large amount of Heroin being stored at this residence.
>
> Mr. – what Mr. Smack's responsibility for, in relation to what was found in the residence, is the Taurus handgun, essentially, the firearm count that he pled guilty to, even though it's not specified. It's a generic handgun if you have an individual who is a wholesale Heroin salesman, the last thing in the universe they're doing, especially if they're weary of law enforcement, is doing retail sales.

> Retail sales is the way that most of these individuals end up getting caught, and it would be the thing that a wise person would be – would never be doing, especially because the profit margin is low.
>
> If Mr. Smack was a wholesale salesman of Heroin, wouldn't it have been picked up on the series of telephone calls that there were? The fact that there's nothing indicative of a wholesale sale of Heroin, there's no evidence to support that, all we have is this conjecture just thrown out today, and that's why I ask Your Honor to sentence Mr. Smack for what he did.

(A120). Mr. Smack further articulated that, under a preponderance of the evidence standard, the State failed to demonstrate that Mr. Smack was responsible for the contraband found inside the Kemper Drive address. (A120).

Ultimately, the sentencing hearing was continued so as to permit Mr. Smack to present to the Superior Court a written argument concerning what should be the burden of proof at sentencing in relation to disputed agrivating facts. (A122).

On August 15, 2016, Mr. Smack filed his Pre-Sentence Motion in Response to the Court's June 22, 2016 Order Regarding the Scope of Consideration at Mr. Smack's Sentencing Hearing. (A12, DE 43). In the motion, Mr. Smack asserted that the State had the burden of proof to establish any disputed facts by a preponderance of the evidence. (A126-27). Mr. Smack also asserted that Due Process required Mr. Smack be provided with an opportunity to cross-examine witnesses about disputed facts at the sentencing hearing. (A127-28).

On October 3, 2016, the State filed their response to Mr. Smack's pre-sentence motion. (A12, DE44). In their response, the State asserted that the burden of proof

at sentencing was a minimum indicia of reliability. (A133). The State also asserted that the Superior Court's Rules of Criminal Procedure did not provide a procedure for witness testimony at sentencing hearings. (A134).

On November 9, 2016, the Superior Court held oral argument on the pre-sentence filings. Consistent with his filings, Mr. Smack asserted that preponderance of the evidence was the applicable burden of proof at sentencing hearing for disputed facts. (A197-00). The Superior Court, however, rejected this assertion, and instead found that a minimum indicia of reliability was the applicable burden of proof. (A201). Mr. Smack asserted that he was also entitled to an evidentiary hearing in order to rebut the State's presentation of aggravating factors that were outside the counts of conviction. (A205-10). In response, the State and the Court sought clarification as to what sentencing facts Mr. Smack sought to contest. (A210-12). Mr. Smack responded by noting that he was contesting "the assertion of the other uncharged aspects, such as Mr. Price's residence and what is found in Mr. Price's residence that we dispute. We're disputing the conduct beyond conviction." (A215).

On November 11, 2016, the State filed a letter asserting that the issue of an evidentiary hearing was now moot as the State did not intend to ask the Superior Court to consider the drugs found at Mr. Price's home. (A218).

On November 17, 2016, the Superior Court held that Mr. Smack was not entitled to an evidentiary hearing at sentencing and that the Superior Court "may

consider matters so long as they are accompanied by a minimal indicia of reliability." Ex. A at 1.

On November 18, 2016, Mr. Smack filed a letter in response to the State's November 11, 2016 letter. In that letter, Mr. Smack asserted that, pursuant to the Superior Court's ruling that the applicable burden of proof was a minimum indicia of reliability, the only indicted counts to which Mr. Smack was not convicted of that he would contest at sentencing were three counts of Possession of a Firearm by a Person Prohibited, three counts of Drug Dealing and one count of Possession of Marijuana. (A219-20).

On November 23, 2016, Mr. Smack's sentencing hearing was held. The State began its sentencing presentation by noting:

> Your Honor, the State did make a presentation on the sentencing I think back in June, and at that time asked Your Honor to impose a 15 year sentence. That comes from the plea agreement.
>
> The plea agreement indicates that Mr. Smack has pled guilty to two offenses, each of which require a two-year minimum mandatory sentence.
>
> Pursuant to the plea agreement, Mr. Smack has agreed to request no less than eight years here today, and the State has agreed that it will ask for no more than 15, which the State has done previously, and continues to do today.
>
> That number is within the guidelines.
>
> On each of the Tier IV drug dealing charges, it is within the guidelines for those offenses.
>
> On the first, the SENTAC Guidelines are two to ten, and on the second they are two to five.
>
> Additionally, the remaining Drug Dealing counts, which are no tier weight, are guidelines up to two years;

> the Firearm charge is up to one year;
> The Conspiracy charge is up to one year, all at Level V.
> ...
> And, so the State's position is that a within the guidelines on the Tier IV charges alone; the higher end, but within the recommendation is are within the guidelines.
> As far as the SENTAC aggravating factors are concerned, Mr. Smack has one prior violent offense that was listed in the presentence report. It is a juvenile conviction; however because he was 17 at the time SENTAC does not allow this Court to consider it.
> That offense was for robbery and for a handgun charge. And, according to SENTAC specifically Page 133, that is why his initial drug dealing charge, the presumptive is a two to ten.

(A221-22).

In response, Counsel explained to the Superior Court that Mr. Smack was not a drug king pin but rather, his involvement in drug dealing was solely to support his family. (A222-25). As such, Counsel asserted that eight years was a sufficient sentence. (A225).

In response to Counsel's assertions, the State responded:

> Your Honor, I think if you can gather sufficient evidence to charge 77 counts of drug dealing in two months of intercepted phone calls, that would suggest that this is certainly a full-time job. And that suggestion is backed up by all of the cases that Your Honor has sentenced.
> Your Honor has sentenced numerous people, not only for purchasing drugs in this case, but in wrapping up all of their other cases.
> So, Your Honor actually is in such a unique position to have seen individuals who were committing other crimes in order to feed their drug habit, and has such a unique picture on the, sort of, global problem that this was creating.
> And the General Assembly has seen that to charge, to enable the court to give higher minimum mandatories, or enable the prosecutors to

ask for higher minimum mandatories when there is a greater quantity of drugs.

But, having seen those faces, Your Honor knows, and the State knows, and certainly Mr. Smack ought to know, that when you are directly supplying an addict, this is someone who becomes known to you.

And, so, many of the problems that Your Honor heard about, many of the mothers who came in with their children at sentencing, many of the loved ones speaking of children who are affected by their loved ones' heroin abuse are, certainly, people who maybe weren't known to Mr. Smack, but he knew them as people.

And, so, is there a statutory difference in the way that we treat people who supply large quantities of heroin and profit the most? Yes.

But, there is something different about the act of supplying daily heroin to a person with a family that is counting on them, as opposed to showing up at a parking lot with trunk full of heroin and dropping it off as a distributor.

Yes, they are punished differently; absolutely.

Moving lots of weight and profiting in great amounts is certainly something that the State sees as a significant problem.

But we can't minimize seeing the same people again and again.

And, again, they are on the indictment, people who bought on a regular basis from Mr. Smack.

And, so, the State's position is as it always has been. He is a significant drug dealer.

(A225-26).

In response to the State's assertions, Counsel described how 77 drug deals in a two month span is indicative of retail sales, stating that Mr. Smack engaged in "slightly more than one heroin deal per day over a two month time period." (A227). Counsel also argued that the suppliers were the more culpable individuals. (A227). Furthermore, Counsel argued that the State was promoting an illogical theory by

arguing that "the retail drug dealer is considered a greater evil than the wholesale individuals that are supplying them." (A228).

After permitting Mr. Smack to address the court,[4] the Superior Court issued its sentence. The Superior Court began by noting that:

> Crafting sentencing is always difficult.
>
> I fully understand Mr. Smack's contentions and Mr. Koyste's contentions essentially that, through no real fault of his own, Mr. Smack lives in an environment where he has really no means of supporting himself other than illegal conduct.
>
> I can understand that.
>
> I understand that Mr. Smack did not choose to be born into the life in which he has lived.
>
> But on the other side of the coin is, I think of all of the victims of his crime. And not only the people who purchased the drugs which he sells, but also their loved ones and families.
>
> I think about all of the lives that he has destroyed.
>
> I think about the fact that he has willingly destroyed them because it provides him with money.
>
> And I believe that, in addition to the value of punishment, there is also here a need to try to defer others from doing this. And, also, frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.
>
> I have to balance those.
>
> The General assembly has, in the large part, done that balancing for me by specifying the realm of the sentences to be imposed.

(A229-30). Thereafter, the Superior Court issued Mr. Smack's sentence. (A230-31).

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[4] A228-29.

ARGUMENT I. THE SUPERIOR COURT ERRED BY APPLYING AN UNCONSTITUTIONAL BURDEN OF PROOF AT MR. SMACK'S SENTENCING HEARING.

QUESTION PRESENTED

Did the Superior Court err by applying an unconstitutional burden of proof at Mr. Smack's sentencing hearing? This issue was preserved as it was raised in Mr. Smack's pre-sentence filings. (A126-27, A189-90).

SCOPE OF REVIEW

This Court reviews a sentencing court's decision for an abuse of discretion.[5] Questions of law are reviewed *de novo*.[6] Claims of constitutional violations are reviewed *de novo*.[7]

MERITS OF THE ARGUMENT

The Superior Court abused its discretion by ruling on November 17, 2016 that a minimum indicia of reliability is the applicable burden of proof for disputed facts at sentencing.[8] In support of its holding, the Superior Court referenced and relied upon this Court's language in the 1992 case of *Mayes v. State*.[9] The Superior Court

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[5] *Mayes v. State*, 604 A.2d 839, 843 (Del. 1992) (holding "a sentencing court abuses its discretion if it sentences on the basis of inaccurate or unreliable information") (citing *Hamilton v. State*, 534 A.2d 657 (Del. 1987)).

[6] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011); *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

[7] *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

[8] Ex. A at 3.

[9] *Id.*

noted that "[t]he minimum-indicia-of-reliability standard employed by the Supreme Court in *Mayes* is the same as the federal courts have held is required by the Constitution."[10] For the reasons outlined below, the Superior Court's holding was erroneous and therefore, this Court must reverse Mr. Smack's conviction and remand for a new sentencing hearing.

A. Due Process requires a preponderance of the evidence burden of proof at sentencing in relation to disputed facts.

In finding that the burden of proof in relation to disputed facts at sentencing is a minimum indicia of reliability, the Superior Court noted that "[t]he minimum-indicia-of-reliability standard employed by the Supreme Court in *Mayes* is the same as the federal courts have held is required by the Constitution."[11] However in reaching this erroneous conclusion, the Superior Court overlooked Mr. Smack's pre-sentence filings which expressly cited and referenced controlling United States Supreme Court precedent. (A126-27, A189-90).

Over five years before the issuance of the *Mayes* opinion, in *McMillan v. Pennsylvania*, the United States Supreme Court found that because Pennsylvania's

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[10] *Id.* (citing *United States v. Matthews*, 773 F.2d 48, 51 (3d Cir. 1985) ("Factual matters considered as a basis for sentence must have 'some minimal indicium of reliability beyond mere allegation' and must 'either alone or in the context of other available information, bear some rational relationship to the decision to impose a particular sentence.'")).

[11] *Id.*

sentencing scheme required sentencing considerations to be proven by a preponderance of the evidence, it comported with the requirements of Due Process.[12] In *McMillan*, the defendants challenged the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act which provided "that anyone convicted of certain enumerated felonies [was] subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge f[ound], by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offense."[13] The defendant specifically alleged that "due process ... require[d] that visible possession be prove[n] by at least clear and convincing evidence."[14]

On certiorari review, the United States Supreme Court rejected this argument, noting:

> [W]e have little difficulty concluding that in this case the preponderance standard satisfies due process. Indeed, it would be extraordinary if the Due Process Clause as understood in *Patterson* plainly sanctioned Pennsylvania's scheme, while the same Clause explained in some other line of less clearly relevant cases imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment.[15]

Although *McMillan* did not expressly create a constitutional rule establishing a precise burden of proof at sentencing, the United States Supreme Court's holding

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[12] *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).
[13] *Id.* at 80-81.
[14] *Id.* at 91.
[15] *Id.*

was clearly premised on the crucial fact that the requisite burden of proof pursuant to Pennsylvania's sentencing scheme was a preponderance of the evidence.[16]

Nearly eight years after the decision in *McMillan*, the United States Supreme Court was asked to decide "[w]hether the Constitution prohibits a sentencing court from considering a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense."[17] The United States Supreme Court held that "consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."[18]

In support of this conclusion, the United States Supreme Court referenced the *McMillan* decision concerning its analysis of burden of proof, finding:

> [C]onsistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. *And the state need prove such conduct only be a preponderance of the evidence.* Surely, then it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proved beyond a reasonable doubt.[19]

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[16] *Id.* at 91-92.
[17] *Nichols v. United States*, 511 U.S. 738, 740 (1994).
[18] *Id.* at 748-49.
[19] *Id.* at 748 (emphasis added).

Similarly, two and a half years later, the United States Supreme Court was called upon to determine whether sentencing courts were permitted to consider acquitted conduct at trial, and if so, what burden of proof in relation to facts is required.[20] The United States Supreme held "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[21] In support of this conclusion, the United States Supreme Court expressly referenced its prior holdings in *McMillan* and *Nichols*, noting "that [the] application of the preponderance standard at sentencing generally satisfies due process."[22]

Although the United States Supreme Court has not yet established a bright line rule of constitutional law clarifying that the requisite burden of proof at sentencing is preponderance of the evidence, the Court has consistently held that aggravating factors must be proven at sentencing by a preponderance of the evidence.[23] Accordingly, it is readily apparent, based upon controlling United States Supreme Court precedent, that Due Process requires application of a preponderance of the evidence burden of proof standard in a sentencing proceeding for disputed facts.

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[20] *United States v. Watts*, 519 U.S. 148, 149 (1997).

[21] *Id.* at 157.

[22] *Id.* at 156 (citing *McMillan*, 477 U.S. at 91-92; *Nichols*, 511 U.S. at 747-48).

[23] *Id.* at 157; *Nichols*, 511 U.S. at 748; *McMillan*, 477 U.S. at 91.

Thus, the Superior Court erred by finding that the applicable burden of proof for disputed facts at sentencing was a minimal indicia of reliability.

B. This Court's decisions in *Mayes v. State* and *Davenport v. State* are not controlling on the issue of whether aggravating factors at sentencing must be proven by a preponderance of the evidence.

In support of its holding that the applicable burden of proof for disputed facts at sentencing was a minimum indicia of reliability, the Superior Court also referenced and relied upon this Court's language in *Mayes v. State*.[24] However in doing so, the Superior Court failed to properly take into consideration that this Court's decisions in *Mayes* and *Davenport* should not be considered controlling on this matter, as this Court neither analyzed nor articulated the applicable burden of proof for disputed facts at sentencing, as such an issue was not properly presented to this Court.

In *Mayes*, the defendant "was indicted on six counts of unlawful sexual intercourse in the first degree and three counts of unlawful sexual contact in the second degree."[25] The defendant "pled guilty to two lesser included offenses of the first and third counts of the indictment. These counts ... charged defendant with first degree unlawful sexual intercourse occurring in Delaware between October and

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[24] Ex. A at 3.

[25] *Mayes*, 604 A.2d at 840.

December 1988, involving a victim under sixteen ... who was not the voluntary social companion of the defendant."[26]

At sentencing, "[t]he State argued that the court was entitled to take into consideration allegations of criminal conduct beyond those to which defendant had pled guilty under the court's broad authority to consider any relevant information concerning defendant's history and past behavior."[27] The State also sought to introduce a letter not included in the pre-sentence report and which "described the defendant's sexual attacks upon victim over the prior five years as being with force and against her will."[28] In response, the defendant "asserted that the State was, in effect, expanding the charges, and objected to the introduction of the victim's statement on the ground of surprise."[29]

The court, relying upon "the charges of victim and her family that defendant had engaged in crimes significantly more extensive and more serious than those to which he pled guilty of for which he had been indicted," sentenced the defendant to the maximum statutory penalty for each count.[30]

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[26] *Id.*
[27] *Id.* at 841.
[28] *Id.*
[29] *Id.*
[30] *Mayes*, 604 A.2d at 842.

On appeal, the defendant asserted "that the Superior Court abused its discretion and illegally enhanced his sentence in violation of his right to due process."[31] This Court held that the Superior Court did not abuse its discretion nor did the Superior Court commit "legal error in relying on allegations in the presentence report" as "the court implicitly found such allegations to be credible and reliable."[32] In support of the holding, this Court noted:

> [A] sentencing court abuses its discretion if it sentences on the basis of inaccurate or unreliable information. Moreover, the due process clause of the Fifth Amendment prohibits a criminal defendant from being sentenced on the basis of information which is either false or which lacks minimal indicia of reliability. "[M]aterial false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."[33]

Therefore, this Court went to note, "in reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record below that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability."[34]

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[31] *Id.*

[32] *Id.* at 840.

[33] *Id.* at 843 (citing *United States v. Tucker*, 404 U.S. 443, 446 (1972); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976); *Hamilton v. State*, 534 A.2d 657 (Del. 1987)).

[34] *Id.* (citing *United States v. Baylin*, 696 F.2d 1030 (3d Cir. 1982); *Hamilton*, 534 A.2d at 3; *Henry v. State*, 588 A.2d 1142 (Del. 1991); *Bailey v. State*, 459 A.2d 531, 535 (Del. 1983)).

Nevertheless, it is clear that this Court, neither analyzed nor articulated the applicable burden of proof for disputed facts at sentencing. This is reasonable, however, as the defendant in *Mayes* never asserted that the burden of proof at sentencing was a preponderance of the evidence; rather, the defendant narrowly contended "that the sentencing court abused its discretion and violated due process in its reliance on allegations which on their fact lacked a minimal indicium of reliability."[35] Regardless, the express language of this Court plainly indicates that this decision was solely intended to address the question of what constitutes an abuse of discretion in the context of the appropriate standard of review concerning sentencing determinations.[36] Thus, *Mayes* is not controlling law on this particular issue, and in context, in how federal case law interprets the Constitution.

In *Davenport v. State*, Mr. Davenport was charged with the murder of his girlfriend, Holly Wilson, along with other related charges.[37] Mr. Davenport pled no contest to a manslaughter charge and a weapons charge.[38] Prior to sentencing, "the

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[35] *Mayes,* 604 A.2d at 842.

[36] *Id.* at 843 (noting that "in reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record below that a sentence has been imposed on the basis of demonstrably false information or information lacking minimal indicium of reliability.") (citing *Baylin*, 696 F.2d 1030; *Hamilton*, 534 A.2d at 3; *Henry*, 588 A.2d at 1142; *Bailey*, 459 A.2d at 535).

[37] *Davenport v. State*, 2016 WL 6156170, at *1 (Del. Oct. 21, 2016).

[38] *Id.*

State submitted a case summary describing not only the events on the day leading to Wilson's death but also the history of Davenport's relationship with Wilson, pictures of Wilson's body, and home videos of Wilson with her family."[39] At the sentencing hearing, the Superior Court heard testimony of individuals who believed Mr. Davenport had been abusing Ms. Wilson, had been previously charged with offensive touching and terroristic threatening against Ms. Wilson, and that a no contact order was in effect at the time of the murder.[40] The Superior Court also heard witness testimony alleging that Mr. Davenport and Ms. Wilson were observed fighting with each other on the night of the murder.[41]

After hearing the evidence, the Superior Court sentenced Mr. Davenport to twenty years.[42] In support of the sentence, the Superior Court "noted the series of incidents involving Davenport and Wilson before the killing" and "observed that the charges for offensive touching and terroristic threatening were dismissed 'as we sometimes see in domestic violence cases.'"[43] "The Superior Court [also] referred to the existence of the no contact order as 'most significant.'"[44]

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Davenport*, 2016 WL 6156170, at *2.
[43] *Id.*
[44] *Id.*

On appeal, Mr. Davenport alleged that "the Superior Court used inaccurate information in sentencing him;" specifically, he asserted that the Superior Court improperly applied defined aggravating factors to determine the length of his sentence.[45] This Court rejected this contention.[46] In supporting the decision, this Court noted in a footnote that "Due process requires that information used in sentencing meet a 'minimal indicium of reliability beyond mere allegation standard', but the evidence that the Superior Court considered regarding Davenport's past domestic abuse of and violence toward Wilson was sufficiently reliable."[47]

It is crucial to note, however, that akin to *Mayes,* this Court, justifiably, neither analyzed nor articulated the applicable burden of proof for disputed facts at the sentencing hearing. This is attributable to the failure of Mr. Davenport to advocate that the burden of proof must be a preponderance of the evidence and/or the absence of either party to advance an argument as to what the requisite burden of proof was. (A42-47, A83-91). Instead, the defendant opened the door to the argument that, in determining the appropriate sentence, the sentencing court relied upon information which failed to meet a minimum indicium of reliability. (A42-47).

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[45] *Id.* at 2.
[46] *Id.* at 3.
[47] *Id.* at 3 n.22 (citing *Mayes*, 604 A.2d at 840).

As the defendants in *Mayes* and *Davenport* failed to consider and cite to controlling United States Supreme Court case law, which unmistakably establishes that a preponderance of the evidence burden of proof for disputed facts at sentencing comports with the requirements of due process, it is apparent that the issue of burden of proof at sentencing has not been fully and accurately presented to this Court.[48] Accordingly, this Court's decisions in *Mayes* and *Davenport* are not controlling on this issue.[49] To hold otherwise would be a violation of the Due Process Clause of the Fourteenth Amendment, as it is well recognized that states can provide more, but not less, protection than that which is provided under the United States Constitution.[50]

C. This Court must remand this case for a new sentencing hearing.

As the Superior Court abused its discretion when it applied an erroneous burden of proof, which resulted in the Superior Court's reliance upon unproven aggravating factors outside the counts of conviction in determining Mr. Smack's

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[48] *Watts*, 519 U.S. at 157; *Nichols*, 511 U.S. at 748; *McMillan*, 477 U.S. at 91.

[49] If this Court believes that in order to grant Mr. Smack a new sentencing hearing it must overrule *Mayes* and *Davenport*, the issues raised within will need to be heard by the Court *en banc*. Del. Supr. Ct. R. 4(d).

[50] *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (noting "that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment").

sentence, this Court must reverse Mr. Smack's conviction and remand this case for a new sentencing hearing.

The record manifestly depicts how the State sought to negatively portray Mr. Smack as a drug king pin/criminal mastermind. In the course of the State's sentencing presentation at the June 22, 2016 sentencing hearing, the State asserted, in its description of Mr. Smack's involvement in drug dealing, the following:

> How would Mr. Smack, who lives on 4th Street in the City of Wilmington, who lived there throughout this investigation, despite his assertions now to this court that he was homeless – he lived there with Akia Harley (ph) and her mother and the children – how would he transport his drugs from 4th Street to Sparrow Run and avoid detection?
>
> As Your Honor knows, because the Court took a plea from his sister, Tiffany Smack, he would have somebody else drive him, somebody with no criminal history, who had no reason to be stopped by the police.
>
> Then, he would, because he's undeniably smart, have someone else within the community of Sparrow Run, hold on to his drugs and guns, and so, the police searched the home of Al-Ghaniyy Price, which was on Kemper Drive. Many of the allegations of drug dealing in this case took place on Heron Court, Raven Turn, Kemper Drive, a few blocks from there.

(A116). During its presentation, the State also portrayed Mr. Price as Mr. Smack's "good soldier." *Id.*

At the November 23, 2016 sentencing hearing, the State began its presentation by reminding the Superior Court of its previous sentencing presentation. (A221). However, due to Mr. Price's statements during his sentencing hearing and the State's

concession that it would not ask the Superior Court to consider the drugs found at Mr. Price's residence, the State took a more victim centric approach in negatively portraying Mr. Smack as a "significant drug dealer." (A218, A225-26). Specifically, the State asserted that the sheer number of indicted drug dealing counts was indicative of Mr. Smack being a "full-time" drug dealer and reminded the Superior Court of all the people Mr. Smack hurt by dealing heroin, including the family members of those to whom Mr. Smack sold. (A225-26).

In response to the State's representations, Counsel described to the Superior Court how 77 drug deals in a two month span was indicative of retails sales as Mr. Smack was engaged in "slightly more than one heroin deal per day over a two month time period." (A227). Counsel also argued that the suppliers were more culpable and that the State was promoting an illogical theory by arguing that "the retail drug dealer is considered a greater evil than the wholesale individuals that are supplying them." (A227-28).

Despite Counsel illustrating the inherent weaknesses in the State's sentencing presentation, the sentencing record clearly reflects that the Superior Court relied upon the State's presentation of aggravating factors outside of the counts of conviction. This became evident when the Superior Court expressly noted:

> ... I think of all of the victims of his crime. And not only the people who purchased the drugs which he sells, but also their loved ones and families.
>
> I think about all of the lives that he has destroyed.
>
> I think about the fact that he has willingly destroyed them because it provides him with money.
>
> And I believe that, in addition to the value of punishment, there is also here a need to try to defer others from doing this. And, also, frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.

(A229-30). Based upon this record, it is apparent that the Superior Court heavily relied upon the aggravating factors presented by the State, which were not proven by a preponderance of the evidence, and which Mr. Smack was, in essence, precluded from challenging once the Superior Court applied an erroneous burden of proof.[51]

Accordingly, this Court must find that the Superior Court abused its discretion by applying the incorrect burden of proof at sentencing. This abuse of discretion permitted the Superior Court to consider information not proven by a preponderance of the evidence in determining Mr. Smack's sentence. As such, the Superior Court's error resulted in a violation of Mr. Smack's due process rights under the Fourteenth Amendment to the United States Constitution. Therefore, this case must be remanded

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[51] In his November 18, 2016 letter, issued in response to the Superior Court's request, Mr. Smack articulated which counts of the indictment he would contestiat sentencing based upon the Superior Court's decision that the minimum indicia of reliability was the applicable burden of proof. *See* A219-20.

for a new sentencing hearing with instructions that the applicable burden of proof for disputed facts is a preponderance of the evidence.

ARGUMENT II. THE SUPERIOR COURT ABUSED ITS DISCRETION IN DENYING MR. SMACK'S REQUEST FOR AN EVIDENTIARY HEARING TO CHALLENGE THE STATE'S PRESENTATION OF CONTESTED AGGRAVATING FACTORS AT SENTENCING, IN VIOLATION OF MR. SMACK'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, § 7 OF THE DELAWARE CONSTITUTION.

QUESTION PRESENTED

Did the Superior Court err in denying Mr. Smack's request for an evidentiary hearing to rebut the State's presentation of contested aggravated factors and to cross-examine live witnesses on disputed facts relevant to the Court's sentencing decision? This issue was preserved as it was raised in Mr. Smack's pre-sentence filings. (A127-28, A190).

SCOPE OF REVIEW

This Court reviews a sentencing court's decision for an abuse of discretion.[52] Questions of law are reviewed *de novo*.[53] Claims of constitutional violations are reviewed *de novo*.[54]

MERITS OF ARGUMENT

The Superior Court abused its discretion in denying Mr. Smack's request for an evidentiary hearing at sentencing, which precluded him from cross-examining live

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[52] *Mayes*, 604 A.2d at 843 (citing *Hamilton*, 534 A.2d 657).
[53] *Swan*, 28 A.3d at 382; *Dawson*, 673 A.2d at 1190.
[54] *Hall*, 788 A.2d at 123.

witnesses on disputed facts relevant to the Court's sentencing decision and thwarted an essential component of Mr. Smack's rebuttal to the State's presentation of contested aggravating factors. Ex. A at 1-2. The Court's error resulted in a violation of Mr. Smack's due process rights under the Fourteenth Amendment to the United States Constitution and under Article I, § 7 of the Delaware Constitution.

The Fourteenth Amendment to the United States Constitution mandates that no person shall be "deprived of life, liberty or property, without due process of law."[55] Article I, § 7 of the Delaware Constitution similarly provides that the accused shall not "be deprived of life, liberty or property, unless by the judgment of his or her peers or by the law of the land."[56] This Court has held that the phrase "due process of law" as found in the Fourteenth Amendment and the phrase "law of the land" as found in Article I, § 7 of the Delaware Constitution are synonymous.[57] Both phrases, in crafting due process of law protections, incorporate the concept of fundamental fairness.[58]

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[55] U.S. CONST. amend. XIV.

[56] DEL. CONST. art. I, § 7.

[57] *Moore v. Hall*, 62 A.3d 1203, 1208 (Del. 2013).

[58] *Id*; *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989) (recognizing "fundamental fairness, as an element of due process" under Article I, § 7 of the Delaware Constitution).

In a non-capital sentencing proceeding in which jail time is requested, the State advocates a position that deprives the defendant of the fundamental, constitutionally protected interest he possesses in maintaining his liberty.[59] It is indisputable that the fundamental fairness principles enshrined in the due process clauses of both the United States and Delaware Constitutions require notice and a hearing.[60] Despite these unequivocal principles, however, the State was permitted to present disputed aggravating factors to the Court, while, over the objection of Counsel,[61] Mr. Smack was denied the opportunity to refute the State's assertions and/or compel the State to meet the necessary burden of proof as to these contested facts.

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[59] *State v. Cicione*, 2014 WL 4656426, at *2 (Del. Super. Sept. 16, 2014) ("In order to invoke the Due Process clause [ ] Defendant must first make the initial showing that he has been deprived of "life, liberty, or property."); *United States v. McDowell*, 888 F.2d 285, 290 (3d Cir. 1989) ("[O]nce the reasonable doubt standard has been applied and the defendant has been convicted, 'the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him.'" (citations omitted)).

[60] *Gann v. State*, 2011 WL 4985701, at *2 (Del. Oct. 19, 2011) ("The two most fundamental elements of due process are notice and a hearing.") (internal citations omitted); *Franco v. State*, 918 A.2d 1158, 1162 (Del. 2007) (noting that "[t]he Due Process clauses of the United States and the Delaware Constitutions require that the defendant receive notice and be afforded the opportunity to be heard and to cross-examine witnesses in criminal proceedings.").

[61] *Mayes*, 604 A.2d at 845 (finding that defendant had waived his claim of insufficient "notice or opportunity to rebut the allegations made against him at the sentencing hearing," as he failed to "request a continuation or an opportunity to present rebuttal evidence").

"Fundamental requirements of fairness which are the essence of due process govern all judicial proceedings."[62] As Due Process protections are applicable to sentencing proceedings, and the United States Supreme Court has held that "application of the preponderance standard at sentencing generally satisfies due process,"[63] the Superior Court's refusal to conduct an evidentiary hearing was reversible error. Mr. Smack had the right to test the State on disputed facts which the State deemed relevant to sentencing, the denial of which violated due process of law. Moreover, even though the Sixth Amendment Confrontation Clause is not directly applicable to the sentencing process,[64] a defendant is still entitled to confront and cross-examine witnesses at sentencing proceedings on matters relevant to sentencing, pursuant to the Due Process Clause.[65]

In *United States v. Furst*, the defendant asserted that the district court had violated both Federal Rule of Criminal Procedure 32(c)(3)(D) and his constitutional right to due process by failing to make findings as to alleged factual inaccuracies or,

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[62] *Gann*, 2011 WL 4985701, at *2

[63] *Watts*, 519 U.S. at 156.

[64] *Franco*, 918 A.2d at 1161; *see also United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007).

[65] *See Franco*, 918 A.2d at 1162-63 (finding error that had prevented the defendant from inquiring as to a witness's potential bias to be harmless, but explaining "[i]n restitution hearings, a defendant's constitutional right to Due Process is violated only where the trial court refuses to permit cross-examination that is relevant to determining the proper amount of restitution").

alternatively, by failing to explicitly state that it would not rely upon the disputed information.[66] The Third Circuit Court of Appeals concluded that the district court had in fact violated Rule 32 and therefore, vacated the defendant's sentence and remanded the matter to the district court for further action.[67] Significantly, the Third Circuit found it unnecessary to consider the defendant's due process claim, as "the rule operates to guarantee the very right that [the defendant] claims has been constitutionally infringed upon."[68] The Third Circuit further noted that upon remand, the district court must either make findings "based upon the evidence already before it or upon evidence adduced at a hearing,"[69] if it wishes to rely upon the disputed information in sentencing.

Similarly, Delaware Superior Court Rule of Criminal Procedure 32(c)(3) undoubtedly endeavors to protect the fundamental fairness principles essential to due process by affording to the defendant notice and an opportunity to challenge a disputed sentencing issue.[70] Delaware's Rule 32 provides, "[t]he court shall afford the parties an opportunity to comment on the [presentence investigation] report and, in the discretion of the court, to present information relating to any alleged factual

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[66] *United States v. Furst*, 918 F.2d 400, 407 (3d Cir. 1990).
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Del. Super. Ct. Crim. R. 32(c)(3).

inaccuracy contained in it."[71] Rule 32 further stipulates, "[i]f the comments or information presented allege any factual inaccuracy in the presentence investigation report, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing."[72]

The language of Delaware's Rule 32 plainly tracks the language of Federal Rule 32 in significant part.[73] Pursuant to the federal rule, which by design protects a defendant's due process rights,[74] if a court considers disputed sentencing factor(s) in the absence of an initial finding as to the disputed information, based upon either the evidence before it or additional evidence adduced at a hearing, then the defendant's sentence must be vacated and remanded.[75] When, as here, it is a question of a Constitutional violation, there is no justification for distinguishing between a

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[71] *Id.*

[72] *Id.*

[73] Fed. R.Crim. P. 32(i), formerly 32(c)(3)(D), provides: "[a]t sentencing, the court: (B) must–for any disputed portion of the presentence report or other controverted matter–rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing."

[74] The purpose of the Rule is to "ensure that the defendant is made aware of the evidence to be considered and potentially used against him at sentencing, and is provided an opportunity to comment on its accuracy." *United States v. Nappi*, 243 F.3d 758, 763 (3d Cir. 2001).

[75] *Furst*, 918 F.2d at 408; *United States v. Rosa*, 891 F.2d 1071, 1073 (3d Cir. 1989); *United States v. Gomez*, 831 F.2d 453 (3d Cir. 1987).

state sentence and a federal sentence in deciding the merits of the claim. It would be inequitable and fundamentally unfair if, under the same facts, a defendant who alleges a violation of his right to due process should be denied relief under the state rule but be granted relief under the federal rule, even though the basis for the requested relief stems not from an alleged violation of the state rule, but rather, of the protections guaranteed by the federal and state constitutions.

In *United States v. Cifuentes*, the Third Circuit considered whether the defendant's due process rights were violated when the district court considered a disputed fact in the absence of an appropriate hearing.[76] The Third Circuit held that "where, as here, the disputed information is important to the fashioning of an appropriate sentence, the court, if it relies on it, should grant a hearing at which the government, through testimony and other relevant evidence about its investigation, can attempt to show the disputed information is reliable and the defendant can produce evidence, including his own testimony, to refute it."[77]

Similarly, in *United States v. Zabielski*, the Third Circuit held that "a sentencing court may consider '[p]rior similar adult criminal conduct not resulting in a criminal conviction,' as long as that conduct has been proven by a preponderance

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[76] *United States v. Cifuentes*, 863 F.2d 1149, 1150 (3d Cir. 1988).
[77] *Id.* at 1155.

of the evidence."[78] The Third Circuit found that in Zabielski's case, the alleged criminal conduct had been proven by a preponderance of the evidence, as the government had introduced during the sentencing hearing live testimony of the investigating officer who described for the court the defendant's alleged past criminal conduct.[79]

Likewise, in *United States v. Rosa*, factual disputes arose between the defense and the government concerning factors relevant to sentencing.[80] After a government witness testified in support of the government's version of events, the defense moved for the production of Jencks material, a request that the court denied.[81] The Third Circuit, however, vacated the sentence and remanded the case, noting that "sentencing is the end of the line. The defendant has no opportunity to relitigate factual issues resolved against him. ...[W]here, after a guilty plea, the critical fact was litigated for the first time at the sentencing hearing, the defendant is irreparably disadvantaged."[82]

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[78] *United States v. Zabielski*, 711 F.3d 381, 391 (3d Cir. 2013) (internal citations omitted).

[79] *Id.* at 385, 391.

[80] *Rosa*, 891 F.2d at 1075.

[81] *Id.* at 1075, 1077.

[82] *Id.* at 1078.

Significantly, the Third Circuit stated, "we can perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if accepted, add substantially to the defendant's sentence."[83] Akin to the situation in *Rosa*, for Mr. Smack, who also pled guilty, sentencing was "in effect, the 'bottom-line.'"[84] As such, there was no purpose in depriving Mr. Smack of an opportunity to cross-examine witnesses that the State should have been compelled to present to prove its version of the facts by the requisite preponderance of the evidence standard, particularly at such a "critical stage of [the] criminal proceedings."[85]

It is also significant to note that the United States Sentencing Guidelines, which were enacted in an effort to improve fairness in sentencing, state,[86] "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor."[87] The Guidelines further provide that "[t]he court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R.

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[83] *Id.* at 1079.

[84] *Id.* ("We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the "bottom-line" for the defendant, particularly where the defendant has pled guilty.").

[85] *Id.*

[86] *McDowell*, 888 F.2d at 290.

[87] U.S. Sentencing Guidelines Manual § 6A1.3(a) (2016).

Crim. P."[88] The Guidelines Commentary notes that "[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues" and that "[w]hen a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information."[89]

In *United States v. McDowell*, the Third Circuit considered for the first time under the then-recently enacted federal Sentencing Guidelines what the relevant burden of proof is for the determination of facts that are relied upon in sentencing.[90] The Third Circuit noted that because "[d]ue process [] guarantee[s] a convicted criminal defendant the right not to have his sentence based upon 'materially false' information," the federal rules, in compliance with due process, "require the court to hold a hearing to determine the disputed issues of fact included in the presentence report if it wishes to rely upon these facts in sentencing."[91] The Court went on to hold that "the preponderance of evidence standard can withstand constitutional muster" and is therefore, the appropriate burden of proof to apply.[92]

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[88] *Id.* at § 6A1.3(b).
[89] *Id.* at § 6A1.3 cmt.
[90] *McDowell*, 888 F.2d at 290.
[91] *Id.* (internal citations omitted).
[92] *Id.* at 291.

The Superior Court abused its discretion when it denied Mr. Smack's request for an evidentiary hearing at sentencing to test any disputed facts. This error precluded Mr. Smack from cross-examining live witnesses on disputed facts presented to the Superior Court at sentencing, thereby depriving him of the opportunity to ensure that he would not receive a sentence based upon materially false information in violation of due process. Without an evidentiary hearing, Mr. Smack was unable to challenge the State's presentation of the contested aggravating factors, or make certain that the State had met the requisite burden of proof for the disputed information. Accordingly, the Superior Court's decision violated Mr. Smack's due process rights under the Fourteenth Amendment to the United States Constitution and under Article I, § 7 of the Delaware Constitution. Thus, this Court must reverse Mr. Smack's conviction and remand this case for a new sentencing hearing with instructions that Mr. Smack must be permitted to present testimony and other evidence to rebut the State's presentation of contested aggravating factors.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Smack respectfully requests this Court to reverse Mr. Smack's conviction and remand for a new sentencing hearing with instructions to the Superior Court that the evidentiary standard for disputed facts is a preponderance of the evidence and that the Defense has the right to call witnesses and present evidence to rebut the State's presentation of contested aggravating factors.

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADRIN SMACK,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 601, 2016**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S CORRECTED ANSWERING BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

Cases

Rules

NATURE AND STAGE OF THE PROCEEDINGS

On May 26, 2015, a New Castle County Grand Jury returned a 152-count indictment against 29 defendants, including Adrin Smack ("Smack"). A4. The indictment was the result of an investigation into a drug dealing organization that operated from the Sparrow Run neighborhood in Claymont, Delaware. Smack was charged with 71 counts of Drug Dealing, one count of Giving a Firearm to a Person Prohibited, one count of Possession of Marijuana, two counts of Conspiracy Second Degree, two counts of Possession of a Firearm by a Person Prohibited ("PFBPP") (11 *Del. C.* § 1448(a)(9)), and three counts of PFBPP (11 *Del. C.* § 1448). A1. On March 31, 2016, Smack pled guilty to four counts of Drug Dealing, one count of PFBPP, and one count of Conspiracy Second Degree. A10. The Superior Court sentenced Smack to an aggregate of 14 years incarceration followed by decreasing levels of supervision. Exhibit B to *Op. Brief.* Smack appealed. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court sentenced Smack within the statutory penalties for the charges to which he pled guilty. Under Delaware law, the sentencing judge correctly relied on relevant facts in determining the appropriate sentence. Smack fails to demonstrate how the sentencing judge abused his discretion, and there is no evidence in the record that the sentencing judge relied on information that lacked some minimal indicia of reliability or was materially false.

II. Appellant's argument is denied. Smack was not entitled to an evidentiary hearing to test the State's evidence prior to sentencing. The Superior Court Criminal Rules do not provide for an evidentiary hearing prior to sentencing. A defendant and his counsel are given the opportunity to address the sentencing judge prior to the imposition of the court's sentence.

STATEMENT OF FACTS[1]

In August 2014, the FBI Task Force began investigating a drug trafficking organization known as the Sparrow Run Crew. A169. Members of the task force identified Smack as one of the leaders of the organization. A150. They also determined that Smack resided on West 4th Street in Wilmington, but used a residence in Newark's Sparrow Run neighborhood as the organization's base of operations. A150. Using several confidential sources, the task force learned that Smack:

personally sold drugs to several individuals (A172-75),

at times, possessed significant amounts of drugs (A172; 174), and

was known to possess a variety of firearms. (A172-75).

As a result of their wiretap investigation, the task force obtained a search warrant for 326 Kemper Drive, a residence located in Sparrow Run associated with one of Smack's co-defendants, Al-Ghaniyy Price ("Price"). A132. The task force executed the warrant and recovered heroin, crack cocaine, marijuana, over $16,000 in cash, and 3 firearms from the residence. A132. Smack was charged with

[1] The facts of the case are taken from the Affidavit in Support of Application for Interception of Wire Communications authored by Detectives Brian Lucas of the New Castle County Police Department and Detective Scott Linus of the Delaware State Police. A145-81. An arrest warrant was never issued for Smack because the Superior Court issued a Rule 9 summons after he was indicted. As a result, additional facts are taken from the State's Memorandum Regarding Sentencing. A131-36.

multiple counts of drug dealing, firearms offenses and conspiracy as a result of the wiretap investigation and the evidence discovered in Price's home.

ARGUMENT

I. THE SENTENCING JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE SENTENCED SMACK WITHIN STATUTORY LIMITS.

Question Presented

Whether the sentencing judge abused his discretion by sentencing Smack within statutory limits.

Standard and Scope of Review

"This Court reviews sentencing of a defendant in a criminal case under an abuse of discretion standard. Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature."[2] To the extent that Smack is raising a constitutional claim, this Court's review is *de novo*.[3]

Merits of the Argument

On appeal, Smack claims that the sentencing judge abused his discretion by sentencing him to a 14-year term of incarceration. His sentence was within the maximum statutory penalty however, Smack argues that the Superior Court abused

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[2] *Wescott v. State*, 2009 WL 3282707, at *5 (Del. Oct. 13, 2009) (quoting *Fink v. State,* 817 A.2d 781, 790 (Del. 2003) (internal quotation marks omitted)).
[3] *Wescott,* 2009 WL 3282707, at *5 (citing *Norman v. State,* 976 A.2d 843,857 (Del. 2009); *Weber v. State,* 971 A.2d 135, 141 (Del. 2009); *Capano v. State,* 781 A.2d 556, 607 (Del. 2001)).

its discretion when it "consider[ed] information not proven by a preponderance of the evidence in determining [his] sentence."[4] He contends that this Court's decisions in *Mayes v. State*[5] and *Davenport v. State*[6] are not controlling and the Superior Court should have applied federal sentencing standards when considering information to determine the appropriate sentence under Delaware law. Smack is wrong.

"To disturb a sentence on appeal, there must be a showing either of the imposition of an illegal sentence or of abuse of the trial judge's broad discretion."[7] Generally speaking, this Court "review[s] only to determine whether the sentence imposed is within the statutory limits prescribed by the legislature."[8] Smack pled guilty to four counts of Drug Dealing, one count of PFBPP, and one count of Conspiracy Second Degree. The maximum penalty he could have received was 76 years of incarceration. Smack understood the penalty range for the crimes to which he pled guilty, including the potential maximum sentence.[9] The sentence Smack received was within the statutory limits and was otherwise legal.

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[4] *Op. Brf.* at 29.
[5] 604 A.2d 839 (Del. 1992).
[6] 2016 WL 6156170 (Del. Oct. 21, 2016).
[7] *Weber v. State*, 655 A.2d 1219, 1221 (Del. 1995).
[8] *Id.* (citing *Mayes*, 604 A.2d at 842).
[9] When he pled guilty, Smack signed the Truth-In-Sentencing Guilty Plea form acknowledging that he knew the penalty range for the crimes to which he was

Under Delaware law, "a sentencing court has broad discretion to consider 'information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted.'"[10] "[I]n reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record below that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability."[11]

Despite this Court's clear pronouncement of sentencing standards, Smack urges the Court to impose a preponderance of the evidence standard when a sentencing judge considers information pertinent to sentencing. His argument is derived from an analysis of federal cases in which federal judges are bound by a guideline-driven and mandatory sentencing scheme, which is not analogous to Delaware's sentencing procedures. Rather than identifying specific evidence considered by the sentencing judge and analyzing it under the proper legal framework, Smack argues that this Court's decisions establishing sentencing

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pleading guilty. *State v. Adrin Smack*, Super. Ct. ID No. 1505015401, Truth-In-Sentencing Guilty Plea Form (March 31, 2016) (B1).

[10] *Mayes*, 604 A.2d at 842 (quoting *Lake v. State*, 1984 WL 997111, at *1 (Del. Oct. 29, 1984) (other citations omitted)).

[11] *Mayes*, 604 A.2d at 843 (citing *United States v. Baylin,* 696 F.2d 1030 (3d Cir. 1982); *Hamilton v. State*, 1987 WL 4687 (Del. Nov. 12, 1987); *Henry v. State*, 1991 WL 12094 (Del. Jan 15, 1991); *Bailey v. State,* 459 A.2d 531, 535 (Del. 1983)).

standards for violations of Delaware law should be set aside in favor of the federal sentencing standards established for violations of federal law under a completely different sentencing scheme. This argument is without merit and has no support under Delaware law.

Here, the State argued that Smack was one of the leaders of an organization engaged in large-scale drug dealing. In support of its sentencing recommendation, the State identified the amount of drugs police seized as part of their investigation of Smack (over 10,000 bags of heroin weighing more than 150 grams with a street value of more than $48,000); the amount of cash seized (over $15,000), and the weapons seized (two handguns).[12] The evidence presented to the sentencing judge and the prosecutor's characterization of Smack as a "kingpin" were supported by evidence that had at least the minimum indicia of reliability required by Delaware law. Smack's argument notwithstanding, the Superior Court employed a standard of proof that comports with due process when it considered the information provided and argument made in support of the State's sentencing recommendation.[13] As such, the sentencing judge did not abuse his discretion.

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[12] A116.

[13] *See Mayes*, 604 A.2d at 843 (holding that a sentencing judge's review of evidence which is neither false nor lacks minimal indicia of reliability comports with due process).

II. THE SENTENCING JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED SMACK'S REQUEST FOR AN EVIDENTIARY HEARING.

Question Presented

Whether the sentencing judge abused his discretion when he denied Smack's request for an evidentiary hearing in connection with his sentencing.

Standard and Scope of Review

"This Court reviews sentencing of a defendant in a criminal case under an abuse of discretion standard.[14] To the extent that Smack is raising a constitutional claim, this Court's review is *de novo*.[15]

Merits of the Argument

Smack claims that the Superior Court "precluded him from cross-examining live witnesses on disputed facts relevant to the Court's sentencing decision and thwarted an essential component of [his] rebuttal to the State's presentation of contested aggravating factors."[16] According to Smack, the Superior Court's denial of his request for an evidentiary hearing resulted in a due process violation. He contends, "the State advocates a position that deprives the defendant of the

[14] *Wescott*, 2009 WL 3282707, at *5 (citation omitted).
[15] *Id.* (citations omitted).
[16] *Op. Brf.* at 32.

fundamental, constitutionally protected interested he possesses in maintaining his liberty."[17] Smack is mistaken.

Superior Court Criminal Rule 32 governs sentencing procedures and provides, in part:

> Before imposing sentence, the court shall also—
>
> (A) Determine that the defendant's counsel or, when the defendant is acting pro se, the defendant have had the opportunity to read the presentence investigation report made available pursuant to subdivision (c)(3);
> (B) Afford counsel for the defendant an opportunity to speak on behalf of the defendant, and
> (C) Address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.
>
> The attorney general shall have an equivalent opportunity to speak to the court. The victim shall have an opportunity to speak, in accordance with guidelines established by the court. Upon a motion that is jointly filed by the defendant and by the attorney general, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney general.[18]

In support of his argument that he was entitled to an evidentiary hearing, Smack cites to Federal Rule of Criminal Procedure 32(i)(2) and federal cases addressing the rule. His reliance is misplaced. Smack's assertion that Rule 32 of the Federal Rules of Criminal Procedure "plainly tracks" the language of Superior Court Criminal Rule 32 is only partially correct. The federal rule provides, in part:

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[17] *Op. Brf.* 33.
[18] Super. Ct. Crim. R. 32.

> (2) Introducing Evidence: Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness statement, the court must no consider the witness's statement.[19]

There is no analog to this portion of the federal rule in Superior Court Criminal Rule 32. The Superior Court rule does not provide for an evidentiary hearing for a defendant to test the State's presentation of aggravating factors. The Superior Court correctly determined that the federal cases cited by Smack and the language of Rule 32(c)(1) of the Federal Rules of Criminal Procedure were not helpful or controlling because Delaware's Rule 32 is different and does not entitle a defendant to a full blown-evidentiary hearing.

While the information presented at sentencing must possess some minimal indicia of reliability, "due process does not necessitate a full evidentiary hearing to determine the reliability of the information." Rule 32 provides a defendant with an opportunity to explain or rebut any information upon which the court relies in making its sentencing determination.[20] "Discretion to rebut, however, lies in the hands of the sentencing judge, and the exercise of this discretion will not be overturned absent an abuse of discretion or plain error."[21] Here, the information

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[19] Fed. R. Crim. Proc. 32(c)(1).
[20] *See, e.g.*, Super. Ct. Crim. R. 32(a)(1); (c)(3).
[21] *Lake v. State*, 1984 WL 997111, at *1 (Del. Oct. 29, 1984).

considered by the court possessed the minimal indicia of reliability required. Smack was given the opportunity to rebut any of the information and the State's characterization of his role in the Sparrow Run Crew. Indeed, Smack argued that the same information the State identified as demonstrating that he was a "kingpin" could be used to show that he was not a "kingpin." The Superior Court did not abuse its discretion when it denied Smack's request for an evidentiary hearing.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

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DATE: May 24, 2017

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Case Number 601,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADRIN SMACK,	:	
	:	
Defendant-Below,	:	
Appellant,	:	**No. 601,2016**
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	**Case below No. 1505015401**
Plaintiff-Below,	:	
Appellee.	:	

APPELLANT'S REPLY BRIEF

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Dated: June 12, 2017

TABLE OF CONTENTS

TABLE OF CITATIONS

Delaware Court Rules

ARGUMENT I. THE STATE'S ANSWERING BRIEF CONTAINS MULTIPLE FACTUAL AND LEGAL INACCURACIES IN RELATION TO MR. SMACK'S ARGUMENTS RAISED IN THE OPENING BRIEF.

A. The applicable standard of review for constitutional claims is *de novo*.

In response to Mr. Smack's argument that the Superior Court applied an erroneous burden of proof at sentencing, the State asserts that the applicable standard of review is an abuse of discretion and that "[a]ppellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature."[1] The State has, however, seemingly misunderstood the issues preserved and raised by Mr. Smack.[2] Mr. Smack is not seeking appellate review of the specific sentence imposed but rather is seeking appellate review of the Superior Court's legal determination that the applicable burden of proof for aggravating factors at sentencing must be proven only by a minimum indicia of reliability, a standard of proof lower than a preponderance of the evidence. As Due Process prohibits the deprivation of liberty through application of an erroneous burden of proof,[3] the Superior Court's erroneous finding that the applicable burden

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[1] Answer at 5 (citing *Wescott v. State*, Del., No. 202, 2009, at 5, Ridgely, J. (Oct. 13, 2009) (quoting *Fink v. State*, 817 A.2d 781, 790 (Del. 2003)) (unreported opinion attached hereto as Exhibit A)).

[2] Opening at 15-30.

[3] *Addington v. Texas*, 441 U.S. 418, 423 (1979) (noting that "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and

of proof for aggravating factors at sentencing is a minimum indicia of reliability violates Mr. Smack's Due Process rights.[4] Thus, *de novo* is the appropriate standard of review.[5]

In support of its erroneous assertion that the applicable standard of review is an abuse of discretion, the State relies upon *Wescott v. State*[6] and *Fink v. State*,[7] neither of which addresses the issue in this case, which is whether the Superior Court erred by not requiring the State to prove aggravating factors by a preponderance of the evidence at Mr. Smack's sentencing hearing. In *Wescott*, the defendant was indicted on attempted murder first degree, possession of a firearm during the commission of a felony, and possession of a firearm by a person prohibited.[8] The person prohibited charge was later severed from the remaining counts and "Wescott

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in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'") (citing *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

[4] U.S. CONST. amend. V; U.S. CONST. amend. XIV; Del. CONST. art. I, § 7; *see also Moore v. Hall*, 62 A.3d 1203, 1208 (Del. 2013) (holding that the phrase "due process of law" as found in the Fourteenth Amendment and the phrase "law of the land" as found in Article I, § 7 of the Delaware Constitution are synonymous.).

[5] *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

[6] *Wescott*, No. 202, 2009.

[7] 817 A.2d 781.

[8] *Wescott*, No. 202, 2009, at 4.

went to trial first on the attempted murder and PFDCF charges."[9] The jury returned a "not guilty" verdict at the first trial but found the defendant guilty of possession of a firearm by a person prohibited at the second trial.[10]

"At sentencing the prosecutor requested the statutory maximum sentence because Wescott already was on probation for reckless endangering involving the firing" of a firearm at another person.[11] The Superior agreed with the State and sentenced the defendant to "the maximum period of incarceration for the PFPP charge."[12] In support of the sentence, the Superior Court explained:

> I am absolutely convinced that you are a very violent man, and that you are not amenable to any lesser sanction. As an aggravating factor, it is certainly obvious that you were on probation at the time of this offense and you should not have possessed a firearm or any other deadly weapon.[13]

On appeal, the defendant asserted "that the Superior Court abused its discretion and violated his due process rights and guarantees against double jeopardy when it sentenced him to the maximum possible of incarceration without a sufficient articulation of aggravating factors."[14] The defendant also asserted that:

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[9] *Id.*
[10] *Id.* at 4-5.
[11] *Id.* at 5.
[12] *Id.*
[13] *Id.*
[14] *Wescott*, No.202, 2009, at 12.

> ... the severity of the sentence, combine with the lack of explanation raise[d] the question of whether the trial judge was acting vindictively–that he thought Wescott "got away with (attempted) murder after the first trial, and that the guilty verdict on the Person Prohibited charged opened an opportunity to compensate for the acquittal."[15]

This Court rejected the defendant's arguments, finding that the Superior Court imposed a sentenced within the statutory limits and that there was no evidence demonstrating "that the sentencing judge had a closed mind regarding sentencing."[16]

In *Fink v. State*, "a Superior Court jury convicted appellant Kenneth Fink of fifteen counts of Unlawfully Dealing in Materials Depicting a Child Engaged in a Prohibited Act and fifteen counts of Possession of Child Pornography."[17] At sentencing, the Superior Court sentenced the defendant to 8 years at Level V, followed by 35 years of probation.[18] The defendant appealed his conviction, arguing "that his sentence of eight years at Level V incarceration followed by thirty-five years of probation [was] excessive" and that the trial judge exhibited a closed mind during sentencing, as the presentence report "clearly indicate[d] that the defendant's background 'absent this unfortunate circumstance' positively supported leniency."[19] This Court also rejected the defendant's argument, again finding that the sentence

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[15] *Id.*
[16] *Id.* at 13-14.
[17] 817 A.2d at 783.
[18] *Id.* at 790.
[19] *Id.*

was within the statutory limits and that there was no evidence the sentencing judge possessed a closed mind.[20]

A thorough review of the case law cited by the State in support of its argument reveals that neither defendant in *Wescott* or *Fink* asserted that the applicable burden of proof for contested aggravating factors at a sentencing hearing is a preponderance of the evidence as was raised by Mr. Smack in his Superior Court filings[21] and his Opening Brief.[22] As neither *Wescott* nor *Fink* address the specific issue preserved and raised by Mr. Smack, they are unpersuasive and should hold no weight in this Court's analysis.

B. The State seemingly misunderstands the issues preserved and raised by Mr. Smack.

In response to Mr. Smack's argument that the application of the preponderance of the evidence burden of proof standard at sentencing hearings is required by Due Process, the State asserts that Mr. Smack "argues that this Court's decisions establishing sentencing standards for violations of Delaware law should be set aside in favor of the federal sentencing standards established for violations of federal law under a completely different sentencing scheme. This argument is without merit and

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[20] *Id.*
[21] A126-27, A189-90.
[22] Opening at 16-30.

has no support under Delaware law."[23] It appears that the State misunderstands the issues raised by Mr. Smack. At no point in Mr. Smack's Superior Court filings nor in his Opening Brief[24] did he request this Court to completely adopt the sentencing procedures employed by the federal court system. Rather, Mr. Smack requests that this Court ensure that the sentencing procedures employed by the Superior Court comport with the protections afforded by the Due Process clause of the Fifth and Fourteenth Amendments and Article I, § 7 of the Delaware Constitution. Thus, the State's summarization of the arguments raised in Mr. Smack's Opening Brief is plainly inaccurate.

The State's argument is also unpersuasive as it completely overlooks the lengthy Due Process analysis contained in the Opening Brief which clearly reinforces the contention that Due Process mandates that contested aggravating factors at sentencing must be proven by a preponderance of the evidence. As noted in the Opening Brief,[25] the Due Process clauses of the Fifth and Fourteenth Amendments mandate that no person shall be "deprived of life, liberty or property, without due process of law."[26] At a sentencing hearing, the State, by seeking a term of

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[23] Answer at 8.

[24] A126-27, A189-90; Opening at 16-30.

[25] Opening at 16-20, 32-41.

[26] U.S. CONST. amend. V; U.S. CONST. amend. XIV; *see also Moore*, 62 A.3d at 1208 (holding that the phrase "due process of law" as found in the

incarceration, advocates a position that would deprive a criminal defendant of his or her fundamental, constitutionally protected interest in maintaining his or her liberty.[27] As such, it is indisputable that the Due Process protections of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, are applicable to Delaware sentencing hearings.[28]

Fourteenth Amendment and the phrase "law of the land" as found in Article I, § 7 of the Delaware Constitution are synonymous.).

[27] *State v. Cicione*, 2014 WL 4656426, at *2 (Del. Super. Ct. Sept. 16, 2014) ("In order to invoke the Due Process clause [ ] Defendant must first make the initial showing that he has been deprived of 'life, liberty, or property.'"); *United States v. McDowell*, 888 F.2d 285, 290 (3d Cir. 1989) ("[O]nce the reasonable doubt standard has been applied and the defendant has been convicted, 'the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him.'") (citations omitted).

[28] *United States v. Watts*, 519 U.S. 148, 156 (1997) (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994)) (noting "that [the] application of the preponderance standard at sentencing generally satisfies due process."); *Id.* at 157 (holding "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."); *Nichols*, 511 U.S. at 748 (finding that "consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 91 (holding that "we have little difficulty concluding that in this case the preponderance standard satisfies due process."); *McDowell*, 888 F.2d at 290; *Ciccione*, 2014 WL 4656426, at *2.

Additionally, as Mr. Smack clearly asserted in his Opening Brief,[29] the United States Supreme Court has consistently held that the application of the preponderance of the evidence standard of proof at sentencing hearings satisfies Due Process requirements.[30] Thus, in light of the United States Supreme Court's consistent decisions, and the fundamental protections afforded by the Due Process clauses, it is clear that the application of a burden of proof lower than a preponderance of the evidence would fail to comport with the requirements of Due Process.[31] Therefore,

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[29] Opening at 16-20.

[30] *Watts*, 519 U.S. at 157 (holding "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."); *Id.* at 156 (noting "that [the] application of the preponderance standard at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (finding that "consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 91 (noting that "we have little difficulty concluding that in this case the preponderance standard satisfies due process.").

[31] *Watts*, 519 U.S. at 156 (citing *McMillan*, 477 U.S. at 91-92; *Nichols*, 511 U.S. at 747-48) (noting "that [the] application of the preponderance standard at sentencing generally satisfies due process."); *Id.* at 157 (holding "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."); *Nichols*, 511 U.S. at 748 (finding that "consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 91 (noting that "we have little difficulty concluding that in this case the preponderance standard

the State's contention that the Superior Court's application of the minimum indicia of reliability burden of proof at Mr. Smack's sentencing hearing comported with Due Process is contrary to controlling United States Supreme Court case law and therefore erroneous.

The State, relying on this Court's holding in *Mayes*, also asserts that "the Superior Court employed a standard of proof that comports with due process when it considered the information provided and argument made in support of the State's sentencing recommendation."[32] However, as was already articulated in Mr. Smack's Opening Brief, this Court's decision in *Mayes* is not controlling on the issue of whether contested aggravating factors at sentencing must be proven by a

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satisfies due process. Indeed, it would be extraordinary if the Due Process Clause as understood in *Patterson* plainly sanctioned Pennsylvania's scheme, while the same Clause explained in some other line of less clearly relevant cases impose more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment."); *Addington*, 441 U.S. at 423 (citing *Winship*, 397 U.S. at 370 (Harlan, J., concurring)) (noting that "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."); *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (noting "that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgement are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.").

[32] Answer at 8 (citing *Mayes v. State*, 604 A.2d 839, 843 (Del. 1992)) (stating "that a sentencing judge's review of evidence which is neither false nor lacks minimal indicia of reliability comports with due process.").

preponderance of the evidence as this issue was not presented to this Court in *Mayes*.[33] Thus, the State's failure to provide any response to Mr. Smack's analysis of this Court's holding in *Mayes* renders the State's contention unpersuasive.

The State further asserts that Mr. Smack's "argument is derived from an analysis of federal cases in which federal judges are bound by a guideline- driven and mandatory sentencing scheme, which is not analogous to Delaware's sentencing procedures."[34] The State's argument is puzzling as it disregards the analysis of *McMillan v. Pennsylvania* in the Opening Brief.[35]

As was noted in the Opening Brief,[36] prior to this Court's decision in *Mayes v. State*,[37] the United States Supreme Court reviewed the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act which provided "that anyone convicted of certain enumerated felonies [was] subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge f[ound], by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offence."[38] The United States Supreme held:

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[33] Opening at 20-23.
[34] Answer at 7.
[35] Opening at 16-18.
[36] *Id.*
[37] *Mayes*, 604 A.2d 839.
[38] *McMillan*, 477 U.S. at 80-81.

> [W]e have little difficulty concluding that in this case the preponderance standard satisfies due process. Indeed, it would be extraordinary if the Due Process Clause as understood in *Patterson* plainly sanctioned Pennsylvania's scheme, while the same Clause explained in other line of less clearly relevant cases imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment.[39]

As the State simply ignores, rather than attempts to address or distinguish the United States Supreme Court's decision in *McMillan*, the State's contention that Mr. Smack's "argument is derived from an analysis of federal cases in which federal judges are bound by a guideline-driven and mandatory sentencing scheme"[40] is inaccurate and unpersuasive.

C. This Court must remand for a new sentencing hearing.

In response to Mr. Smack's argument that the Superior Court abused its discretion by denying Mr. Smack's request for an evidentiary hearing, the State asserts that Mr. Smack's reliance on Federal Rule of Criminal Procedure 32(i)(2) and the federal case law addressing this rule is misplaced.[41] The State also asserts that "[t]here is no analog to [the evidentiary hearing] portion of the federal rule in Superior Court Criminal Rule 32" and that "[t]he Superior Court correctly determined that the federal cases cited by Smack and the language of Rule 32(c)(1) ... were not

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[39] *Id.* at 91.
[40] Answer at 7.
[41] Answer at 10.

helpful because Delaware's Rule 32 is different and does not entitle a defendant to a full blown-evidentiary hearing."[42] However, in making these arguments, the State ignores the critical fact that Federal Rule of Criminal Procedure 32 was specifically designed to protect a criminal defendant's Due Process rights at sentencing.[43] As Federal Rule of Criminal Procedure 32 "emanates from Congress' concern for protecting a defendant's due process rights in the sentencing process,"[44] the State's argument that Federal Rule of Criminal Procedure 32 is "not helpful or controlling" is incorrect.

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[42] Answer at 11.

[43] *United States v. Nappi*, 243 F.3d 758, 763 (3d Cir. 2001) (citing *United States v. Greer*, 223 F.3d 41, 58 (2d Cir. 2000); *United States v. Curran*, 926 F.2d 59, 61 (1st Cir. 1991)) ("Federal Rule of Criminal Procedure 32, which governs sentencing procedures in the federal courts, emanates from Congress' concern for protecting a defendant's due process rights in the sentencing process."); *United States v. Barnhart*, 980 F.2d 219, 222 (3d Cir. 1992) (noting that the "due process requirements have been incorporated into the Federal Rule of Criminal Procedure...."); *see also* Fed. R. Crim. P. 2 ("These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."); Bob Goodlatte, *Foreword* to the Fed. R. Crim. P. (2016) (noting that the Federal Rules of Criminal Procedure "have been promulgated and amended by the United States Supreme Court pursuant to law, and further amended by Acts of Congress.").

[44] *Nappi*, 243 F.3d at 763 (citing *Greer*, 223 F.3d at 58; *Curran*, 926 F.2d at 61).

The State also asserts that "due process does not necessitate a full evidentiary hearing to determine the reliability of the information."[45] The State's argument, however, is unpersuasive for two reasons. First, the State's contention is wholly conclusory as the State fails to engage in any legal analysis to support their contention.[46] Additionally, by simply concluding that "due process does not necessitate a full evidentiary hearing,"[47] the State again ignores the lengthy and detailed analysis contained in the Opening Brief explicating why Due Process requires a sentencing judge to hold an evidentiary hearing to determine contested aggravating factors that are relevant to sentencing. As the State has failed to provide any support for their contention, or at a minimum to acknowledge Mr. Smack's Due Process analysis, the State's contention is unpersuasive.

Lastly, the State appears to contend that the Superior Court did not abuse its discretion when it denied Mr. Smack's request for an evidentiary, because Mr. Smack was able to "argue[ ] that the same information the State identified as demonstrating that he was a 'kingpin' could be used to show that he was not a 'kingpin.'"[48] This argument has no merit, as Mr. Smack was precluded from cross-examining live

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[45] Answer at 11.
[46] *Id.*
[47] *Id.*
[48] Answer at 12.

witnesses on disputed facts, which deprived him of the ability to challenge the veracity of the State's presentation of contested aggravating factors and to ensure that the State met the requisite burden of proof for those disputed facts. In a case such as this, in which a criminal defendant will be severely deprived of his fundamental liberty interest, it is consistent with Due Process for the record to reflect that the aggravating factors have been proven by a preponderance of the evidence. For aforementioned reasons, the Superior Court erred when it sentenced Mr. Smack without allowing for an evidentiary hearing so as to permit Mr. Smack an opportunity to cross-examine live witnesses on disputed facts relevant to the Superior Court's sentencing decision. Thus, this Court must overturn Mr. Smack's conviction and remand this case for a new sentencing hearing that fully comports with Due Process pursuant to the United States Constitution and Delaware Constitution.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Smack respectfully requests that this Court reverse Mr. Smack's conviction and remand for a new sentencing hearing with instructions to the Superior Court that the evidentiary standard for disputed facts is a preponderance of the evidence and additionally that the Defense has the right to call witnesses and present evidence to rebut the State's presentation of contested aggravating factors.

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Dated: June 12, 2017

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ADRIN SMACK
Petitioner

v.

STATE OF DELAWARE
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

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QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require disputed facts presented at a sentencing hearing to be proven by a preponderance of the evidence standard?

PARTIES TO THE PROCEEDING

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ADRIN SMACK, Petitioner

v.

STATE OF DELAWARE, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF DELAWARE

Petitioner, Adrin Smack, by and through his counsel John S. Malik, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Delaware Supreme Court filed on October 11, 2017, cited as *Smack v. State*, No. 601, 2016 (Del. Oct. 11, 2017) and appearing at A 1-6.

OPINION BELOW

The Supreme Court of Delaware issued an opinion on October 11, 2017 affirming Mr. Smack's sentence and denying his claim that a due process violation had occurred, finding that the burden of proof for disputed facts at a sentencing hearing is a minimal indicium of reliability.[1] The Delaware Supreme Court's opinion appears at A 1-6 and is reported as *Smack v. State*, No. 601, 2016 (Del. Oct. 11, 2017).

[1] The Delaware Supreme Court held that "[t]o fix the sentence *within* th[e] statutory range, the judge was entitled to consider all facts that had a minimal indicia of reliability. . . ." and therefore, "[t]he Superior Court did not err by applying a minimal indicia of reliability standard or by denying the evidentiary hearing." (A 5-6).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the Supreme Court of Delaware for which petitioner seeks review was issued on October 11, 2017. This petition is filed within 90 days of the Delaware Supreme Court's decision in compliance with United States Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14 provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend XIV.

STATEMENT OF THE CASE

The critical fact of this case, which lead to the filing of this petition, is that after motions and briefing, but prior to sentencing, the Delaware Superior Court rejected petitioner's argument that disputed sentencing facts must be proven by a preponderance of the evidence in order to comply with due process. The Delaware Superior Court instead held that disputed facts need only be proven by a minimal indicium of reliability, a holding upheld by the Delaware Supreme Court. The facts set forth below establish the factual background which lead to the Delaware courts' decisions.

As the result of an FBI Task Force investigation into a drug trafficking organization known as the Sparrow Run Crew, petitioner Adrin Smack was indicted on the following charges: one count of Giving a Firearm to a Person Prohibited; five counts of Drug Dealing in violation of 16 *Del. C.* § 4752(1); sixty-six counts of Drug Dealing in violation 16 *Del. C.* § 4754(1); one count of Possession of Marijuana; two counts of Conspiracy Second Degree; two counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448(a)(9); and three counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448. (A 14). In the course of the task force's investigation, wireless communications to and from Mr. Smack's cell phone were intercepted, including a conversation between Mr. Smack and his co-defendant, Al-Ghaniyy Price, in which they discussed something being hidden behind a radiator in Mr. Price's residence. (A 175). A subsequent search of this location revealed a military style tactical vest, $16,108 in currency, a loaded black Taurus .9-millimeter handgun, and 803 bundles of heroin. (*Id.*).

On March 31, 2016, Mr. Smack pleaded guilty to the following offenses: two counts of Drug Dealing in a Tier 4 Quantity; two counts of Drug Dealing; one count of Possession of a Firearm by a Person Prohibited; and one count of Conspiracy Second Degree. (A 111-117). As a condition of

the plea agreement, the State agreed to request a sentence no greater than fifteen years at Level V. (*Id.*).

During the June 22, 2016 sentencing hearing, the State sought to characterize petitioner as a drug king pin/criminal mastermind. Specifically, the State asserted:

> Your Honor, by way of background in this case, during the period of time in which the FBI Task Force was intercepting Mr. Smack's phone calls, on April 18th, police intercepted a phone call between defendant and a young man named Al-Ghaniyy Price. Price was just barely 18 years old at the time of this call.
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> During the call, Price told Smack that he was hiding something behind a radiator in his house. He told Smack that it would be in his opening behind the radiator. Mr. Smack then counseled Price to make sure that no one watched him hide the item.
>
> Just a few minutes later, like a good soldier, Mr. Price then texted Mr. Smack back and said, "Yo, Bro, it's there."
>
> How would Mr. Smack, who lives on 4th Street in the City of Wilmington, who lived there throughout this investigation, despite his assertions now to this court that he was homeless – he lived there with Akia Harley (ph) and her mother and the children – how would he transport his drugs from 4th Street to Sparrow Run and avoid detection?
>
> As Your Honor knows, because the Court took a plea from his sister, Tiffany Smack, he would have somebody else drive him, somebody with no criminal history, who had no reason to be stopped by the police.
>
> Then, he would, because he's undeniably smart, have someone else within the community of Sparrow Run, hold on to his drugs and guns, and so, the police searched the home of Al-Ghaniyy Price, which was on Kemper Drive. Many of the allegations of drug dealing in this case took place on Heron Court, Raven Turn, Kemper Drive, a new blocks from there.
>
> When the police searched this house, this is what they found: a military style tactical vest in a trash bag outside the back door of the residence, $11,853 inside a shoe box. In a different shoe box, police found $4,255. They also found a black Taurus .9-millimeter handgun, loaded with one round in the chamber.

(A 175).

The State further informed the Superior Court that law enforcement had recovered a total of 803 bundles of heroin from inside the Kemper Drive address and accordingly, the State was seeking a sentence of fifteen years at Level V incarceration. (A 175, 177).

In response to the State's sentencing presentation, petitioner's counsel asserted:

> The totality of the record supports the conclusion that Mr. Smack is absolutely not a king pin.
>
> Why, Your Honor? His phone calls clearly demonstrate, overwhelmingly demonstrate, he is a small-time retail Heroin salesman. That's it. That's the reason why the evidence of the individuals who were going to – would have testified, if there was a trial, and we certainly didn't put the State to the test on that, would have been about smaller portions of Heroin that were sold by Mr. Smack.
>
> Now, we all have some experience with the drug culture, and it's not because we purchase Heroin, Your Honor. It's because we deal in these types of cases. So, when you have an individual whose exposure that the evidence demonstrates, rather than just conjecture, is a retail salesman, there'd be no reason to be thinking that you have someone that is a wholesale salesman of the type of an individual that would have such a large amount of Heroin being stored at this residence.
>
> Mr. – what Mr. Smack's responsibility for, in relation to what was found in the residence, is the Taurus handgun, essentially, the firearm count that he pled guilty to, even though it's not specified. It's a generic handgun if you have an individual who is a wholesale Heroin salesman, the last thing in the universe they're doing, especially if they're weary of law enforcement, is doing retail sales.
>
> Retail sales is the way that most of these individuals end up getting caught, and it would be the thing that a wise person would be – would never be doing, especially because the profit margin is low.
>
> If Mr. Smack was a wholesale salesman of Heroin, wouldn't it have been picked up on the series of telephone calls that there were? The fact that there's nothing indicative of a wholesale sale of Heroin, there's no evidence to support that, all we have is this conjecture just thrown out today, and that's why I ask Your Honor to sentence Mr. Smack for what he did.

(A 179).

Petitioner's counsel further asserted that under a preponderance of the evidence standard, the State had failed to prove that Mr. Smack was responsible for the contraband found inside the Kemper Drive address. (*Id.*). Thereafter, the sentencing hearing was continued to allow for briefing on the applicable burden of proof at sentencing. (A 181).

Through a series of filings, petitioner asserted that the State bears the burden of proving any disputed factual allegation by a preponderance of the evidence and that due process also required

petitioner be provided with an opportunity to cross-examine live witnesses concerning disputed facts at the sentencing hearing. (A 185-187, 249). The State responded that the applicable burden of proof at sentencing is a minimal indicium of reliability and that local court rules offer no procedure for live witness testimony at sentencing hearings. (A 191-193).

Oral argument was held on November 9, 2016 in relation to the burden of proof issue. (A 251). During this oral argument, petitioner's counsel asserted, consistent with his prior filings, that the applicable burden of proof for disputed sentencing facts was a preponderance of the evidence. (A 256-259). The Superior Court rejected this assertion, ruling that the applicable burden of proof is only a minimum indicia of reliability. (A 260). The Superior Court sought clarification on which specific facts Mr. Smack sought to contest, to which petitioner's counsel responded that it was "the assertion of the other uncharged aspects, such as Mr. Price's residence and what [was] found in Mr. Price's residence that we dispute." (A 269-271, 274). Counsel further specified that it was "the conduct beyond conviction" that they disputed. (A 274).

Following oral argument, the Superior Court issued a letter/order on November 17, 2016 which ruled that Mr. Smack was not entitled to an evidentiary hearing and that the applicable burden of proof was a minimum indicia of reliability. (A 7-9). The Superior Court further held "that the State may rely upon (in addition to the Presentence Investigation) the indictment and the affidavit submitted by the State in support of its application to obtain a warrant" as the court found that "the[y] bear the requisite indicia of reliability. . . ." (A 9). Despite only expressly stating that the State could rely on the indictment to argue for a higher sentence, the Superior Court's language made it apparent that the Superior Court was free to consider all of the indicted counts when deciding Mr. Smack's sentence.

As the burden of proof was decided by the Superior Court on November 17, 2016, a remaining issue was whether Mr. Smack disputed any indicted conduct beyond the counts of conviction under the minimum indica of reliability standard. Petitioner filed a letter on November 18, 2016 asserting that seven indicted counts outside of those for which Mr. Smack was convicted failed to meet the minimum indicia of reliability: three counts of Possession of a Firearm by a Person Prohibited, three counts of Drug Dealing and one count of Possession of Marijuana for which he was indicted. (A 278-279). This argument was also rejected by the Superior Court during Mr. Smack's November 23, 2016 sentencing hearing, as the Superior Court found that "there [was] a sufficient indicia of reliability to an indictment for [him] to, at least, consider the indicted counts." (A 288).

At the beginning of the sentencing hearing, the State reasserted its request for fifteen years of incarceration pursuant to the plea agreement. (A 280-281). Petitioner's counsel argued in response that an eight year sentence was sufficient, as Mr. Smack was not a drug kingpin, and his involvement in drug dealing was solely to support his family. (A 281-282, 284). The State thereafter contended that seventy-seven counts of drug dealing within a two month span suggested that petitioner's activities were a full-time job, that Mr. Smack was a significant drug dealer, that retail drug sales were as worse than distributing large amounts of drugs, all of which justified a harsher sentence. (A 284-285). Petitioner's counsel responded that seventy-seven drug deals within two months only indicated that Mr. Smack was a retail seller, and not a supplier, and that it is illogical for the State to argue that "the retail drug dealer is considered a greater evil than the wholesale individuals that are supplying them." (A 286).

Thereafter, the Superior Court sentenced petitioner to fourteen years incarceration with descending level of probation. (A 289). In support of this sentence, the Superior Court rejected

petitioner's arguments and considered all of the indicted counts, noting "we have had this discussion, and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts." (A 287-288). The Superior Court largely adopted the State's sentencing arguments, stating:

> [I] think of all of the victims of his crime. And not only the people who purchased the drugs which he sells, but also their loved ones and families.
>
> I think about all of the lives that he has destroyed.
>
> I think about the fact that he has willingly destroyed them because it provides him with money.
>
> And I believe that, in addition to the value of punishment, there is also here a need to try to deter other from doing this. And, also frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.

(A 288-289).

Following his sentence, petitioner appealed to the Supreme Court of Delaware where he asserted that the Superior Court abused its discretion in resolving contested aggravating sentencing facts when it applied the minimal indicium of reliability standard, rather than the preponderance of the evidence standard. (A 16, 28-29). Mr. Smack contended that the Due Process Clause requires both the application of the preponderance of the evidence standard at sentencing and an opportunity to rebut the State's presentation of contested aggravating facts through an evidentiary hearing. (A 16, 28-32, 44-46).

The Delaware Supreme Court affirmed the judgment of the Superior Court, finding that it had already established a minimal indicium of reliability as the proper evidentiary standard in *Mayes v. State*. 604 A.2d 839, 843 (Del. 1992). (A 4). The Delaware Supreme Court held that the federal case law cited by petitioner was inapposite, because it involved sentencing under the federal guidelines. (A 4-5). The Supreme Court further found that an evidentiary hearing was not required

under due process, as petitioner had been provided with an opportunity to rebut the State's evidence, which is all that is constitutionally required. (A5-6).

The constitutional question at issue was preserved in the Delaware Supreme Court, as petitioner asserted that his rights under the Fourteenth Amendment's Due Process Clause were violated by the Superior Court's application of a minimal indicium of reliability standard to resolve disputed aggravating sentencing facts. (A11, 16, 28-33, 42).

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10(c) provides that a writ of certiorari may be granted where "a state court of last resort . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Delaware Supreme Court ruled in this case that due process does not require contested sentencing facts be proven by more than a minimal indicium of reliability nor does it require an evidentiary hearing be held to allow for the cross-examination of witnesses concerning the facts in dispute. (A 4-6). However, Delaware has reached this conclusion by misinterpreting federal case law which makes it apparent that the minimum burden of proof necessary to comply with due process at sentencing is the preponderance of the evidence standard.

This is an ideal case for granting *certiorari*, as Delaware has inadvertently created a lower burden of proof for state courts when resolving disputed aggravating facts presented at a sentencing hearing contrary to whatt this Court has consistently indicated since 1986. This due process error has persisted for over thirty years in the state of Delaware and continues to effect hundreds of criminal defendants who are sentenced in Delaware each year. Every defendant who appears at a state court in Delaware in which disputed facts are presented at sentencing is subjected to an unconstitutional standard that violates his or her due process rights when a judge determines and

issues a sentence. Sentencing hearings directly implicate a criminal defendant's constitutionally protected right to liberty and because of the significance attached to liberty rights, these hearings must comply with due process. Delaware has veered off course of being in conformity with the constitutional guidance of this Court and must be redirected back onto the path of compliance with the Due Process Clause.

I. THE DELAWARE SUPREME COURT ERRED IN CONCLUDING THAT DUE PROCESS REQUIRES CONTESTED SENTENCING FACTS BE PROVEN BY NO MORE THAN A MINIMAL INDICIUM OF RELIABILITY.

For the judicial fact-finding of contested sentencing facts, the Delaware Supreme Court's holding erroneously establishes a burden of proof that falls below the minimum requirements of due process under the Fourteenth Amendment to the United States Constitution. The Delaware Supreme Court's conclusion that petitioner's due process rights were not infringed upon results from the court's misinterpretation of both the argument on appeal and the federal authority upon which petitioner's legal argument is premised. *Smack v. State*, No. 601, 2016, at 2, 5-6 (Del. Oct. 11, 2017). Although this Court has never explicitly articulated the burden of proof to be applied to contested sentencing facts in a state sentencing proceeding, the Delaware Supreme Court's minimal indicium of reliability standard is incompatible with this Court's holdings in *United States v. Watts*, *Nichols v. United States* and *McMillan v. Pennsylvania*. *See Watts v. United States*, 519 U.S. 148 (1997); *Nichols v. United States*, 511 U.S. 738 (1994); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). As such, the Delaware Supreme Court erred by holding that the application of a minimal indicium of reliability standard at sentencing is sufficient to comply with due process under the Fourteenth Amendment. *Smack*, No. 601, 2016, at 4-5. The Delaware Supreme Court similarly erred in concluding that due process does not require an evidentiary hearing to resolve contested

aggravating sentencing facts. *Id.*

The Delaware Supreme Court concluded that federal case law, including the prior decisions of this Court, were "inapposite" to state sentencing proceedings, since they do not involve the application of the United States Federal Sentencing Guidelines. *Id.* at 5. However, in a crucial omission, the Delaware Supreme Court failed to consider the principle that underlies the holdings in each federal case–that sentencing hearings must meet minimum requirements to comply with due process. The federal cases cited by petitioner made evident the gradual progression of cases in which this Court began to demarcate the scope of the Fourteenth Amendment's due process protections at sentencing.

In dismissing the relevancy of these federal cases, the Delaware Supreme Court created a distinction in the weight of aggravating sentencing facts depending on whether the facts in question, if accurate, would increase the sentencing range under the federal guidelines, or if the facts would result in a harsher, but within statutory range, sentence under a state sentencing scheme. However, in doing so, the Delaware Supreme Court failed to appreciate that this Court did not rely solely upon the sentencing guidelines in finding that contested aggravating facts must be proven by a preponderance of the evidence, but also upon the principles of due process. *McMillan*, 477 U.S. at 84-87, 91-93; *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49. As the Due Process Clause of the Fourteenth Amendment is equally applicable to the states,[2] the Delaware Supreme Court erred

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[2] Although the Fourteenth Amendment's due process rights have been selectively incorporated to the states through judicial interpretation, this Court has specifically held that the Fourteenth Amendment's Due Process Clause applies to sentencing in state court. (*Gardner v. Florida*, 430 U.S. 349,358 (1977) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing hearing.") (citing

in dismissing the federal authority referenced by petitioner. Accordingly, the Delaware courts' holding is incompatible with current federal law, as it advances a burden of proof less than that already required under the Fourteenth Amendment. That federal cases necessarily involve sentencing pursuant to the guidelines and state cases do not, is irrelevant to the basic question of what the minimum requirement for compliance with due process is at a sentencing hearing. Based upon the current federal authority, that answer must be the preponderance of the evidence standard.

No legal analysis was provided by the Delaware Supreme Court to clarify the court's basis for declaring the federal cases to be "inapposite." Rather, the Delaware Supreme Court merely identified the cases cited by petitioner, *McMillan v. Pennsylvania*, *United States v. Watts*, *Nichols v. United States*, and *United States v. McDowell*, and pronounced them irrelevant, because they involved situations "where the court applied a preponderance of the evidence standard to establish facts warranting a sentencing enhancement under the federal sentencing guidelines." *McMillan*, 477 U.S. 79; *Watts*, 519 U.S. 148; *Nichols*, 511 U.S. 738; *United States v. McDowell*, 888 F.2d 285 (3d Cir. 1989); *Smack*, No. 601, 2016, at 4 n.6.

However, the case that formed the foundation of petitioner's legal argument was *McMillan v. Pennsylvania*, in which this Court considered the constitutionality of a state, not federal, sentencing scheme that required sentencing considerations be proven by a preponderance of the evidence. *McMillan*, 477 U.S. at 81. This Court found Pennsylvania's Mandatory Minimum Sentencing Act to be constitutional, as sentencing factors need not be proven beyond a reasonable

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Witherspoon v. Illinois, 391 U.S. 510, 521-523 (1968)); *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3022-23, 177 L.Ed.2d 894 (2010); *Albright v. Oliver*, 510 U.S. 266, 272 (1994)). The *McMillan* decision further confirms that the Due Process Clause is applicable to state sentencing proceedings, as this Court reviewed Pennsylvania's sentencing scheme for due process compliance under the Fourteenth Amendment. (*McMillan*, 477 U.S. at 83-87, 90-93).

doubt under due process. *Id.* at 84. It was determined that under Pennsylvania's sentencing scheme, because the sentencing factor in question, which was not an element of the crime, did not "come[] into play" until after the defendant had already been found guilty beyond a reasonable doubt of a crime, due process was not offended by imposing a harsher sentence on the basis of this factor, despite it not being proven beyond a reasonable doubt. *Id.* at 85-86. Nor does due process require the sentencing factor to be proven by clear and convincing evidence, as this Court found the preponderance of the evidence standard, in this case, to have "satisfie[d] due process." *Id.*

It was further acknowledged by this Court that while due process constrains the states' ability to reallocate or reduce the burdens of proof in criminal cases, the extent of that constitutional limitation need not be addressed in *McMillan*, as it was clear Pennsylvania's sentencing scheme had not exceeded those limits. *Id.* This lack of finality on the issue led to the further litigation in *Watts* and *Nichols* and still persists today in cases such as petitioner's. Despite not conclusively establishing the scope of due process at sentencing as it applies to the burden of proof for sentencing facts, *McMillan* undisputably addressed the issue. *Id.* at 84-87, 89-93. As such, the Delaware Supreme Court clearly erred in the conclusory assertion that *McMillan* is inapposite to petitioner's claim. *Id.* at 84-87, 89-93.

Following *McMillan*, this Court was asked to consider in *United States v. Watts* whether acquitted conduct, found by a preponderance of the evidence, could be used to enhance a sentence under the federal guidelines. *Watts*, 519 U.S. at 149. The argument that acquitted conduct could never, under any standard of proof, serve as the basis for a sentence enhancement was rejected by this Court. *Id.* at 149, 154, 156-57. While declining to offer a bright line test as to what the burden of proof should be when acquitted conduct is used as an aggravating fact presented at a sentencing

hearing, this Court acknowledged that a standard of proof less stringent than the beyond a reasonable doubt standard was permissible. *Id.* at 155-56. However, left unresolved was the issue of whether, under certain circumstances, a sentencing enhancement would demand that sentencing facts be found by a burden of proof more rigorous than the preponderance of the evidence standard, such as by the clear and convincing evidence standard. *Id.* at 156-57.

However, a notable facet of the *Watts* decision overlooked by the Delaware Supreme Court is that although this Court raised the possibility that in extreme circumstances, aggravating sentencing facts must be proven by the more stringent clear and convincing standard, the reverse—that in some circumstances, a standard less stringent than a preponderance of the evidence would suffice—was not suggested. *Id.* Following the *Watts* decision, it is clear that the use of acquitted conduct to enhance a sentence, akin to the non-convicted conduct used to impose a harsher sentence on petitioner, is constitutional under most circumstances, provided the conduct has been proven by a preponderance of the evidence. *Id.* at 157 ("We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted conduct, so long as that conduct has been proved by a preponderance of the evidence."). However, in overlooking the constitutional component of *Watts* and focusing solely on the involvement of the sentencing guidelines, the Delaware Supreme Court has created a disparity between the relevant burden of proof required by due process at federal and state sentencing proceedings.

The error in Delaware's legal analysis and conclusion is that there cannot be two separate burdens of proof for contested sentencing facts—a higher burden in federal court and a lower burden in state court—as the burden of proof must satisfy the same Due Process Clause of the Fourteenth Amendment to the United States Constitution. If due process requires disputed aggravating facts

presented at a federal sentencing hearing to be proven by a preponderance of the evidence, then it is incompatible with due process for Delaware to allow contested facts presented at a state sentencing hearing to be proven by the less stringent minimal indicium of reliability standard. In fact, this Court touched upon this very issue in *McMillan*, noting:

> Indeed, it would be extraordinary if the Due Process Clause as understood in *Patterson* plainly sanctioned Pennsylvania's scheme, while the same Clause explained in some other line of less clearly relevant cases imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment.

McMillan, 477 U.S. at 91.

As implied in *McMillan*, employing two separate minimum burdens of proof to the judicial fact-finding of contested aggravating sentencing facts on the basis of the same Due Process Clause and in situations in which a harsher sentence will be imposed is unreasonable and lacks a sound justification. Accordingly, the Delaware Supreme Court, in misinterpreting the holdings of the federal cases cited by petitioner and in overlooking the due process components of those cases, mistakenly permits the moving party in a Delaware sentencing proceeding to prove contested aggravating facts by a standard significantly less rigorous than the preponderance of the evidence standard required by due process. Such a situation clearly occurred in Mr. Smack's case. As previously delineated,[3] the Delaware Superior Court considered contested aggravating facts that the State proved by no more than a minimum indicia of reliability when crafting Mr. Smack's ultimate sentence. It is evident that the Superior Court largely adopted the State's sentencing arguments, as it stated:

> [I] think of all of the victims of his crime. And not only the people who purchased

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[3] *See supra* at 8-10.

> the drugs which he sells, but also their loved ones and families.
>
> I think about all of the lives that he has destroyed.
>
> I think about the fact that he has willingly destroyed them because it provides him with money.
>
> And I believe that, in addition to the value of punishment, there is also here a need to try to deter other from doing this. And, also frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.

(A 288-289).

As such, Mr. Smack was sentenced on the basis of aggravating facts not proven by the State beyond a minimal indicium of reliability in violation of the Due Process Clause.

Because of the Delaware courts' departure from clear federal constitutional precedent on an issue that affect hundreds of state sentencing proceedings every year, there is a desperate need for this Court to plainly affirm what prior cases have already indicated–that contested sentencing facts must be proven by a preponderance of the evidence under the Due Process Clause. This will bring a state such as Delaware, who mistakenly narrows the scope of the Due Process Clause at sentencing, into conformity with the Due Process Clause of the Fourteenth Amendment.

In further support of this minimum due process requirement, this Court addressed the constitutionality of using a defendant's prior uncounseled misdemeanor conviction at sentencing in *Nichols v. United States*. *Nichols*, 511 U.S. at 740. Although the question in *Nichols* was predominantly analyzed under the Sixth Amendment, this Court also engaged in a discussion of prior decisions, such as *McMillan*, in which the constitutionality of a particular sentencing factor or the manner in which that factor was determined was upheld under the Due Process Clause. *Id.* at 747-48. In doing so, the *Nichols* decision clearly implies that a preponderance of the evidence standard

is required under due process to prove aggravating sentencing facts, noting that in the context of an uncounseled misdemeanor conviction, just like with the conduct in *McMillan*, to comply with due process "the state need prove such conduct only by a preponderance of the evidence." *Id.* In light of the due process component of the *Nichols* decision, the Delaware Supreme Court was mistaken in finding *Nichols* irrelevant to petitioner's claim and declining to consider it. *Smack*, No. 601, 2016, at 4-5.

In addition to *McMillan*, *Watts* and *Nichols*, petitioner also presented the Delaware Supreme Court with the decision of the Third Circuit Court of Appeals in *United States v. McDowell*. In *McDowell*, the Third Circuit was specifically called upon to decide the necessary burden of proof in a sentencing hearing to support a finding of fact leading to a sentencing adjustment either upwards or downwards under the guidelines. *McDowell*, 888 F.2d at 290. However, despite the specificity of the issue in *McDowell*, the Delaware Supreme Court erroneously found the case to be inapposite to petitioner's claim, just as it did with *McMillan*, *Watts* and *Nichols*. *Smack*, No. 601, 2016, at 4-5. Although the Delaware Supreme Court's confusion perhaps resulted from the involvement of the sentencing guidelines, the Delaware Supreme Court overlooked the lengthy discussion by the Third Circuit in which the due process rights applicable to sentencing were examined.

The Third Circuit noted that even though the federal rules require a hearing be held to resolve disputed facts contained in the presentence report, this requirement is based in the Due Process Clause, which guarantees "a convicted criminal defendant the right not to have his sentence based upon 'materially false' information." *McDowell*, 888 F.2d at 290. The Third Circuit further asserted that this fact-finding does not require heightened scrutiny, because, in accord with the decisions of the Second, Fourth and Eleventh Circuit Courts of Appeal, the Third Circuit had concluded that "a

defendant's rights in sentencing are met by a preponderance of the evidence." *Id.* at 291. Relying upon *McMillan*, the Third Circuit noted "[t]hat the preponderance of evidence standard can withstand constitutional muster is without much doubt," acknowledging that *McMillan* was a case decided under the Due Process Clause of the Fourteenth Amendment. *Id.*

Although the sentencing proceeding in *McDowell* fell under the purview of the sentencing guidelines, the Third Circuit offered an important discussion and analysis of the interplay between due process and the necessary proof needed for judicial fact-finding. *Id.* at 290-91. Accordingly, the Delaware Supreme Court's decision to write off *McDowell* as immaterial to petitioner's claim was flawed. This was erroneous not only in determining the applicable burden of proof at sentencing but in deciding whether due process, in this case, required an evidentiary hearing to resolve contested sentencing facts. Nor did the Delaware Supreme Court suggest a reasonable basis for distinguishing state sentences from federal sentences in the context of minimal due process requirements.

Precedent of this Court all but expressly mandates that aggravating sentencing facts must be proven by a preponderance of the evidence under due process, but there is a need for this supposition to be conclusively stated, so as to prevent the states' inadvertent infringement of a criminal defendant's due process rights during sentencing. The Delaware Supreme Court's holding that without a sentencing enhancement, due process requires aggravating facts presented at a sentencing hearing be proven by no more than a minimal indicium of reliability, conflicts with the scope of due process protections already decided by this Court and the Third Circuit Court of Appeal. *Smack*, No. 601, 2016 at 4-5. This conflict creates a disparity in the minimum requirements under the United States Constitution for proving aggravating facts, solely on the basis of whether the proceeding occurs in state court or federal court. As such, it is necessary for this Court to do what it did not expressly

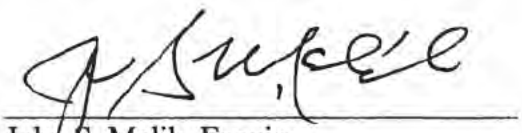
state in *Watts* and *McMillan* and make obvious what is by now, rather evident–that the moving party must prove aggravating facts at sentencing by a preponderance of the evidence to prevent the infringement of a criminal defendant's due process rights. *See Watts*, 519 U.S. at 170 (Kennedy, J., dissenting); *McMillan*, 477 U.S. at 86.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: January 9, 2018

Respectfully submitted,



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IN THE
SUPREME COURT OF THE UNITED STATES

ADRIN D. SMACK,

Petitioner

v.

STATE OF DELAWARE,

Respondent

On Petition for Writ of Certiorari
to the Delaware Supreme Court

BRIEF IN OPPOSITION

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March 12, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Respondent, the State of Delaware, respectfully asks this Court to deny this petition seeking review of the October 11, 2017 judgment of the Delaware Supreme Court.

COUNTER-STATEMENT OF THE CASE

A. The Crimes[1]

In August 2014, a Delaware-based FBI Task Force began investigating a drug trafficking organization known as the Sparrow Run Crew. Members of the task force identified Adrin Smack ("Smack") as one of the leaders of the organization. They also determined that Smack resided on West 4th Street in Wilmington, but used a Newark, Delaware residence in the Sparrow Run community as the organization's base of operations. Using several confidential sources, the task force learned that Smack: 1) personally sold drugs to several individuals; 2) at times, possessed significant amounts of drugs; and 3) was known to possess a variety of firearms.

As a result of a wiretap investigation, the task force obtained a search warrant for 326 Kemper Drive, a residence located in Sparrow Run associated with one of Smack's co-defendants, Al-Ghaniyy Price ("Price"). The task force executed the warrant and recovered heroin, crack cocaine, marijuana, over $16,000 in cash, and three firearms from the residence. Smack was charged with multiple counts of drug

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[1] The facts of the case are taken from the Affidavit in Support of Application for Interception of Wire Communications authored by Detectives Brian Lucas of the New Castle County (Delaware) Police Department and Detective Scott Linus of the Delaware State Police Department. (Pet. App. at A204-40). Because Smack was indicted prior to arrest, there is no arrest warrant from which to draw facts; additional facts are taken from the State's memorandum regarding sentencing. (Pet. App. at A190-95).

dealing, firearms offenses and conspiracy as a result of the wiretap investigation and the evidence discovered in Price's home.

B. Procedural History

On May 26, 2015, a New Castle County Grand Jury returned a more than 200-count indictment against multiple defendants, including Smack. (*See* Pet. App. at A112). The indictment was the result of an investigation into a drug dealing organization that operated from the Sparrow Run neighborhood in Newark, Delaware. Smack was charged with seventy-one counts of Drug Dealing (16 *Del. C.* § 4752), one count of Giving a Firearm to a Person Prohibited (11 *Del. C.* § 1454), one count of Possession of Marijuana (16 *Del. C.* § 4674), two counts of Conspiracy Second Degree (11 *Del. C.* § 512), and five counts of Possession of a Firearm by a Person Prohibited ("PFBPP") under two different subsections (11 *Del. C.* §§ 1448 (a)(4), (a)(9)). On March 31, 2016, Smack pled guilty to four counts of Drug Dealing, one count of PFBPP, and one count of Conspiracy Second Degree.[2] As part of the plea agreement, the State agreed to limit its sentencing recommendation to no more than fifteen years of unsuspended incarceration, and Smack agreed that he would request no less than eight years of unsuspended incarceration. (Pet. App. at A112).

At Smack's sentencing hearing, the prosecutor recounted facts underlying the charges in Smack's indictment and described Smack as a "kingpin" in a drug dealing enterprise. Smack disagreed with the prosecutor's characterization of him as a "kingpin," argued that he was a "retail" level drug dealer, and requested an

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[2] *Smack v. State*, 2017 WL 4548146, at *1 (Del. Oct. 11, 2017).

evidentiary hearing to dispute the characterization. The Superior Court delayed Smack's sentencing to provide him the opportunity to develop his claim that he was entitled to an evidentiary hearing on the issue. After considering relevant briefing and oral argument, the Superior Court denied Smack's request for an evidentiary hearing, finding that Delaware Superior Criminal Court Rule 32(a) did not mandate an evidentiary hearing. The court determined all "that [was] required [was] that the court afford the defendant some opportunity to rebut the Government's allegations,"[3] and the prosecution was "not required to call witnesses to support its contention that the Defendant was heavily involved in drug trade." (Pet. App. at A8).

On November 23, 2017, the Superior Court sentenced Smack to an aggregate of fourteen years of incarceration (one year less than the State requested) followed by decreasing levels of supervision.[4] Smack appealed and the Delaware Supreme Court affirmed his convictions and sentence on October 11, 2017.[5]

REASONS FOR DECLINING REVIEW

There were no disputed facts presented at the sentencing hearing.

This Court should decline to grant certiorari because Smack's complaint about the presentation of disputed facts at a sentencing hearing does not require review. The Delaware Supreme Court correctly determined that the sentencing court did not

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[3] *State v. Smack*, Del. Super., I.D. No. 1505015401, Parkins, J. (Nov. 17, 2016), Ltr. Ord. at 2. (Pet. App. at A8).

[4] *Smack*, 2017 WL 4548146, at *1.

[5] *Id.*

violate Smack's due process rights by considering comments made by a prosecutor at sentencing, when those comments were not based on disputed facts.

The prosecutor's characterization of Smack's role as a "kingpin" in a drug dealing enterprise did not introduce a disputed fact for the sentencing court's consideration, the prosecutor did not refer to Smack as a "kingpin" at his final sentencing hearing, and Smack had the opportunity to rebut the prosecutor's characterization.

Although "not fully controlling," this Court's Rule 10 sets forth three "compelling reasons for the grant of certiorari. Smack does not satisfy any of those reasons. The first addresses decisions of the federal circuit courts, scenarios not applicable here because Smack his filed the petition following a decision of a state supreme court. Supr. Ct. R. 10(a). The second involves occasions when a state court of last resort has decided an important federal question in a way that conflicts with another state court of last resort or of a federal court of appeals. Supr. Ct. R. 10(b). While Smack has alleged the state supreme court's decision conflicts with other federal appellate courts, he is incorrect and the cases he cites do not support this argument. Third, this court may grant certiorari when a state court of last resort or a federal appellate court "has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important question of federal law that conflicts with relevant decisions of this Court." Supr. Ct. R. 10(c). Smack states "this case is an ideal case for granting certiorari, as Delaware has inadvertently created a lower burden of proof for state courts when resolving disputed

aggravating facts presented at a sentencing hearing contrary to what [] this Court has consistently held since 1986." (Pet. at 11). Because the Delaware Supreme Court's decision rested upon state law,[6] Smack cannot show that the Delaware Supreme Court's decision affirming Smack's convictions and sentence rests upon an important question of federal law that this Court has yet to decide.

On appeal to the Delaware Supreme Court, Smack argued that the Superior Court's denial of his request for an evidentiary hearing violated his due process rights. The Delaware Supreme Court rejected Smack's due process argument, finding that the Superior Court "did not abuse its discretion in denying an evidentiary hearing because Smack had, and took, the opportunity to argue he was a middleman in the conspiracy and not the kingpin."[7]

Smack contends "[t]he Delaware Supreme Court's conclusion that petitioner's due process rights were not infringed upon results from the court's misinterpretation of both the argument on appeal and the federal authority upon which petitioner's legal argument is premised." (Pet. at 12). He is incorrect. The Delaware Supreme Court correctly analyzed both Smack's argument and federal authority presented and properly found no due process violation. Because Smack failed to allege disputed facts that were presented at sentencing and, at most, disputes a characterization that the State did not mention at sentencing, he cannot support his argument that he was deprived of due process when the Superior Court denied him an evidentiary hearing

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[6] Unlike Federal Rule of Criminal Procedure 32, Delaware Superior Court Criminal Rule 32 does not provide for an evidentiary hearing at sentencing.

[7] *Smack*, 2017 WL 4548146 at *2.

to prove disputed facts by a preponderance of the evidence. Therefore, there is no federal question for this Court to consider.

Smack acknowledges "this Court has never explicitly articulated the burden of proof to be applied to contested sentencing facts in a state sentencing proceeding." (Pet. at 12). Smack argues that the burden of proof at a state sentencing hearing should be preponderance of the evidence and principally relies on three decisions of this Court, *McMillan v. Pennsylvania,*[8] *Nichols v. United States,*[9] and *United States v. Watts,*[10] to support that argument. These cases are inapposite. In *McMillan*, this Court held that a Pennsylvania statute allowing for a five-year minimum statutory sentencing enhancement if the state proved a fact (that defendant visibly possessed a firearm during the commission of a felony) by a preponderance of the evidence satisfied due process.[11] In *Nichols*, this Court held that a federal sentencing court could consider a defendant's previous uncounseled misdemeanor conviction when applying a sentencing enhancement under the United States Sentencing Guidelines ("USSG.").[12] Likewise, in *Watts*, this Court held that a federal sentencing court could consider conduct for which a defendant was acquitted to enhance their sentence under the USSG, "so long as that conduct has been proved by a preponderance of the

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[8] 477 U.S. 79 (1986).

[9] 511 U.S. 783 (1994).

[10] 519 U.S. 148 (1977).

[11] 477 U.S. at 91.

[12] 511 U.S. at 746-47.

evidence."[13] The common thread in each of the cases upon which Smack relies is the presence of a state statutory or federal sentencing guideline enhancement. Smack's case, however, did not involve a statutory sentencing enhancement provision.[14] The prosecutor in Smack's case was arguing in support of a sentence that was *within* statutory sentencing range, not an increase of the sentencing range.[15] As the Delaware Supreme Court found:

> Under the federal sentencing guidelines, the judge must find facts at sentencing using evidentiary burdens because those factual determinations can cause an increase in the sentencing ranges under the guidelines. Here, Smack's guilty plea resulted in a sentencing range of two to seventy-six years. To fix the sentence *within* that statutory range, the judge was entitled to consider all facts that had a minimal indicia of reliability—including the intercepted text messages and phone conversations that led to the seventy-seven charges of drug dealing brought against Smack.[16]

The Delaware Supreme Court properly found that the federal cases cited by Smack were inapplicable. Here, the Superior Court did not use statutory or guideline-based enhancements when it sentenced Smack to fourteen years of incarceration, which was well within the sentencing range of two to seventy-six years.

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[13] 519 U.S. at 158.

[14] Generally, when making factual findings for sentencing purposes, a federal circuit court have held that a district court "may consider any information which bears sufficient indicia of reliability to support its probable accuracy." *United States v. Zuniga*, 720 F.3d 587, 590 (5th Cir. 2013) (citing *United States. v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012). The USSG permit the sentencing court to consider certain evidence "so long as such evidence has sufficient or minimally adequate indicia of reliability and the defendant has an opportunity to rebut such evidence that he perceives is erroneous." *United States v. Christman*, 509 F.3d 299, 305 (6th Cir. 2007) (citing *United States v. Moncivais*, 492 F.3d 652, 658 (6th Cir. 2007).

[15] *See Smack*, 2017 WL 4548146, at *2.

[16] *Id.* (internal citations omitted) (emphasis in original).

Smack was charged with seventy-seven counts of Drug Dealing and pled guilty to four counts of Drug Dealing. He did not contest the facts underlying the indictment or the charges to which he pled guilty. Indeed, Smack never contested that he was a drug dealer. When he pled guilty to four counts of Drug Dealing, Smack acknowledged that he either possessed, with the intent to deliver, or delivered, various quantities of heroin on separate occasions. (Pet. App. at A114-17). At his original aborted sentencing hearing, the State informed the court that Smack was someone who had been "known to the police for a long time," that many people had purchased drugs from Smack, that Smack could be heard on the phone telling people to be mindful of police and undercover cars, that with Smack's history and the quantity of money and drugs in his possession Smack deserved fifteen years of incarceration. (Pet. App. at A176-77). Smack described his drug dealing activity as that of a "small-time retail [h]eroin salesman." (Pet. App. at A179). Smack again acknowledged that he was a "retail drug dealer" at his second sentencing hearing. (Pet. App. at A282). The prosecutor and Smack both described his criminal activity as the sale of heroin to individual addicts. Smack simply takes umbrage at the prosecutor's use of the term "kingpin" at the initial sentencing hearing, preferring the term "retail drug dealer." (Pet. App. at A282). Smack's disagreement with the prosecutor's characterization of his conduct does not amount to a "disputed fact" upon which the Superior Court relied to apply a statutory or guideline-based sentencing enhancement. Because there is no dispute of fact, and because nothing here

enhanced the sentence available to the court, there is no basis for this Court to grant the petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 12, 2018

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

April 16, 2018

Clerk
Supreme Court of Delaware
P. O. Box 476
Dover, DE 19903-0476

Re: Adrin Smack
v. Delaware
No. 17-7414
(Your No. 601, 2016)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADRIN SMACK,	:	
Petitioner,	:	**No. 1:19-cv-00691-LPS**
	:	
v.	:	
	:	
THERESA DELBALSO, Superintendent,	:	
SCI Mahanoy	:	
Respondent,	:	
	:	
ATTORNEY GENERAL OF THE	:	
STATE OF DELAWARE,	:	
Respondent.	:	

OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

Christopher S. Koyste, Esquire
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Counsel for Adrin Smack

Date: February 3, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS

Federal Cases

State Cases

Federal Statutes

State Statutes

Federal Rules

State Rules

U.S. Constitution

Other

NATURE AND STAGE OF PROCEEDINGS

On May 26, 2015, Mr. Adrin Smack was indicted on one count of Giving a Firearm to a Person Prohibited, five counts of Drug Dealing in violation of 16 *Del. C.* § 4752(1), sixty six counts of Drug Dealing in violation of 16 *Del. C.* § 4754(1), one count of Possession of Marijuana, two counts of Conspiracy Second Degree, two counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448(a)(9), and three counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448.[1] On March 31, 2016, Mr. Smack pleaded guilty to two counts of Drug Dealing in a Tier 4 Quantity (Counts 36, 37),[2] two counts of Drug Dealing (Counts 40, 122),[3] one count of Possession of a Firearm by a Person Prohibited (Count 39),[4] and one count of Conspiracy Second Degree (Count 238).[5] As a condition of the plea agreement, the State agreed to not recommend a sentence greater than 15 years of incarceration and Mr. Smack agreed to not request a sentence less than 8 years of incarceration.[6]

On June 22, 2016, Mr. Smack was scheduled to be sentenced, however, the hearing was continued to allow the parties the opportunity to brief the issue of what the applicable burden of proof was for contested facts presented during the sentencing hearing.[7] On August 15, 2016, Mr. Smack filed his Pre-Sentence Motion in Response to the Court's June 22, 2016 Order Regarding the Scope of Consideration at Mr. Smack's Sentencing Hearing.[8] The State filed their response on

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[1] SR1-4, DE# 3, SR16-102.
[2] SR30.
[3] SR31, SR56.
[4] SR31.
[5] SR10, DE# 35, SR93, SR103, SR106-11.
[6] SR103, SR106.
[7] SR11, DE#38-39, SR113, SR119-20.
[8] SR12, DE# 43, SR121-26.

October 3, 2016.[9] On October 11, 2016, Mr. Smack filed a letter requesting oral argument[10] which was subsequently held on November 9, 2016.[11]

On November 17, 2016, the Superior Court issued an order finding that Mr. Smack was not entitled to an evidentiary hearing and that the Court may consider any information meeting a minimal indicia of reliability.[12]

On November 23, 2016, Mr. Smack was sentenced to an aggregate prison sentence of 14 years followed by 12 years of descending levels of probation.[13]

On December 23, 2016, Mr. Smack timely appealed his sentencing to the Delaware Supreme Court.[14] The Delaware Supreme Court affirmed the judgment of the Superior Court on October 11, 2017.[15] Thereafter, Mr. Smack timely filed a cert petition to the United States Supreme Court on January 9, 2018.[16] On April 16, 2018, the United States Supreme Court denied cert.[17]

On April 16, 2019, Mr. Smack filed his Writ of Habeas Corpus in this Court. This is his Opening Memorandum in support of that petition.

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[9] SR12, DE# 44, SR128-86.
[10] SR12, DE# 45, SR187-89.
[11] SR12, DE# 46, SR190-215.
[12] SR12-13, DE# 48, SR217-19.
[13] SR13, DE# 50, SR231-35.
[14] SR14-15, DE# 53, 60, 62, SR243.
[15] SR240, SR586-91.
[16] SR240.
[17] *Id*.

TIMELINESS

Pursuant to 28 U.S.C. § 2244(d)(1), "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."[18] This one year period of limitation begins to run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.[19]

In the present matter, Mr. Smack pleaded guilty on March 31, 2016 but was not sentenced until November 23, 2016.[20] In order to appeal his conviction, Mr. Smack had 30 days from November 23, 2016 to file a notice of appeal with the Delaware Supreme Court, pursuant to Delaware Supreme Court Rule 6(a)(iii).[21] Mr. Smack timely filed his notice of appeal with the Delaware Supreme Court on December 23, 2016.[22] On October 11, 2017, the Delaware Supreme Court affirmed Mr. Smack's conviction.[23] Thereafter, pursuant to United States Supreme Court Rule 13(1), Mr. Smack had 90 days from October 11, 2017 to file a cert petition to the United States

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[18] 28 U.S.C. § 2244(d)(1).

[19] *Id.*; *McAleese v. Brennan*, 483 F.3d 206, 212 (3d Cir. 2007) (quoting 28 U.S.C. § 2244(d)(1)).

[20] SR10, DE# 35, SR13, DE# 50.

[21] Del. Supr. Ct. R. 6(a)(iii) ("A notice of appeal shall be filed in the office of the Clerk of this Court . . . [w]ithin 30 days after a sentence is imposed in direct appeal of a criminal conviction. . . .").

[22] SR243.

[23] SR240.

Supreme Court.[24]

Mr. Smack timely filed a cert petition to the United States Supreme Court on January 9, 2018.[25] On April 16, 2018, the United State Supreme Court denied Mr. Smack's cert petition[26] and therefore Mr. Smack's conviction became final on April 16, 2018.[27] Thus, the one year period of limitation began to run on April 16, 2018 with 365 days remaining. As Mr. Smack filed his 2254 habeas petition on April 16, 2019, these proceedings are timely.

[24] Sup. Ct. R. 13(1) ("Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.").

[25] SR240.

[26] *Id*.

[27] 28 U.S.C. § 2244(d)(1)(A).

SUMMARY OF ARGUMENT

1. The Delaware State Courts erroneously concluded that Mr. Smack received a constitutionally fair sentencing hearing. In making its rulings, the Delaware State Courts failed to consider controlling United States Supreme Court precedent interpreting the Due Process Clause of the Fourteenth Amendment as requiring that disputed facts presented during a sentencing hearing and considered by the sentencing judge be proven by a preponderance of the evidence. As such, the Delaware Superior Court applied and the Delaware Supreme Court affirmed the application of an erroneous burden of proof for the resolution of disputed facts presented by the State during Mr. Smack's sentencing hearing. Thus, Mr. Smack's sentence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and therefore, Mr. Smack is entitled to habeas relief.

2. The Due Process Clause of the Fourteenth Amendment requires the Delaware State Courts to hold an evidentiary hearing in this case regarding disputed facts that the sentencing court would consider when issuing a sentence. An evidentiary hearing would have provided appropriate due process to prevent Mr. Smack from being sentenced based upon information that fails to meet a preponderance of the evidence burden of proof. However, the Delaware State Courts denied Mr. Smack's request for an evidentiary hearing. Without the evidentiary hearing, Mr. Smack was precluded from challenging the State's presentation of disputed sentencing facts and/or to make certain that the State met the requisite burden of proof for disputed facts. Thus, Mr. Smack is entitled to habeas relief.

STATEMENT OF FACTS

On or around August of 2014, an FBI Task Force began investigating a drug trafficking organization known as the Sparrow Run Crew.[28] "Evidence obtained during the investigation indicate[d] that this organization [was] responsible for distributing heroin and cocaine base to a wide network of distributors and sub-distributors. The heroin [was] distributed by [Mr. Smack] in quantities ranging from multiple bundles to multiple logs per transaction."[29] Law enforcement further alleged that Mr. Smack and his co-defendant Miktrell Spriggs were "co-leaders of the organization and that they pool[ed] money to buy heroin and cocaine from source[s] of supply."[30] This investigation also included the use of confidential informants and the monitoring of Mr. Smack's phone calls.[31]

On April 10, 2015, the Delaware Superior Court signed an order authorizing law enforcement to intercept the wireless communications to and from Mr. Smack's cell phone.[32] On April 18, 2015, law enforcement intercepted a phone call between Mr. Smack and Mr. Price during which Mr. Smack and Mr. Price discussed an item being hidden behind a radiator in Mr. Price's residence.[33] During a subsequent search of Mr. Price's residence, law enforcement located a military style tactical vest, $16,108, a loaded black Taurus .9-millimeter handgun, and 803 bundles of heroin.[34]

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[28] This background information is taken from the affidavit of probable cause used to obtain a wiretap on Mr. Smack's cell phone (SR143-79) as well as the affidavit of probable cause to obtain a search warrant for Co-Defendant Al-Ghaniyy Price's residence. (SR181-86). Both of these affidavits were attached as exhibits to the State's Response to Mr. Smack's pre-sentence motion.

[29] SR168.

[30] *Id*.

[31] SR168-76.

[32] SR137-42.

[33] SR185.

[34] SR113.

On May 26, 2015, Mr. Smack was indicted on one count of Giving a Firearm to a Person Prohibited in violation of 11 *Del. C.* § 1454, five counts of Drug Dealing in violation of 16 *Del. C.* § 4752(1), sixty-six counts of Drug Dealing in violation of 16 *Del. C.* § 4754(1), two counts of Conspiracy Second Degree in violation of 11 *Del. C.* § 512, two counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448(a)(9), three counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448; and a single count of Possession of Marijuana in violation of 16 *Del. C.* § 4764(b).[35]

On March 31, 2016, Mr. Smack agreed to enter a guilty plea to two counts of Drug Dealing Heroin in a Tier 4 Quantity (Counts 36, 37),[36] two counts of Drug Dealing Heroin no tier weight (Counts 40, 122),[37] one count of Possession of a Firearm by a Person Prohibited (Count 39),[38] and one count of Conspiracy Second Degree (Count 238).[39] As a condition of the plea agreement, the State agreed to not recommend a sentence greater than 15 years of incarceration, while Mr. Smack agreed to not request a sentence less than 8 years of incarceration.[40] Following the court's colloquy, the Delaware Superior Court accepted Mr. Smack's plea as knowing, intelligent and voluntary.[41]

At the June 22, 2016, sentencing hearing, the State characterized Mr. Smack as a drug kingpin and a criminal mastermind in an attempt to have Mr. Smack sentenced to at least 15 years of incarceration.[42] In particular, the State asserted:

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[35] SR4, DE# 3, R16-102.
[36] SR30.
[37] SR31, SR56.
[38] SR31.
[39] SR10, DE# 35, SR93-94, SR103, SR106-111.
[40] SR103, SR106.
[41] SR106-10.
[42] SR113-16.

> Your Honor, by way of background in this case, during the period of time in which the FBI Task Force was intercepting Mr. Smack's phone calls, on April 18th police intercepted a phone call between defendant and a young man named Al-Ghaniyy Price. Price was just barely 18 years old at the time of this call.
>
> During the call, Price told Smack that he was hiding something behind a radiator in his house. He told Smack that it would be in his opening behind the radiator. Mr. Smack then counseled Price to make sure that no one watched him hide the item.
>
> Just a few minutes later, like a good soldier, Mr. Price then texted Mr. Smack back and said, "Yo, Bro, it's there."
>
> How would Mr. Smack, who lives on 4th Street in the City of Wilmington, who lived there throughout this investigation, despite his assertions now to this court that he was homeless – he lived there with Akia Harley (ph) and her mother and the children – how would he transport his drugs from 4th Street to Sparrow Run and avoid detection?
>
> As Your Honor knows, because the Court took a plea from his sister, Tiffany Smack, he would have somebody else drive him, somebody with no criminal history, who had no reason to be stopped by the police.
>
> Then, he would, because he's undeniably smart, have someone else within the community of Sparrow Run, hold on to his drugs and guns, and so, the police search the home of Al-Ghaniyy Price, which was on Kemper Drive. Many of the allegations of the drug dealing in this case took place on Heron Court, Raven Turn, Kemper Drive, a few blocks from there.
>
> When the police searched this house, this is what they found: a military style tactical vest in a trashbag outside the back door of the residence, $11,853 inside a shoe box. In a different shoe box, police found $4,255. They also found a black Taurus .9-millimeter handgun, loaded with one round in the chamber.[43]

The State further described that law enforcement also found a total of 803 bundles of heroin inside the Kemper Drive address.[44]

In response, Mr. Smack asserted that the factual record undermined the State's characterization of Mr. Smack as a drug kingpin. Specifically, Mr. Smack asserted:

> The totality of the record supports the conclusion that Mr. Smack is absolutely not a king pin.
>
> Why, Your Honor? His phone calls clearly demonstrate, overwhelmingly demonstrate, he is a small-time retail Heroin salesman. That's it. That's the reason

[43] SR113.
[44] *Id.*

> why the evidence of the individuals who were going to – would have testified, if there was a trial, and we certainly didn't put the State to the test on that, would have been about smaller portions of Heroin that were sold by Mr. Smack.
>
> Now, we all have some experience with the drug culture, and it's not because we purchase Heroin, Your Honor. It's because we deal in these types of cases. So, when you have an individual whose exposure that the evidence demonstrates, rather than just conjecture, is a retail salesman, there'd be no reason to be thinking that you have someone that is a wholesale salesman of the type of an individual that would have such a large amount of Heroin being stored at this residence.
>
> Mr. – what Mr. Smack's responsibility for, in relation to what was found in the residence, is the Taurus handgun, essentially, the firearm count that he pled guilty to, even though it's not specified. It's a generic handgun if you have an individual who is a wholesale Heroin salesman, the last thing in the universe they're doing, especially if they're weary of law enforcement, is doing retail sales.
>
> Retail sales is the way that most of these individuals end up getting caught, and it would be the thing that a wise person would be – would never be doing, especially because the profit margin is low.
>
> If Mr. Smack was a wholesale salesman of Heroin, wouldn't it have been picked up on the series of telephone calls that there were? The fact that there's nothing indicative of a wholesale sale of Heroin, there's no evidence to support that, all we have is this conjecture just thrown out today, and that's why I ask Your Honor to sentence Mr. Smack for what he did.[45]

Mr. Smack further articulated that, under a preponderance of the evidence standard, the State failed to prove that Mr. Smack was responsible for any of the contraband found inside the Kemper Drive address.[46] Thereafter, the sentencing hearing was continued to allow the parties to brief the issue of the burden of proof in relation to contested facts presented to a judge at a sentencing hearing.[47]

Through a series of filings, Mr. Smack asserted that the State bore the burden of proof for proving any contested factual allegation presented during the sentencing hearing by a preponderance of the evidence and that due process required that Mr. Smack have the opportunity to cross-examine live witnesses in relation to those contested allegations.[48] In response to Mr. Smack's assertions, the

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[45] SR117.
[46] *Id*.
[47] SR119-20.
[48] SR121-26, SR187-89.

State contended that the applicable burden proof for contested facts presented at a sentencing hearing was a minimal indicia of reliability and that the Delaware Superior Court's Rules of Criminal Procedure did not provide a procedure for live witness testimony at a sentencing hearing.[49]

On November 9, 2016, the Delaware Superior Court held oral argument on the applicable burden of proof for contested facts presented at a sentencing hearing.[50] During the oral argument, Mr. Smack asserted, consistent with his prior filings, that the applicable burden of proof for contested facts presented during a sentencing hearing was a preponderance of the evidence.[51] The Superior Court dismissed this assertion finding that the applicable burden of proof was a minimum indicia of reliability.[52] The Superior Court also sought clarification as to which specific facts Mr. Smack sought to contest.[53] In response, Mr. Smack indicated that it was "the assertion of the other uncharged aspects, such as Mr. Price's residence and what [was] found in Mr. Price's residence that we dispute."[54] Mr. Smack further specified that it was "the conduct beyond conviction that was being disputed.[55]

On November 17, 2016, the Delaware Superior Court issued a letter/order in which the court ruled that Mr. Smack was not entitled to an evidentiary hearing and that the applicable burden of proof for contested facts presented during a sentencing hearing was a minimum indicia of reliability.[56] The letter/order further noted "that the State may rely upon (in addition to the

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[49] SR129-32.
[50] SR190-92.
[51] SR195-98.
[52] SR198.
[53] SR208-10.
[54] SR213.
[55] *Id.*
[56] SR217-19.

Presentence Investigation) the indictment and the affidavit submitted by the State in support of its application to obtain a warrant" as "the[y] bear the requisite indicia or reliability. . . ."[57] It was also clear from the language of the letter/order that the Superior Court was free to consider all of the indicted counts when deciding Mr. Smack's sentence.[58]

As the Superior Court's letter/order decided that the applicable burden of proof for contested factual allegations presented at a sentencing hearing was a minimum indicia of reliability, and not a preponderance of the evidence, the remaining issue which was raised on November 9, 2016 by the sentencing judge was whether Mr. Smack disputed any of the indicted conduct beyond the counts of conviction under the minimum indicia of reliability evidentiary standard.[59] In response, Mr. Smack filed a letter on November 18, 2016 asserting that "Mr. Smack [would] not be contest[ing] the Court's consideration at sentencing, under the minimum indicium of reliability burden of proof, any of the indicted counts that Mr. Smack was not convicted of, with exception to" seven of the seventy four indicted counts beyond the six counts for which Mr. Smack was convicted.[60] The seven counts that Mr. Smack indicated were so lacking in evidence that they did not meet the incredibly low minimal indica of reliability standard were three counts of Possession of a Firearm by a Person Prohibited (Counts 248, 249, 250), three counts of Drug Dealing (Counts 251, 252, 258), and one count of Possession of Marijuana (Count 253).[61] The Delaware Superior Court ultimately considered

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[57] SR219.

[58] *Id*.

[59] During the November 9th, 2016 oral argument, Judge Parkins asked Defense Counsel what was being disputed to which Counsel replied "criminal conduct beyond the offense of conviction." SR211. Counsel also indicated that he would " respond in writing" with more detail in writing in relation to what indicted counts were at dispute. SR213.

[60] SR220.

[61] SR220-21.

all of the indicted counts when deciding Mr. Smack's ultimate sentence including the above noted seven disputed counts.[62]

At the November 23, 2016 sentencing hearing, the State renewed its request for a fifteen year sentence.[63] Mr. Smack responded by asserting that an eight year sentence was sufficient as Mr. Smack was not a drug kingpin and was only involved in drug dealing to support his family.[64] The State contested Mr. Smack's sentencing presentation by asserting that seventy-seven counts of drug dealing within a two month span suggested that Mr. Smack's illegal activities were a full-time job, that Mr. Smack was a significant drug dealer, and that retail drug sales were a greater evil than distributing large amounts of drugs, all of which justified a higher sentence.[65] In response, Mr. Smack asserted that seventy-seven drug deals within a two month time period was indicative of a retail seller, not a supplier, and that it was illogical for the State to argue that "the drug dealer is considered a greater evil than the wholesale individuals that are supplying them."[66]

Mr. Smack ultimately was sentenced to fourteen years of incarceration followed by descending levels of probation.[67] In support of its sentence, the Superior Court rejected Mr. Smack's arguments and considered all of the indicted counts, noting "we have had this discussion and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts."[68] The Superior Court also largely adopted the State's

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[62] SR230 (noting that "we have had this discussion and I have written in the opinion to you guys that there is sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts.").

[63] SR222.

[64] SR223-26.

[65] SR226-27.

[66] SR228-29.

[67] SR231-35.

[68] SR230.

sentencing arguments, stating:

> [I] think of all of the victims of his crime. And not only the people who purchases the drugs which he sells, but also their loved ones and families.
>
> I think about all of the lives that he has destroyed.
>
> I think about the fact that he has willingly destroyed them because it provides him with money.
>
> And I believe that, in addition to the value of punishment, there is also here a need to try to deter others from doing this. And, also frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.[69]

Mr. Smack timely appealed his sentence and the Delaware Superior Court's ruling on the applicable burden of proof for contested factual allegations presented during a sentencing hearing to the Supreme Court of Delaware.[70] In his filings, Mr. Smack asserted that the Superior Court abused its discretion in resolving contested aggravating sentencing facts when it applied the minimum indicia of reliability standard, rather than the preponderance of the evidence standard.[71] Mr. Smack also asserted that the Due Process Clause required both the application of the preponderance of the evidence standard at sentencing as well as an opportunity to rebut the State's presentation of contested aggravating facts through an evidentiary hearing.[72]

On October 11, 2017, the Delaware Supreme Court affirmed the judgment of the Delaware Superior Court, finding that it established the proper evidentiary standard as a minimal indicia of reliability in *Mayes v. State*, 604 A.2d 839 (Del. 1992).[73] The Delaware Supreme Court also noted that the federal case law cited by Mr. Smack was inapposite as those cases involved sentencing under

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[69] SR230-31.
[70] SR243.
[71] SR262-77, SR565-74.
[72] SR278-88, SR565-74.
[73] SR589-90.

the federal sentencing guidelines.[74] Furthermore, the court held that due process did not require an evidentiary hearing as Mr. Smack was provided an opportunity to rebut the State's evidence, which was all that was constitutionally required.[75]

[74] SR590.
[75] SR590-91.

I. THE DELAWARE STATE COURTS DEPRIVED MR. SMACK OF A CONSTITUTIONALLY FAIR SENTENCING HEARING.

Between 1986 and 1997, in a series of evolving cases, the United States Supreme Court found that the Due Process Clause of the Fourteenth Amendment requires disputed facts presented during a sentencing hearing be proven by a preponderance of the evidence if they are to be considered by the sentencing judge when determining a defendant's sentence.[76] This has been the state of the law since 1997 when the United States Supreme Court issued its decision in *United States v. Watts*. Nevertheless, the Delaware Supreme Court has, since the 1980's to present day, somehow misinterpreted controlling United States constitutional case law in relation to the Due Process Clause of the Fourteenth Amendment, that is applicable to the states, by finding that the burden of proof for disputed facts presented at a Delaware sentencing hearing is only a minimum indicia of reliability. In particular in this matter, both the Delaware Superior Court and Delaware Supreme Court applied the erroneous "minimal indica of reliability" burden of proof to resolve disputed facts presented by the State during Mr. Smack's sentencing hearing. Thus, Mr. Smack's sentence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution[77] and this Court must: (1) reverse and remand this matter back to the Delaware Superior Court for a new sentencing hearing; and (2) order the Delaware Superior Court to comply with the Due Process Clause of the Fourteenth Amendment by applying the preponderance of the evidence

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[76] *United States v. Watts*, 519 U.S. 148, 156-57 (1997); *Nichols v. United States*, 511 U.S. 738, 747-49 (1994); *McMillan v. Pennsylvania*, 477 U.S. 79, 84-87, 91-93 (1986).

[77] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. at 84-87; *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Agyemang*, 876 F.2d 1264, 1270 (7th Cir. 1989) (" A convicted defendant has a right to be sentenced on the basis of accurate and reliable information."); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970) (citing *Townsend*, 334 U.S. at 740-41) (holding that misinformation regarding a convicted defendant's history or untrue factual assumption at sentencing deprive the defendant of due process).

burden of proof for the resolution of disputed facts presented to the Superior Court during the sentencing hearing.

A. This claim is ripe for consideration by this Court.

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court."[78] This means that a petitioner "must give the state courts an opportunity to act on his claims before he[/she can] present[] those claims to a federal court in a habeas petition."[79] This exhaustion doctrine was codified in 28 U.S.C. § 2254(b)(1) which provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . ."[80]

Subsection (c) further provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the questions presented."[81] Although this language could be read to effectively foreclose habeas review by requiring a state prisoner to invoke any possible avenue of state court review, [the United States Supreme Court] has never interpreted the exhaustion requirement in such a restrictive fashion" nor has the United States Supreme Court interpreted the exhaustion doctrine as requiring a defendant to file repetitive petitions.[82] As such, 28 U.S.C. § 2254(c) and the exhaustion doctrine only requires that the state

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[78] *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999).
[79] *Id*.
[80] 28 U.S.C. § 2254(b)(1).
[81] 28 U.S.C. § 2254(c).
[82] *O'Sullivan*, 526 U.S. at 844 (citing *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (*per curiam*); *Brown v. Allen*, 344 U.S. 443, 447 (1953) (holding that a defendant does not need "to ask the state for collateral relief, based on the same evidence and issues already decided by

court "have the first opportunity to review this claim and provide any necessary relief."[83]

In the present matter, Mr. Smack's claim for relief, fully described below,[84] was properly exhausted in the Delaware State Courts. After litigating this issue before the Delaware Superior Court,[85] Mr. Smack appealed the denial of this claim to the Delaware Supreme Court asserting that the Delaware Superior Court abused its discretion by resolving contested aggravating sentencing facts under the minimum indicia of reliability burden of proof.[86] Mr. Smack further asserted that the Due Process Clause of the Fourteenth Amendment required the application of the preponderance of the evidence burden of proof for contested facts presented at a state sentencing hearing.[87] As such, the Delaware State Courts had "the first opportunity to review [Mr. Smack's] claim [for relief] and provide any necessary relief."[88] Thus, this claim for relief is fully exhausted and ripe for consideration by this Court.

B. The Due Process Clause of the Fourteenth Amendment requires disputed facts presented during a sentencing hearing to be proven by a preponderance of the evidence.

In 1986, the United States Supreme Court, in *McMillan v. Pennsylvania*, considered the constitutionality of Pennsylvania's sentencing scheme which only required sentencing considerations to be proven by a preponderance of the evidence.[89] The focus of the challenge to Pennsylvania's Mandatory Minimum Sentencing Act was whether due process required a burden of proof *greater*

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direct review.").

[83] *Id.* (citing *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982); *Darr v. Burford*, 339 U.S. 200, 204 (1950)).

[84] *See infra* pp. 17-21.

[85] SR122-126, SR187-89, SR195-214.

[86] SR243, SR262-77, SR565-74.

[87] SR278-88, SR565-74.

[88] *O'Sullivan*, 526 U.S. at 844 (citing *Rose*, 455 U.S. at 515-16; *Darr*, 339 U.S. at 204).

[89] 477 U.S. at 81.

than a preponderance of the evidence.[90] The United States Supreme Court concluded that due process did not require sentencing facts to be proven beyond a reasonable doubt, and that Pennsylvania's sentencing scheme was constitutional.[91]

In support of the Supreme Court's holding, the Court noted that the sentencing facts in question were not elements of a crime and did not "come[] into play" until after the defendant had already been found guilty of a crime beyond a reasonable doubt, and therefore, due process was not offended by using this factor to justify the imposition of a harsher sentence, despite the factor not having been proven beyond a reasonable doubt.[92] Accordingly, the United States Supreme Court concluded that the preponderance of the evidence evidentiary standard "satisfie[d] due process."[93]

The United States Supreme Court further acknowledged that while due process constrains a state's ability to reallocate or reduce the burden of proof in criminal cases, the constitutional limitation need not be addressed at the time, as it was clear that Pennsylvania's sentencing scheme did not exceed those limits.[94] In other words, despite not clearly defining the outer limits of due process at sentencing, it was clear to the United States Supreme Court that relying on contested sentencing facts proven by a preponderance of the evidence to impose a harsher sentence did not fall below the lower limit,[95] suggesting that a lower burden of proof very well may.

Eight years after its decision in *McMillan*, the United States Supreme Court accepted jurisdiction of the issue presented in *United States v. Watts*, which was whether acquitted conduct,

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[90] *Id*. at 84.
[91] *Id*.
[92] *Id*. at 85-86.
[93] *Id*.
[94] *McMillan*, 477 U.S. at 85-86.
[95] *Id*. at 84-87, 89-93.

proven by a preponderance of the evidence, could be used to enhance a sentence under the United States Sentencing Guidelines.[96] The Supreme Court rejected the contention that acquitted conduct could never, under any burden of proof, serve as a basis for a sentence enhancement,[97] and found that the application of the preponderance of the evidence standard to be sufficient.[98] While the Supreme Court did not explicitly state that the preponderance of the evidence standard was the minimum burden of proof for use of acquitted conduct as a sentence enhancement, the express language used by the Court–"[w]e therefore hold that a jury verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted conduct, so long as that conduct has been proved by a preponderance of the evidence"[99]–established just that.

The United States Supreme Court decision in *Watts* is significant not only for what it says, but also for what it does not say. While the Court acknowledged that a standard of proof less stringent than the beyond a reasonable doubt standard was permissible,[100] the Court left open the possibility that in some circumstances, a burden of proof *stronger* than a preponderance of the evidence, such as the clear and convincing evidentiary standard may be required.[101] Although the Supreme Court left open the possibility that a more stringent evidentiary standard may be required in some instances, the Court never suggested that an evidentiary standard *less* stringent than a preponderance of the evidence would be sufficient.[102] Accordingly, it is clear from *Watts*, that a sentencing court's consideration of acquitted conduct when imposing a harsher sentence, akin to the

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[96] 519 U.S. at 149.
[97] *Id*. at 149, 154, 156-57.
[98] *Id*.
[99] *Id*. at 157.
[100] *Watts*, 519, U.S. at 155-56.
[101] *Id*. at 156-57.
[102] *Id*.

non-convicted conduct used to impose a harsher sentence on Mr. Smack, is constitutional in most instances, provided that the conduct has been proven by at least a preponderance of the evidence.[103] Thus, the United States Supreme Court's decision in *McMillan* and *Watts* clearly supports Mr. Smack's argument that the Due Process Clause of the Fourteenth Amendment requires disputed sentencing facts to be proven, at a minimum, by a preponderance of the evidence.

In further support of this assertion is the United States Supreme Court's holding in *Nichols v. United States*. In *Nichols*, the Supreme Court ruled on the constitutionality of using a defendant's prior uncounseled misdemeanor conviction at sentencing.[104] In reaching its holding, the Supreme Court analyzed its prior decisions, such as *McMillan*, in which the Court was tasked with deciding the constitutionality of a particular sentencing factor or the manner in which the factor was determined under the Due Process Clause.[105] And just as with *McMillan* and *Watts*,[106] the United States Supreme Court found that the use of a defendant's prior uncounseled misdemeanor at sentencing was constitutional as it had been proven by a preponderance of the evidence, holding that to comply with due process, "the state need prove such conduct only by a preponderance of the evidence."[107] In doing so, the United States Supreme Court clearly indicated its support for the assertion that due process requires disputed aggravating sentencing facts be minimally proven by a preponderance of the evidence.

Following the holdings and logic of *McMillan*, *Watts*, and *Nichols*, the Third Circuit Court

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[103] *Id*. at 157 ("We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering the conduct underlying the acquitted conduct, so long as that conduct has been proved by a preponderance of the evidence.").

[104] *Nichols*, 511 U.S. at 740.

[105] *Id*. at 747-48.

[106] *Watts*, 519 U.S. at 157; *McMillan*, 477 U.S. at 85-86.

[107] *Nichols*, 511 U.S. at 747-48.

of Appeals, when deciding the burden of proof necessary to support a factual finding leading to an upward or downward sentencing adjustment under the United States Sentencing Guidelines, found that due process guarantees "a convicted defendant the right not to have his sentence based upon 'materially false' information" and that a "defendant's rights in sentencing are met by a preponderance of the evidence."[108] The Third Circuit further noted that this conclusion was in accord with the decisions of the Second, Fourth, and Eleventh Circuit Courts of Appeal.[109] In specific reliance on *McMillan* and, notably, on the fact that *McMillan* was decided under the Due Process Clause of the Fourteenth Amendment, the Third Circuit also stated "[t]hat the preponderance of evidence standard can withstand constitutional muster is without much doubt."[110]

C. The Delaware State Courts have misinterpreted controlling United States constitutional case law requiring disputed facts presented during a sentencing hearing to be proven by a preponderance of the evidence.

Despite the express language of the United States Supreme Court and the Third Circuit Court of Appeals in above described decisions,[111] the Delaware Supreme Court refuted the applicability of this controlling United States constitutional case law because those cases involved situations "where the court applied a preponderance of the evidence standard to establish facts warranting a sentencing enhancement under the federal sentencing guidelines."[112] In doing so, the Delaware State Courts clearly misinterpreted the holdings in those cases,[113] failing to appreciate that despite the involvement of the United States Sentencing Guidelines, the ultimate holding–that contested

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[108] *United States v. McDowell*, 888 F.2d 285, 290-91 (3d Cir. 1989).
[109] *Id.* at 291.
[110] *Id.*
[111] *See supra* pp. 17-21.
[112] SR589 (citing *McMillan*, 477 U.S. 79; *Watts*, 519 U.S. 148; *Nichols*, 511 U.S. 738; *McDowell*, 888 F.2d 285).
[113] SR589-90.

aggravating sentencing facts must be proven by a preponderance of the evidence–was premised on the requirement that sentencing hearings comply with the Due Process Clause of the Fourteenth Amendment.[114] To hold otherwise would be an incorrect interpretation of the requirements of the Due Process Clause of the Fourteenth Amendment as well as the United States Supreme Court's holdings in *McMillan*, *Watts*, and *Nichols*, and the Third Circuit's holding in *McDowell*.[115]

The unmistakable problem with the Delaware Supreme Court's holding is that it erroneously creates two separate burdens of proof for contested sentencing facts–a higher burden in federal court and a lower burden in state court–when the burden of proof must satisfy the same Due Process Clause of the Fourteenth Amendment. If aggravating facts presented at a federal sentencing hearing must be proven by a preponderance of the evidence, as held by the United States Supreme Court, then it is incompatible with the Due Process Clause of the Fourteenth Amendment for Delaware

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[114] *McMillan*, 477 U.S. at 84-87, 91-93; *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49.

[115] While the Fourteenth Amendment's due process rights have been selectively incorporated to the states through judicial interpretation, the United States Supreme Court has specifically held that the Fourteenth Amendment's Due Process Clause applies to sentencing in state court. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968)) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirement of the Due Process Clause . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing hearing"); *see also Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 763-65, n.13 (2010)) ("With only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States."); *McDonald*, 561 U.S. at 763-65, n.13 ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict, see n. 14, *infra*), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines."); *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. at 84-87, 91-93; *McDowell*, 888 F.2d at 290-91.

State Courts to allow contested facts presented at a Delaware sentencing hearing to be proven by the lower minimal indicia of reliability burden of proof. The United States Supreme Court specifically touched upon this very issue in *McMillan*, noting:

> Indeed, it would be extraordinary if the Due Process Clause as understood in *Patterson* plainly sanctioned Pennsylvania's scheme, while the same Clause explained in some other line of less clearly relevant cases imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment.[116]

The Due Process Clause of the Fourteenth Amendment is applicable to Delaware and the rest of the states,[117] and as *McMillan*,[118] *Watts*,[119] *Nichols*,[120] and *McDowell*[121] make it clear that the Due Process Clause requires disputed facts presented at a sentencing hearing to be proven, at a minimum, by a preponderance of the evidence, the Delaware State Courts continued adherence to the minimal indicia of reliability burden of proof for disputed facts presented during a sentencing hearing[122] violates the Due Process Clause of the Fourteenth Amendment.

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[116] *McMillan*, 477 U.S. at 91.

[117] Although the Fourteenth Amendment's due process rights have been selectively incorporated to the states through judicial interpretation, the United States Supreme Court has specifically held that the Fourteenth Amendment's Due Process Clause applies to sentencing in state court. *Gardner*, 430 U.S. at 358 (citing *Witherspoon*, 391 U.S. at 521-523) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause . . . The defendant has a legitimate interest in the character of the procedures which leads to the imposition of a sentence even if he may have no right to object to a particular result of the sentencing hearing."); *see also McDonald*, 561 U.S. at 764-65; *Albright v. Oliver*, 510 U.S. 266, 272 (1994). The *McMillan* decision further confirms that the Due Process Clause is applicable to state sentencing proceedings, as the Supreme Court reviewed Pennsylvania's sentencing scheme for due process compliance under the Fourteenth Amendment. *McMillan*, 477 U.S. at 83-87, 90-93.

[118] *McMillan*, 477 U.S. 79.

[119] *Watts*, 519 U.S. 148.

[120] *Nichols*, 511 U.S. 738.

[121] *McDowell*, 888 F.2d at 290-91.

[122] SR589.

D. This Court must remand Mr. Smack's case as the Sentencing Court resolved and considered unproven and disputed aggravating sentencing facts under the erroneous minimal indicia of reliability burden of proof.

Mr. Smack is entitled to a new sentencing hearing as the Delaware Superior Court applied a burden of proof less than what is required by the Due Process Clause of the Fourteenth Amendment as well as relied on disputed aggravating sentencing facts not proven by a preponderance of the evidence to impose Mr. Smack's sentencing.

At Mr. Smack's June 22, 2016 sentencing hearing, the State alleged that Mr. Smack was a violent drug kingpin and that he was responsible for drugs and a firearm found at his co-defendant's house in an attempt to persuade the Delaware Superior Court to sentence Mr. Smack to a 15 year prison sentence, the max recommendation pursuant to Mr. Smack's plea agreement.[123] In support of their argument, the State described Mr. Smack's involvement in drug dealing:

> How would Mr. Smack, who lives on 4th Street in the City of Wilmington, who lived there throughout this investigation, despite his assertions now to this court that he was homeless–he lived there with Akia Harley (ph) and her mother and the children–how would he transport his drugs from 4th Street to Sparrow Run and avoid detection?
>
> As Your Honor knows, because the Court took a plea from his sister, Tiffany Smack, he would have somebody else drive him, somebody with no criminal history, who had no reason to be stopped by the police.
>
> Then, he would, because he's undeniably smart, have someone else within the community of Sparrow Run, hold on to his drugs and guns, and so, the police searched the home of Al-Ghaniyy Price, which was on Kemper Drive. Many of the allegations of drug dealing in this case took place on Heron Court, Raven Turn, Kemper Drive, a few block from there.[124]

The State also sought to portray Mr. Price as Mr. Smack's "good soldier."[125]

Additionally, in his November 18, 2016 letter, Mr. Smack specifically identified seven, out

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[123] SR113-15.
[124] SR113.
[125] *Id.*

of the seventy four indicted counts beyond the six counts of conviction, which Mr. Smack asserted lacked sufficient evidence to meet the incredibly low minimal indicia of reliability standard.[126] Those seven counts were three counts of Possession of a Firearm by a Person Prohibited (Counts 248, 249, 250), three counts of Drug Dealing (Counts 251, 252, 258), and one count of Possession of Marijuana (Count 253).[127]

During the November 23, 2016 sentencing hearing, the State began its sentencing presentation by reminding the Delaware Superior Court of its previous assertions during the June 22, 2016, sentencing hearing.[128] However, due to Mr. Price's statements during his own sentencing hearing and the State's concession that it would not ask the Delaware Superior Court to consider the drugs found at Mr. Price's residence, the State sought to portray Mr. Smack as a "significant drug dealer."[129] In particular, the State asserted that the amount of indicted drug dealing counts demonstrated that Mr. Smack was a "full-time" drug dealer and reminded the Delaware Superior Court of all of the people Mr. Smack hurt by his drug dealing activities, including the family members of those whom Mr. Smack supplied with heroin.[130]

To refute the State's allegations, Mr. Smack described how 77 drug deals in a two month span suggested that Mr. Smack was only involved in retail sales as Mr. Smack was engaged in "slightly more than one heroin deal per day over a two month time period."[131] Mr. Smack also asserted that the State's sentencing presentation was illogical as the State was arguing that "the retail

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[126] SR220.
[127] SR220-21.
[128] SR222.
[129] SR216, SR226-27.
[130] SR226-27.
[131] SR228.

drug dealer is considered a greater evil than the wholesale individuals that are supplying them."[132]

Despite the inherent weaknesses in the State's sentencing presentation and Mr. Smack's identification of the seven counts of the indictment that were so lacking in evidence that they did not even meet the minimal indicia of reliability standard,[133] the Delaware Superior Court, in violation of the Due Process Clause of the Fourteenth Amendment, rejected Mr. Smack's assertions and considered all of the indicted counts, including the 74 non-conviction counts[134] noting "we have had this discussion and I have written in the opinion to you guys that there is sufficient indicia of reliability to an indictment for me to, at least consider the indicted counts."[135] The Delaware Superior Court also largely adopted the State's sentencing presentation when crafting Mr. Smack's 14 year sentence as the Delaware Superior Court expressly noted that:

> . . . I think of all of the victims of his crime. And not only the people who purchased the drugs which he sells, but also their loved ones and families.
>
> I think about all of the lives that he has destroyed.
>
> I think about the fact that he has willingly destroyed them because it provides him with money.
>
> And I believe that, in addition to the value of punishment, there is also here a need to try to defer others from doing this. And, also, frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.[136]

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[132] SR228-29.

[133] SR220-21, SR228-29.

[134] This included the counts of the indictment that Mr. Smack conceded met the erroneous minimal indicia or reliability burden of proof as well as the counts of the indictment that Mr. Smack contested did not even meet the minimal indicia of reliability burden of proof. SR220-21.

[135] SR230.

[136] Compare SR227 with SR230-31 ("And, so many of the problems that Your Honor heard about, many of the mothers who came in with their children at sentencing, many of the loved ones speaking of children who are affected by their loved one's heroin abuse are, certainly, people who maybe weren't known to Mr. Smack, but he know them as people. And so, is there a statutory difference in the way we treat people who supply large quantities of heroin and profit the most? Yes. But there is something different about the act of supplying daily heroin to a person with a family that is counting on them, as opposed to showing up at a parking lot with a

Thus, it is apparent on the record that the Delaware Superior Court relied heavily on the State's presentation of disputed aggravating facts including all of the 74 indicted counts beyond conviction, which were not proven by a preponderance of the evidence, and which Mr. Smack was, in essence, precluded from challenging once the Superior Court applied the erroneous minimal indicia of reliability burden of proof.[137] Thus, Mr. Smack was sentenced in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and this Court must reverse and remand this matter to the Delaware Superior Court for a new sentencing hearing with instructions that the applicable burden of proof for disputed facts presented during a sentencing hearing, including the 74 non-convicted counts, is a preponderance of the evidence.

E. State sentencing hearings must comply with the Due Process Clause of the Fourteenth Amendment.

It is well recognized that a sentence based on inaccurate and/or unreliable information violates a defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.[138] It is also well accepted that the Due Process Clause of the Fourteenth Amendment has been incorporated to the states and in particular, state sentencing proceedings.[139]

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trunk full of heroin and dropping it off as a distributor.").

[137] In his November 18, 2016 letter, Mr. Smack articulated which counts of the indictment he would and would not contest at the sentencing hearing based upon the Sentencing Court's decision that the minimum indicia of reliability was the appropriate burden of proof. SR220-21.

[138] *See Agyemang*, 876 F.2d at 1270 ("A convicted defendant has a right to be sentenced on the basis of accurate and reliable information."); *Townsend*, 334 U.S. at 741; *see also Malcolm*, 432 F.2d at 816 (citing *Townsend*, 334 U.S. at 740-41) (holding that misinformation regarding a convicted defendant's history or untrue factual assumptions at sentencing deprive the defendant of due process.).

[139] While the Fourteenth Amendment's due process rights have been selectively incorporated to the states through judicial interpretation, the United States Supreme Court has specifically held that the Fourteenth Amendment's Due Process Clause applies to sentencing in

Accordingly, the Fourteenth Amendment's due process rights guaranteed to defendants at federal sentencing are equally guaranteed to defendants at state sentencing. Thus, in determining whether a defendant in a state sentencing proceeding is entitled to a specific right held by a defendant in a federal sentencing hearing, the central question is whether the right in question is statutorily based or based on the Due Process Clause of the Fourteenth Amendment. If the right is guaranteed by the Due Process Clause, the right is equally held by both federal and state criminal defendants.

For the foregoing reasons,[140] Mr. Smack asserts that the preponderance of the evidence burden of proof for disputed sentencing facts that has been applied in federal court is clearly based on the Due Process Clause of the Fourteenth Amendment is therefore equally applicable to state sentencing proceedings. Thus, contested sentencing facts presented at a state sentencing proceeding must be proven by a preponderance of the evidence so as to comply with due process.

However, even if this Court determines that this particular due process protection has not yet been incorporated to the states, this Court has the discretion[141] to find that this protection is

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state court. *Gardner*, 430 U.S. at 358 (citing *Witherspoon*, 391 U.S. at 521-23) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing hearing."); *see also Timbs*, 139 S.Ct. at 687 (citing *McDonald*, 561 U.S. at 763-65, n. 13) ("With only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States."); *McDonald*, 561 U.S. at 763-65, n.13 ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict, see n.14, *infra*), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines."); *Albright*, 510 U.S. at 272.

[140] *See infra* pp. 28-32.

[141] *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982) (agreeing with the "district court that the Third Amendment is incorporated into the Fourteenth Amendment for application to the states.").

"'fundamental to our scheme of ordered liberty' [and/]or 'deeply rooted in this Nations' history and tradition.'"[142] In so doing, the constitutionally mandated minimal burden of proof for contested sentencing facts in a federal sentencing hearing–a preponderance of the evidence–can be deemed as being incorporated and fully applicable to the states.

The United States Supreme Court has expressly recognized that "[a] Bill of Rights protection is incorporated . . . if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition."[143] If a right has been incorporated, the "Bill of Rights guarantees are 'enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"[144] "Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."[145]

As sentencing hearings are a "critical stage of the criminal proceeding", it is well-settled "that the sentencing process, as well as the trial itself, must satisfy the requirement of the Due Process Clause."[146] As such, '[t]he defendant has a legitimate interest in the character of the procedure which

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[142] *Timbs*, 139 S.Ct. at 686-87 (citing *McDonald*, 571 U.S. at 767).

[143] *Id*.

[144] *Id*. (additionally noting that this Court has never decided whether the Third Amendment or Eighth Amendment's prohibition on excessive fines are applicable to the states through the Due Process Clause).

[145] *Id*. (quoting *McDonald*, 561 U.S. at 766, n.14) (noting that "[t]he sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. *Apodaca v. Oregon*, 406 U.S. 404 (1972). As we have explained, that 'exception to th[e] general rule . . . was the result of an unusual division among the Justices,' and it 'does not undermine the well established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.'")); *McDonald*, 561 U.S. at 766 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)) (noting that the United States Supreme Court has "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'"); *Id* (noting that the United States Supreme court recognized that "it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court'").

[146] *Gardner*, 430 U.S at 358.

leads to the imposition of a sentence even if he may have no right to object to a particular result of the sentencing process."[147]

The express language of the United States Supreme Court, as explained in detail above,[148] establishes that the minimum burden of proof for contested sentencing facts, as required by due process, is a preponderance of the evidence. The Supreme Court had the occasion to consider the constitutionality the use of the preponderance of the evidence standard at sentencing for: sentencing considerations under a state sentencing scheme; the use of acquitted conduct as a sentencing enhancement; and the use of a defendant's prior uncounseled misdemeanor conviction to enhance a defendant's sentence in *McMillan*,[149] *Watts*,[150] and *Nichols*[151] respectively and in each case, the United States Supreme Court found that the application of the preponderance of the evidence standard passed constitutional muster.[152]

The holdings in *McMillan*, *Watts*, and *Nichols*, make it clear that the application of the preponderance of the evidence burden of proof for contested facts presented during a sentencing hearing is a right guaranteed by the Due Process Clause of the Fourteenth Amendment as the United States Supreme Court's express language in those opinions make it clear that this right/protection is "'fundamental to our scheme of ordered liberty,' [and/]or 'deeply rooted in this Nation's history and tradition.'"[153] As such, this due process protection must be incorporated and be "enforced against the States under the Fourteenth Amendment according to the same standards that protect those

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[147] *Id*. (citing *Witherspoon*, 391 U.S. at 521-23.
[148] *See supra* pp. 17-21.
[149] *McMillan*, 477 U.S. 79.
[150] *Watts*, 519 U.S. 148.
[151] *Nichols*, 511 U.S. 738.
[152] *Watts*, 519 U.S. at 156; *Nichols*, 511 U.S. at 748; *McMillan*, 477 U.S. at 85-86.
[153] *Timbs*, 139 S.Ct. at 686-87 (citing *McDonald*, 571 U.S. at 767).

personal rights against federal encroachment."[154]

This conclusion is enormously buttressed by the United States Supreme Court's recent decision in *Timbs v. Indiana* in which the Supreme Court determined whether "the Eighth Amendment's Excessive Fines Clause [was] an 'incorporated' protection applicable to the States under the Fourteenth Amendment's Due Process Clause."[155] In reaching the conclusion that the Excessive Fines Clause was incorporated, the United States Supreme Court expressly noted that there was "only 'a handful'" of protections that the Supreme Court had not yet held to be incorporated.[156]

The decision in *Timbs* clearly illustrates the intent of the United States Supreme Court to narrow the number of rights that are not incorporated and held to be applicable to the States through the Due Process Clause of the Fourteenth Amendment as the Supreme Court in *Timbs* incorporated one of the few remaining non-incorporated rights.[157] This intent was further demonstrated by the comments of Justice Gorsuch and Justice Kavanaugh during oral argument in *Timbs* when both Justices satirically questioned why the incorporation of the Bill of Rights was still being litigated in

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[154] *McDonald*, 571 U.S. at 765, n.13. (noting that this Court has never decided whether the Third Amendment or Eight Amendment's prohibition on excessive fines is applicable to the states through the Due Process Clause).

[155] *Timbs*, 139 S.Ct. at 686.

[156] *Id*. at 687 (citing *McDonald*, 571 U.S. at 764-765, n. 12-13).

[157] *McDonald*, 561 U.S. at 764-65, n.13 ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict . . .) the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines. We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause.").

2018.[158] Thus, in the event that this Court finds that this right/protection has yet to be incorporated, this Court, in its discretion, may still find that this protection is "'fundamental to our scheme of ordered liberty,' [and/] or 'deeply rooted in this Nation's history and tradition'"[159] and therefore incorporated and applicable to the states.

[158] ALM Media, *Gorsuch, Kavanaugh and Sotomayor Sound Skeptical of States' Civil Forfeiture*, Yahoo Finance (Nov. 28, 2018), https://finance.yahoo.com/news/gorsuch-kavanaugh-sotomayor-sound-skeptical-082359663.html (last visited April 2, 2019) (noting Justice Gorsuch's comment to Indiana Solicitor General Thomas Fisher, "[h]ere we are in 2018 still litigating incorporation of the Bill of Rights. Really?" and Justice Kavanaugh's supporting comment "[w]hy do you have to take into account all of the history, to pick up on Justice Gorsuch's question? Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated?").

[159] *Timbs*, 139 S.Ct. at 686-87 (citing *McDonald*, 571 U.S. at 767).

II. MR. SMACK WAS ENTITLED TO AN EVIDENTIARY HEARING TO CHALLENGE THE CONTESTED FACTS PRESENTED BY THE STATE DURING MR. SMACK'S SENTENCING HEARING.

A. Mr. Smack's claim is ripe for consideration by this Court.

As noted above,[160] a "prisoner must exhaust his remedies in state court" prior to a federal court granting habeas relief.[161] This means that the habeas petitioner "must give the state courts an opportunity to act on his[/her] claims before he[/she can] present[] those claims to a federal court in a habeas petition."[162] Thus, the exhaustion doctrine requires that the state courts be given "the first opportunity to review [the petitioner's claim(s)] and provide any necessary relief."[163]

Mr. Smack's claim for relief, fully described below, has been properly exhausted in the Delaware State Courts. Similar to the above claim for relief, Mr. Smack litigated this claim before the Delaware Superior Court[164] as well as appealed the denial of this claim to the Delaware Supreme Court.[165] Thus, the Delaware State Courts had "the first opportunity to review [Mr. Smack's] claim [for relief] and provide any necessary relief"[166] and therefore this claim is fully exhausted and is ripe for consideration by this Court.

B. The United States Constitution required the Delaware State Courts to hold an evidentiary hearing to resolve contested sentencing facts presented during Mr. Smack's sentencing hearing.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

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[160] *See supra* pp. 16-17.
[161] *O'Sullivan*, 526 U.S. at 842; *see also* 28 U.S.C. § 2254(b)(1).
[162] *Id*.
[163] *Id*. at 844 (citing *Rose*, 455 U.S. at 515-16; *Darr*, 339 U.S. at 204).
[164] SR124-25, SR188-89.
[165] SR278-88, SR565-74.
[166] *O'Sullivan*, 526 U.S. at 844 (citing *Rose*, 455 U.S. at 515-16; *Darr*, 339 U.S. at 204).

mandates that no person shall be "deprived of life, liberty or property, without due process of law"[167] and "[d]ue process . . . guarantee[s] a criminal defendant the right to not have his sentence based upon 'materially false' information."[168] The Federal Rules of Criminal Procedure, which were designed to protect a criminal defendant's due process rights,[169] "contain specific requirements that ensure that the defendant is made aware of the evidence to be considered and potentially used against him at sentencing."[170] Federal Rule of Criminal Procedure 32 similarly "require[s] the court to hold a hearing to determine disputed issues of fact included in the presentence report if it wishes to rely upon th[o]se facts in sentencing."[171]

Although due process "require[s] the court to hold a hearing to determine disputed issues of fact . . . if it wishes to rely upon th[o]se facts in sentencing,"[172] the Delaware Supreme Court, in this matter, concluded that due process does not require a full evidentiary hearing to determine the reliability of information presented during a sentencing hearing, "[i]t only requires the defendant to

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[167] U.S. CONST. amend. XIV

[168] *McDowell*, 888 F.2d at 290 (citing *Townsend*, 334 U.S. at 741; *United States v. Cifuentes*, 863 F.2d 1149, 1153 (3d Cir. 1988); *see also United States v. Nappi*, 243 F.3d 758, 763 (3d Cir. 2001) (citing *Townsend*, 334 U.S. at 741; *Moore v. United States*, 571 F.2d 179, 183 (3d Cir. 1978)).

[169] *Nappi*, 243 F.3d at 763 (citing *United States v. Greer*, 223 F.3d 41, 58 (2d Cir. 2000); *United States v. Curran*, 926 F.2d 59, 61 (1st Cir. 1991)) ("Federal Rule of Criminal Procedure 32, which governs sentencing procedures in the federal courts, emanates from Congress' concern for protecting a defendant's due process rights in the sentencing process.").

[170] *Id.* (citing *United States v. Blackwell*, 49 F.3d 1232, 1235 (7th Cir. 1995); *United States v. Jackson*, 32 F.3d 1101, 1105 (7th Cir. 1994) (Coffey, J., concurring); *United States v. Cervantes*, 878 F.2d 50, 56 (2d Cir. 1989); *Moore*, 571 F.2d at 182); *Blackwell*, 49 F.3d at 1235 ("It is well established that a convicted defendant has the right to be sentenced on the basis of accurate and reliable information, and that implicit in this right is the opportunity to rebut the government's evidence and the information in the presentence report.").

[171] *McDowell*, 888 F.2d at 290 (citing Fed. R. Crim. P. 32(c)(3)(D).

[172] *Id.*

be allowed to explain or rebut the evidence presented."[173] By citing to Delaware's Superior Court Rules of Criminal Procedure and not addressing the United States Constitutionally premised case law from the Third Circuit Court of Appeals cited to and described by Mr. Smack in his direct appeal,[174] the Delaware Supreme Court essentially deemed this precedent irrelevant. The Delaware Supreme Court erred by not adhering to the decisions of the Third Circuit, described below, as the Third Circuit has consistently held that the Due Process Clause of the Fourteenth Amendment requires that courts hold evidentiary hearings when the court wishes to rely upon contested sentencing facts to fashion a defendant's ultimate sentence.[175] To deny Mr. Smack an evidentiary hearing to resolve contested aggravating facts presented during his state sentencing proceedings was erroneous and is inconsistent with clearly established federal law and the Fourteenth Amendment to the United States Constitution.

In *United States v. Furst*, the defendant alleged that the district court violated Federal Rule of Criminal Procedure 32(c)(3)(D) and his due process rights when it failed to make findings in relation to alleged factual inaccuracies or, alternatively, by failing to explicitly state that it would not rely upon the disputed facts.[176] The Third Circuit Court of Appeals held that the district court had violated Rule 32 and therefore, vacated the defendant's sentence and remanded the case back to the district court for further action.[177] In support of its holding, the Third Circuit found that it was unnecessary to consider the defendant's due process claims as "the rule operates to guarantee the

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[173] SR590-91.

[174] SR279-87, SR571-74.

[175] *United States v. Zabielski*, 711 F.3d 381, 385, 391 (3d Cir. 2013); *United States v. Furst*, 918 F.2d 400, 407 (3d Cir. 1990); *Cifuentes*, 863 F.2d at 1150, 1155 *McDowell*, 888 F.2d at 290-91; *United States v. Rosa*, 891 F.2d 1063, 1079 (3d Cir. 1989).

[176] *Furst*, 918 F.2d at 407.

[177] *Id.*

very right that [the defendant] claims has been constitutionally infringed upon."[178] The Third Circuit further noted that, upon remand, the district court would be required to either make findings "based upon the evidence already before it or upon evidence adduced at a hearing"[179] should it wish to rely upon the disputed information to sentence the defendant.

In *United States v. Cifuentes*, the Third Circuit considered whether the defendant's due process rights were violated by the district court's consideration, without an appropriate hearing, of disputed facts.[180] The Third Circuit held that "where, as here, the disputed information is important to the fashioning of an appropriate sentence, the court, if it relies on it, should grant a hearing at which the government, through testimony and other relevant evidence about its investigation, can attempt to show the disputed information is reliable and the defendant can produce evidence, including his own testimony, to refute it."[181]

Similarly, in *United States v. Zabielski*, the Third Circuit Court of Appeals found that "a sentencing court may consider '[p]rior similar adult criminal conduct not resulting in a criminal conviction,' so long as that conduct has been proven by a preponderance of the evidence."[182] In support of this finding, the Third Circuit noted that the alleged criminal conduct had been proven by a preponderance of the evidence, as the government, during the sentencing hearing, introduced live testimony of an investigating officer who was able to describe the defendant's alleged criminal conduct.[183]

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[178] *Id.*
[179] *Id.*
[180] *Cifuentes*, 863 F.2d at 1150.
[181] *Id.* at 1155.
[182] *Zabielski*, 711 F.3d at 391 (internal citations omitted).
[183] *Id.* at 385, 391.

Likewise, in *United States v. Rosa*, factual disputes arose between the government and the defendant in relation to factors relevant to the sentencing hearing.[184] In particular, the defendant requested the production of *Jencks* materials, a request that the court denied, following a government's witness testifying in support of the government's version of the events.[185] On direct appeal, the Third Circuit vacated the defendant's sentence and remanded the case, noting that "sentencing is the end of the line. The defendant has no opportunity to relitigate factual issues resolved against him . . . [W]here, after a guilty plea, the critical fact was litigated for the first time at the sentencing hearing, the defendant is irreparably disadvantaged."[186] In support of this conclusion, the Third Circuit states that "we can perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if accepted, add substantially to the defendant's sentence."[187] Like the defendant is *Rosa*, Mr. Smack pleaded guilty and therefore, Mr. Smack's sentencing hearing was "in effect, the 'bottom-line.'"[188] Thus, there was "no purpose in denying [Mr. Smack] the ability to effectively cross-examine"[189] witnesses that the State should have been required to present its version of the facts by the requisite preponderance of the evidence standard, particularly at such a "critical stage of [the] criminal proceedings."[190]

Additionally, the Delaware Superior Court Rule of Criminal Procedure 32(c)(3), like its

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[184] *Rosa*, 891 F.2d at 1075.
[185] *Id*. at 1075, 1077.
[186] *Id*. at 1078.
[187] *Id*. at 1079.
[188] *Id*. ("We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the 'bottom-line' for the defendant, particularly where the defendant has pled guilty.").
[189] *Rosa*, 891 F.2d at 1079.
[190] *Id*.

federal counterpart, undoubtedly endeavors to protect the fundamental fairness principles essential to due process by affording a criminal defendant notice and an opportunity to challenge disputed sentencing issues.[191] In particular, Delaware's Rule 32 provides that "[t]he court shall afford the parties an opportunity to comment on the [presentence] report and, in the discretion of the court, to present information relating to any alleged factual inaccuracy contained in it."[192] Rule 32 further stipulates that "[i]f the comments or information presented allege any factual inaccuracy in the presentence investigation report, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing."[193] Unfortunately, Rule 32(c)(3) was not utilized in the present matter as only a shortened presentence report was prepared that related only to Mr. Smack's criminal history and not to the disputed facts at issue.

Delaware's Superior Court Rule of Criminal Procedure 32 largely tracks the language of Federal Rule of Criminal Procedure 32.[194] Pursuant to the Federal Rules of Criminal Procedure, which was designed to comply with and protect a defendant's due process rights,[195] if a court considers disputed sentencing factor(s) in the absence of an initial finding as to the disputed information, based upon either the evidence before it or additional evidence adduced at a hearing,

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[191] Del. Super. Ct. Crim. R. 32(c)(3).

[192] *Id*.

[193] *Id*.

[194] Fed. R. Crim. P. 32(i), formerly 32(c)(3)(D), provides: "[a]t sentencing the court . . . must–for any disputed portion of the presentence report or other controverted matter–rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i).

[195] *Nappi*, 243 F.3d at 763 (noting that the purpose of the Rule is to "ensure that the defendant is made aware of the evidence to be considered and potentially used against him at sentencing, and is provided an opportunity to comment on its accuracy.").

then the defendant's sentence must be vacated and remanded.[196] When, as here, it is a question of the applicability of the Due Process Clause of the Fourteenth Amendment, there is no justification for distinguishing between a state sentence and a federal sentence in deciding the merits of a claim. It would inequitable and fundamentally unfair if, under the same facts, a defendant who alleges a violation of his due process rights should be denied relief under the state rule but be granted relief under the federal rule, even though the basis for the requested relief stems not from an alleged violation of the state rule, but rather, of the protections guaranteed by the Due Process Clause of the Fourteenth Amendment.

It is also significant to note that the United States Sentencing Guideline, which were enacted in an effort to improve fairness in sentencing,[197] state that "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor."[198] The Sentencing Guidelines also provide that "[t]he court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P."[199] The commentary to the guidelines further notes that "[a]n evidentiary hearing may sometime be the only reliable way to resolve disputed issues" and that "[w]hen a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information."[200]

In *United States v. McDowell*, the Third Circuit considered for the first time under the then-

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[196] *Furst*, 918 F.2d at 408; *Rosa*, 891 F.2d at 1073; *United States v. Gomez*, 831 F.2d 453 (3d Cir. 1987).

[197] *McDowell*, 888 F.2d at 290.

[198] U.S. Sentencing Guidelines Manual § 6A1.3(a) (2016).

[199] *Id.* at § 6A1.3(b).

[200] *Id.* at § 6A1.3 cmt.

recently enacted United States Sentencing Guidelines what the relevant burden of proof was for the determination of facts relied upon in sentencing.[201] The Third Circuit noted that because "[d]ue process [] guarantee[s] a convicted criminal defendant the right not to have his sentence based upon 'materially false' information," the federal rules, in compliance with due process, "require the court to hold a hearing to determine the disputed issues of fact included in the presentence report if it wishes to rely upon these facts in sentencing."[202] The Third Circuit went on to hold that "the preponderance of evidence standard can withstand constitutional muster" and is therefore, the appropriate burden of proof to apply to disputed issues of fact.[203]

In the present matter, the Delaware State Courts violated the Due Process Clause of the Fourteenth Amendment when it denied Mr. Smack's request for an evidentiary hearing to challenge the State's sentencing presentation of unproven disputed aggravating facts.[204] The Delaware State Courts refusal to conduct an evidentiary hearing precluded Mr. Smack from cross-examining live witnesses on disputed facts presented to the Delaware Superior Court at Mr. Smack's sentencing hearing,[205] thereby depriving Mr. Smack of the opportunity to ensure that he would not receive a sentence based upon materially false information in violation of due process.[206] Additionally, without an evidentiary hearing, Mr. Smack could not challenge the State's presentation of contested aggravating sentencing facts,[207] and/or make certain that the State had met the requisite burden of

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[201] 888 F.2d at 290.
[202] *Id*. (internal citations omitted).
[203] *Id*. at 291.
[204] SR217-18, SR590-91.
[205] SR113-16, SR117, SR213, SR220-21, SR222, SR223-27, SR228-29.
[206] *McDowell*, 888 F.2d at 290 (citing *Townsend*, 334 U.S. at 741; *Cifuentes*, 863 F.2d at 1153); *See also Nappi*, 243 F.3d at 763 (citing *Townsend*, 334 U.S. at 741; *Moore*, 571 F.2d at 183).
[207] *Id*.

proof for disputed facts. Accordingly, the Delaware State Court's decision to deny Mr. Smack's request for an evidentiary hearing violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Thus, this Court must overturn Mr. Smack's conviction and remand this matter to the Delaware Superior Court for a new sentencing hearing with instructions that Mr. Smack be permitted to present testimony and other evidence to rebut the State's presentation of contested aggravating facts.

CONCLUSION

Based on the arguments made above regarding the merits of his claims for relief, Mr. Smack respectfully requests that this Court grant him a writ of habeas corpus so that he may be discharged from his unconstitutional confinement and restraint. This Court must recognize that Mr. Smack's sentence was the result of the Delaware State Courts applying the erroneous minimal indicia of reliability evidentiary standard in violation of the Due Process Clause of the Fourteenth Amendment and controlling United States Supreme Court precedent interpreting the Due Process Clause. As such, Mr. Smack's conviction must be vacated and this matter must be remanded back to the Delaware State Courts for a new sentencing hearing that fully complies with the Due Process Clause of the Fourteenth Amendment.

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Date: February 3, 2020

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ADRIN SMACK,	:	
	:	
Petitioner,	:	
	:	
v.	:	No. 1:19-CV-0691-LPS
	:	
THERESA DELBALSO, Superintendent, SCI Mahanoy; and, ATTORNEY GENERAL OF THE STATE OF DELAWARE,	:	
	:	
Respondents.	:	

BRIEF OF AMICUS CURIAE OFFICE OF DEFENDER SERVICES OF THE STATE OF DELAWARE IN SUPPORT OF PETITIONER'S WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

J. BRENDAN O'NEILL
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

FACTUAL BACKGROUND

1. Introduction

The Office of Defense Services for the State of Delaware, (hereinafter "ODS"), provides legal representation statewide to indigent defendants who are charged with criminal offenses in Delaware state courts. Given its obligation to provide legal counsel to indigents in criminal courts, the ODS represents more persons accused of crimes than any other law firm or agency in the State of Delaware. A substantial part of the ODS' representation of indigent clients involves contested Sentencing Hearings.

In fulfilling its duties to represent the indigent, the ODS strives to ensure that the federal and state constitutional rights of its clients are protected, including at Sentencing Hearings. Often times, Sentencing Hearings involve disputed facts that could directly influence the ultimate Sentence of an ODS client. ODS attorneys seek to safeguard the due process rights of their indigent clients and protect them from unreliable evidence being considered by a judge at a Sentencing Hearing.

The proper resolution of the issue regarding the standard of proof that must be employed by judges in Delaware state courts at Sentencing Hearings involving contested facts will affect all indigent defendants that the ODS represents in Delaware state criminal courts. In this *amicus brief*, the ODS urges this Honorable Court to find that, consistent with an indigent defendant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, (1) contested facts presented at a Sentencing Hearing must be proven by a preponderance of the evidence; and, (2) a defendant must be permitted to present testimony and evidence and to cross examine

witnesses at an evidentiary Sentencing Hearing to rebut contested aggravating facts alleged by the prosecution.

2. Petitioner Smack's Sentencing

Petitioner Adrin Smack, by way of a negotiated plea agreement, entered guilty pleas to four counts of Drug Dealing, one count of Possession of a Firearm by a Person Prohibited, and one count of Conspiracy Second Degree. (SR248). At his Sentencing Hearing, the prosecution alleged that Smack was a drug kingpin and argued for a Sentence of fifteen years incarceration. (SR254). In support of its claim that Smack was a drug kingpin, the prosecution presented allegations from Smack's Indictment that law enforcement officers had seized a substantial amount of cash and drugs from the home of a co-conspirator. (SR114).

The defense disputed the claim that Smack was a drug kingpin and requested an evidentiary hearing on this factual issue. (SR118). Smack's request was denied by the Sentencing Court on the rationale that it could consider evidence offered by the prosecution at Sentencing if it met the minimal indicia of reliability standard, which was also the standard of proof the Sentencing Court determined it must apply in making findings of facts contested at Sentencing. (SR219). Although Smack did not contest the scope of what evidence the Court could consider at Sentencing, he contended that the standard of proof to be employed by the Court in making a factual determination of the prosecution's drug kingpin claim was proof by a preponderance of the evidence. (SR123). At Sentencing, Smack sought a Sentence of eight years incarceration.

The Delaware Superior Court used the minimal indicia of reliability standard in finding that the prosecution established that Smack was a drug kingpin and ultimately sentenced Smack to a term of fourteen years incarceration.

3. Petitioner Smack's Direct Appeal

Following Sentencing, Smack appealed to the Delaware Supreme Court arguing that the prosecution was required to prove that he was a drug kingpin by a preponderance of the evidence pursuant to the due process guarantee of the Fourteenth Amendment. Additionally, Smack contended that his Fourteenth Amendment due process right was further violated when he was denied an evidentiary hearing at which he could cross examine witnesses on the drug kingpin claim. The Delaware Supreme Court affirmed Smack's fourteen year Sentence holding that the Sentencing Court comported with the due process guarantee of the Fourteenth Amendment by relying on information that met the "miminal indicium of reliability beyond mere allegation standard,"[1] and that due process did not require a full evidentiary hearing on contested facts, only an opportunity for the a defendant to explain or rebut evidence presented by the prosecution.[2]

[1]Smack v. State of Delaware, 172 A.3d 390 (Del. 2017) (citing Mayes v. State of Delaware, 604 A.2d 839, 840 (Del. 1992)).
[2]Smack, supra.

ARGUMENT

THE FAILURE OF THE SENTENCING COURT TO EMPLOY THE PREPONDERANCE OF THE EVIDENCE STANDARD IN DETERMINING DISPUTED FACTS AT SENTENCING AND TO HOLD AN EVIDENTIARY HEARING ON DISPUTED FACTS DENIED PETITIONER SMACK DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

1. The standard of proof mandated by the Fourteenth Amendment to be employed by a Court in resolving disputed facts relevant to a defendant's Sentencing is proof by a preponderance of the evidence.

It is well-settled by United States Supreme Court case law that the Fourteenth Amendment of the United States Constitution mandates that contested facts presented during a Sentencing Hearing must be proven by a preponderance of the evidence.[3] Anything short of this amounts to a denial of a criminal defendant's constitutional right to due process of law.

In the Delaware Superior Court, Petitioner Smack properly requested that the Court utilize the preponderance of the evidence standard of proof in rendering a factual determination regarding the disputed claim that he was a drug kingpin. Rather than complying with the due process guarantee of the Fourteenth Amendment, the Sentencing Court looked to Delaware state case law and utilized an improper standard of proof, namely, the "minimal indicium of reliability beyond mere allegation standard."[4] This amounted to an error of law.

Petitioner agreed that the threshold issue of what evidence the Sentencing Court could consider was governed by the minimal indicia of reliability standard. However, Petitioner expressly requested that the Delaware Superior Court employ the

[3]United States v. Watts, 519 U.S. 148, 156-157 (1997); Nichols v. United States, 511 U.S. 738, 747-749 (1994); McMillan v. Pennsylvania, 477 U.S. 79, 84-87, 91-93 (1996).
[4]Smack, supra.

preponderance of the evidence standard in weighing and considering all evidence presented by the prosecution and the defense in making its decision regarding whether the prosecution had proved that Petitioner was a drug kingpin. The Sentencing Court and the Delaware Supreme Court erred as a matter of law in equating the threshold standard of minimal indicia of reliability for admission of evidence that the Court could consider in making a factual determination with the actual evaluation of admitted evidence standard, which by federal constitutional mandate is proof by a preponderance of the evidence.

The Sentencing Court's use of the constitutionally infirm minimal indicia of reliability standard in resolving the disputed factual issue of the prosecution's kingpin claim amounted to a manifest violation of Smack's Fourteenth Amendment right to due process of law.

2. The Fourteenth Amendment guarantees a criminal defendant an evidentiary hearing to determine the reliability of disputed facts at a Sentencing Hearing.

The Fourteenth Amendment of the United States Constitution guarantees that the Sentence of a criminal defendant is not based on materially false information.[5] To achieve this guarantee, Delaware Courts are required, pursuant to Delaware Superior Court Rule of Criminal Procedure 32, to make a finding regarding disputed allegations at Sentencing or make a determination that the controverted matter will not be part of the Sentencing calculus.

Federal Rule of Criminal Procedure 32 is largely similar to Delaware Superior Court Rule of Criminal Procedure 32. The federal rule was implemented to protect a

[5]United States v. McDowell, 888 F.2d 285, 290 (3rd Cir. 1989).

criminal defendant's right to due process of law at Sentencing.[6] Both rules specifically permit defendants to comment on factual issues, typically raised in Presentence Investigation Reports, at Sentencing and to have the Sentencing Court make a finding as to a disputed factual allegation. Although no Presentence Report was drafted in Petitioner Smack's case, there still existed a significant dispute regarding a factual issue. Consistent with the letter and spirit of Delaware Superior Court Rule of Criminal Procedure 32, Petitioner should have been afforded an evidentiary hearing at which he could have cross examined witnesses alleging that he was a drug kingpin. Without cross examination, Smack was robbed of the most effective method of challenging the veracity of the allegation. The denial of this fundamental right rendered Petitioner's Sentencing constitutionally infirm and requires that Smack's Sentence be vacated and his case remanded for a new Sentencing at which an evidentiary hearing on the drug kingpin issue will be conducted.

3. Although federal law regarding Sentencing Guideline cases is not mandatory, it is highly persuasive regarding due process guarantees at Sentencing Hearings.

As previously, indicated, Federal Rule of Criminal Procedure 32 was passed to protect a defendant's due process rights in the Sentencing process.[7] The United States Sentencing Guidelines set forth a mechanism for determining at what point a federal Sentencing Judge must begin to exercise judicial discretion in arriving at an appropriate Sentence considering all relevant Sentencing factors. Although not as technically specific as their federal counterpart, the Delaware SENTAC Guidelines also provide a Delaware

[6] United States v. Nappi, 243 F.3d 758, 763 (3rd Cir. 2001).
[7] Id.

Sentencing Judge with a recommended Sentencing range or starting point at which judicial Sentencing discretion is exercised.

The United States Sentencing Guidelines favor fairness in Sentencing and suggest that a formal evidentiary hearing may be the only reliable way in which a factual dispute can be resolved at Sentencing.[8] This principal espoused in federal case law should be viewed as highly persuasive authority in the case sub judice. Federal case law is well developed in the area of Sentencing Hearings. Its guidance regarding guaranteeing due process of law to defendants at Sentencing Hearings should be followed in the instant matter.

[8]U.S.S.G. § 6A1.3, comment. See also, McDowell, supra at 290-291.

CONCLUSION

Based upon the facts and legal authorities set forth above, Amicus respectfully requests that this Honorable Court vacate Petitioner Adrin Smack's convictions and remand the subject criminal matter to the Delaware Superior Court for a new Sentencing Hearing that provides Petitioner Smack with the full guarantees of the due process clause of the Fourteenth Amendment.

Respectfully submitted,

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Dated: February 28, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADRIN SMACK, Petitioner, v. THERESA DELBALSO, Superintendent, SCI Mahanoy Respondent, ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondent.	: : : : : : : : : : : : :	No. 1:19-cv-00691-LPS

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF DELAWARE IN SUPPORT OF PETITIONER'S WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

FACTUAL BACKGROUND

There are two elementary categories of evidentiary questions: admissibility and standard of proof. The first concept, admissibility, concerns what evidence is reliable enough to warrant being weighed at all by the factfinder.[1] In many contexts, for example, hearsay is inadmissible because it is too unreliable. *See, e.g.*, Fed. R. Evid. 801. The second concept, the standard of proof, concerns whether the weight of the evidence is sufficient to establish a given fact.[2]

This case involves the conflation of these two distinct evidentiary questions in the context of Delaware criminal sentencing law generally, and at one particular criminal sentencing in particular.

Adrin Smack was charged with, among other things, sixty-six counts of drug dealing. SR 248. He pleaded guilty to two counts of Drug Dealing Heroin in a Tier 4 Quantity, two counts of Drug Dealing Heroin no tier weight, one count of Possession of a Firearm by a Person Prohibited, and one count of Conspiracy Second Degree. SR 248. The State agreed, as a condition of the plea, not to seek a sentence exceeding 15 years. SR 254.

At Mr. Smack's originally scheduled sentencing, the prosecutor began to introduce allegations from the indictment that police had recovered large sums of cash and drugs from Mr. Smack's co-conspirator's home, in order to argue that Mr. Smack was a "drug kingpin" and

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[1] ADMISSIBILITY, Black's Law Dictionary (11th ed. 2019) ("The quality, state, or condition of being allowed to be entered into evidence in a hearing").

[2] The burden of proof is a legal concept that denotes both the burden of production and burden of persuasion. *See* BURDEN OF PROOF, Black's Law Dictionary (11th ed. 2019). The latter concept, burden of persuasion, is the party's duty to prove facts to a particular standard of proof, such as preponderance of the evidence. *See* BURDEN OF PERSUASION, Black's Law Dictionary (11th ed. 2019). For clarity, this brief uses the term "standard of proof" when referring to the concept of the standard for assessing the weight of the evidence.

should be sentenced accordingly. SR 114. Acknowledging the admissibility of the information contained in the indictment, but disputing it and the inferences to be drawn from it about Mr. Smack's role in the drug trade, defense counsel asked for and received an opportunity to submit written materials. SR 118. The Court stated that "what I want you to do is give me authorities for what the State has the burden of proving." SR 119.

As he did at the initial sentencing hearing, Mr. Smack's counsel's written submission to the Court conceded that the bar for admissibility of evidence at sentencing is extremely low and not the subject of his dispute, stating "Mr. Smack does not contest the scope of what the court may consider at his sentencing." SR 123. Instead, he explains, his disagreement with the State concerns the "burden of proof." SR 123. The burden of proof that he asks the State to bear is for any factual assertions made by the State—i.e., that Mr. Smack is a drug kingpin—to "be proven by the preponderance of the evidence" if they are used to determine Mr. Smack's sentence. SR 123.[3]

The State's response to Mr. Smack's submission characterized the disputed issue variously as the "standard of review at sentencing" and "the scope of consideration at sentencing." SR 130. It concludes that the appropriate standard is the minimal indicia of reliability standard. SR 131.

The sentencing judge's letter order resolving the dispute frames the evidentiary question as concerning the "admissibility of matters the court can consider," SR 217, but also as "the standard which applies to information presented at sentencing." SR 219. He concludes that the

[3] Mr. Smack also asked for other relief, including an evidentiary hearing with witnesses, that is not the subject of this amicus brief.

indictment, among other things, may be relied upon at sentencing because it meets the requisite indicia of reliability. SR 219.

In his subsequent submission, Mr. Smack's counsel summarized the judge's ruling as "that the burden of proof, for purposes of considering aggravating facts/factors at sentencing, is a minimum indicia of reliability, not a preponderance of the evidence as asserted by Mr. Smack." The sentencing hearing proceeded on that basis.

Once again, a central factual dispute at the new sentencing hearing was whether Mr. Smack was a "drug kingpin" or merely a street-level dealer, not significantly upstream in the chain of distribution from other street-level dealers. SR 224-228. Various pieces of evidence were put forward as relevant to that question, including the number of drug charges prosecutors chose to include in the indictment, SR 226-227; the amount of heroin found in an apartment belonging to Mr. Smack's co-conspirator, SR 227, and what inferences might be appropriately drawn from that evidence; and Mr. Smack's financial assets such as the fact that he did not even own a car, SR 224.

Toward the end of the hearing, after defense counsel questioned the evidentiary weight of the indicted counts on the drug kingpin question in light of the other contentions at the hearing, and the Court replied: "Well, we have had this discussion, and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts. I am not going to punish him for that, I can't do that, but I can consider it." SR 230. He then proceeds to sentence Mr. Smack to fourteen years, a sentence near the top of the negotiated range.

The sentencing court's imposition of the sentence elided the question of the admissibility of the information in the indictment and the separate questions of the evidentiary weight to be

given to that evidence and whether the evidence as a whole sufficiently supported the conclusion the prosecution asked him to draw—i.e., that Mr. Smack should be sentenced at the upper end of the range because he was a kingpin. The fact that the sentencing court could admit evidence on the kingpin question so long as it met a minimal indicia of reliability was never in dispute. What was in dispute was the weight of that evidence and whether it met the appropriate standard of proof.

Unfortunately, on appeal, the Delaware Supreme Court made the same error. The Supreme Court's Order states: "According to Smack, the State was required to prove by a preponderance of the evidence that Smack was a drug kingpin. Because this Court has previously upheld the use of a minimal indicia of reliability standard to consider evidence offered at a sentencing hearing, and due process does not require an evidentiary hearing, we affirm the Superior Court's decision." *Smack v. State*, 172 A.3d 390 (Del. 2017).

The second sentence of that paragraph from the Delaware Supreme Court's opinion is a non-sequitur to the first sentence. The standard of proof necessary for the Court to find that Smack was a drug kingpin, and thereby increase his sentence in reliance on that fact, is separate from what evidence is admissible when considering that question. As explained below, this elided question of the standard of proof has a clear answer: the sentencing judge must at least believe the fact is more likely than not. By instead adopting the test for admissibility as the only test for whether a fact may be relied upon in issuing a sentence, the trial court violated Mr. Smack's right to due process, and therefore this Court must reverse and remand this matter to the Delaware Superior Court for new sentencing hearing with instructions that the applicable burden of proof for disputed facts presented during a sentencing hearing, including the 74 non-convicted counts, is a preponderance of the evidence.

ARGUMENT

As the Delaware Supreme Court has long acknowledged, and controlling federal precedent makes clear, a sentence based on materially false facts violates due process. *Mayes v. State*, 604 A.2d 839, 843 (Del. 1992) (quoting *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976)). A sentencing judge is not permitted to merely find that a fact relied upon to increase a sentence is supported by admissible evidence. Instead, the judge must determine that the evidence supporting the fact relied upon, when considered with the evidence opposing the fact (if any), makes the relied upon fact more likely than not true.

A. The question of admissibility is separate from the question of the standard of proof, even in sentencing

Although these legal categories are elementary, their application in the context of a sentencing proceeding can be confusing. Often the fact being advanced as relevant to sentencing is the direct import of a single piece of evidence, and that evidence is not meaningfully contested—for example, when the fact relied upon is the defendant's prior conviction history. Sometimes, the evidence and the fact it supports are so closely connected, and undisputed, that the distinction is immaterial. *See United States v. Matthews*, 773 F.2d 48, 52 (3d Cir. 1985) (holding that it was proper for sentencing court to rely on fact of anticipation of profits when court considered defendant's statements about anticipated profits). In that scenario, questions of admissibility and standard of proof largely collapse into each other. If the evidence is admissible, then absent other evidence, it proves the relevant fact at issue by a preponderance of the evidence. When the evidence is very close to the fact being inferred from it, or the evidence is not meaningfully controverted, the space between admissibility and standard of proof becomes thin or nonexistent.

But the collapsing of the questions of admissibility and standard of proof is not always appropriate. When there is competing evidence or competing inferences that might be drawn from the evidence, or when the evidence is merely relevant to some ultimate factual conclusion but too removed to be sufficient to establish the conclusion on its own, then the separate questions of admissibility and standard of proof become important. *Cf. Huddleston v. United States*, 485 U.S. 681, 691, (1988) (observing that an individual piece of evidence may be insufficient in itself to meet a standard of proof for some factual conclusion).

Delaware's lead case on the question of admissibility at sentencing acknowledges this distinction between admissibility and standard of proof. *See Mayes v. State*, 604 A.2d 839, 844 (Del. 1992). After explaining the admissibility of evidence provided in the presentence report, the Court's opinion notes that the sentencing court had to "make its own determinations of credibility from the information provided in the presentence report" and that under the circumstances of claims of private crimes without witnesses or physical evidence, it is appropriate to make that determination about the weight of the evidence based on corroboration from other witnesses alleging similar facts. *Mayes v. State*, 604 A.2d 839, 844 (Del. 1992). This further review of whether to believe the admitted evidence is required. Indeed, part of the rationale for the precedent holding that information alleged in the indictment is admissible at sentencing is precisely because the sentencing judge is equipped to evaluate it and give it the evidentiary weight it deserves—in some circumstances, presumably, believing it, and in other circumstances not, and with a level of weight depending on the context. *See United States v. Watts*, 519 U.S. 148, 160 (1997) (noting otherwise inadmissible evidence can be used at sentencing but that the judge is "to give appropriate weight to uncorroborated hearsay or to evidence of criminal conduct that had not resulted in a conviction").

If, at sentencing, a judge were permitted to rely on evidence merely because it was admissible, it would follow, for example, that a judge could increase a sentence based on testimony that the judge does not find credible. After all, lots of non-credible testimony is nevertheless admissible.

For all these reasons, it is necessary for the sentencing court to distinguish questions of admissibility and standard of proof.

B. The minimum possible standard of proof for facts relied upon to increase a sentence is preponderance of the evidence

Because admissibility and standard of proof are two separate questions, the only remaining issue is whether the standard for admissibility can be used as a standard of proof.

The notion of "minimal indicia of reliability" as a standard of proof is logically incoherent. To understand why the minimum indicia test cannot be the test for standard of proof, one need only consider what it would mean to apply it in the context of countervailing pieces of admissible evidence. If a court faces, for example, competing testimony, it simply provides no guidance at all to say the standard of proof is whether the testimony bears the minimal indicia of reliability—if it did not, it would not have been admitted for consideration, and that test has been met by both sides of the evidence.

When a standard of proof is being applied to fact-finding—as opposed to justifying further investigation or narrowing the scope of appellate review—the minimum requirement is that the judge believes the fact to be inferred from the evidence is, more likely than not, true; a preponderance of the evidence standard is the lowest possible standard of proof. *United States v. Sparkman*, 500 F.3d 678, 685 (8th Cir. 2007) (noting that preponderance of evidence is the lowest possible standard of proof); *Jeremiah v. State*, 73 S.W.3d 857, 858 (Mo. Ct. App. 2002)

(same); *Ashcraft v. State*, 716 N.E.2d 1278, 1280 (Ind. 1999) (same); *United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996) (same); *MaGuire v. Merrimack Mut. Ins. Co.*, 573 A.2d 451, 453 (N.H. 1990) (same). [4] Any standard of proof less that a preponderance, by definition, would involve relying on facts for a final sentence that the sentencing court believes are more likely than not false. Such a lower standard cannot satisfy due process.

In sum, the minimum possible standard of proof for a fact that is to be relied on to increase a sentence is that the sentencing court believes the fact is, more likely than not, true. The sentencing court errs if it relies on a fact that is has merely determined is supported by some admissible evidence, without weighing competing evidence or assessing the weight of the evidence.

The petitioner's writ should be granted.

Respectfully submitted,

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[4] Of course, appellate courts sometimes adopt more deferential standards, requiring, for example, only substantial evidence. But that is a standard allowing for reasonable disagreement about the weight of the evidence between a court sitting on appeal and a court receiving the evidence in the first instance, and not a standard of proof as such. *See, e.g.*, *Rutherford v. Barnhart*, 399 F.3d 546, 552 (3d Cir.2005) (explaining that review for substantial evidence is to avoid weighing evidence or substituting the appellate court's own conclusions for those of the fact-finder).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADRIN SMACK,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civ. Act. No. 19-691-LPS
	:	
THERESA DELBALSO, Superintendent, SCI Mahoney, and, ATTORNEY GENERAL OF THE STATE OF DELAWARE,	:	
	:	
Respondents.	:	

ANSWER

Pursuant to Rule 5 of the Rules Governing Section 2254 Actions, 28 U.S.C. foll. § 2254, Respondents state the following in response to the petition for a writ of habeas corpus:

Factual Background[1]

On or around August 2014, an FBI Task Force began investigating a drug trafficking organization known as the Sparrow Run Crew. "Evidence obtained during the investigation indicate[d] that this organization [was] responsible for distributing heroin and cocaine base to a wide network of distributors and sub-distributors. The heroin [was] distributed by [Mr. Smack] in quantities ranging from multiple bundles to multiple logs per transaction." Law enforcement believed that Mr. Smack and his Co-Defendant, Miktrell Spriggs, were "co-leaders of the organization and that they pool[ed] money to buy heroin and cocaine from source(s) of supply." The FBI Task Force's investigation included the use of confidential sources to conduct controlled

[1] This recitation of facts is taken verbatim from Smack's Opening Brief on appeal to the Delaware Supreme Court in Case No. 201, 2016 (footnotes and citations to the record omitted). D.I. 30 at 104-05 of 153.

purchases, as well as to enable law enforcement to monitor phone calls between Mr. Smack and these confidential sources.

On April 10, 2015, Resident Judge Richard R. Cooch signed an order authorizing law enforcement to intercept the wireless communications to and from Mr. Smack's cell phone. On April 18, 2015, a phone call between Mr. Smack and his Co-Defendant, Al-Ghaniyy Price, was intercepted. During this call, Mr. Price informed Mr. Smack that he was hiding something behind a radiator in Mr. Price's residence. In response, Mr. Smack advised Mr. Price to make sure that no one saw him hide the object behind the radiator. Later on that day, law enforcement intercepted a text message from Mr. Price to Mr. Smack advising that "Yo bro it's there." A subsequent search of Mr. Price's residence revealed a military style tactical vest, $16,108, a loaded black Taurus .9-millimeter handgun, and 803 bundles of heroin.

Procedural History

On May 26, 2015, a New Castle County Grand Jury returned a 261-count indictment against multiple defendants, including the petitioner, Adrin Smack.[2] Smack was charged with seventy-one counts of Drug Dealing (16 *Del. C*. § 4752), one count of Giving a Firearm to a Person Prohibited (11 *Del. C*. § 1454), one count of Possession of Marijuana (16 *Del. C*. § 4674), two counts of Conspiracy Second Degree (11 *Del. C*. § 512), and five counts of Possession of a Firearm by a Person Prohibited ("PFBPP") under two different subsections (11 *Del. C.* § 1448 (a)(4) and (a)(9)). On March 31, 2016, Smack pleaded guilty to four counts of Drug Dealing, one count of PFBPP, and one count of Conspiracy Second Degree.[3] As part of the plea agreement, the State agreed to limit its sentencing recommendation to no more than fifteen years of unsuspended

[2] D.I. 29 at 19-105 of 151.

[3] *Smack v. State*, 2017 WL 4548146, at *1 (Del. Oct. 11, 2017).

incarceration, and Smack agreed that he would request no less than eight years of unsuspended incarceration.[4]

At Smack's June 22, 2016 sentencing hearing, the prosecutor recounted facts underlying the charges in Smack's indictment and noted that Smack asserts he is not a "kingpin" in a drug dealing enterprise.[5] Smack disagreed with the prosecutor's characterization of him as a "kingpin," argued that he was a "retail" level drug dealer and requested an evidentiary hearing to dispute the "kingpin" characterization.[6] The Superior Court continued Smack's sentencing to allow him to develop his claim that he was entitled to an evidentiary hearing.[7] After considering the submitted briefing and oral argument, the Superior Court, on November 17, 2016, denied Smack's request for an evidentiary hearing, finding that Delaware Superior Court Criminal Rule 32(a) did not mandate an evidentiary hearing.[8] The court determined "all 'that [was] required [was] that the court afford the defendant some opportunity to rebut the Government's allegations,'"[9] and the prosecution was "not required to call witnesses to support its contention that the Defendant was heavily involved in drug trade."[10]

On November 23, 2017, the Superior Court sentenced Smack to an aggregate of fourteen years of incarceration, followed by decreasing levels of supervision.[11] Smack appealed, and the

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[4] D.I. 29 at 109 of 157.

[5] D.I. 29 at 116-17 of 151.

[6] D.I. 29 at 120-21 of 151.

[7] D.I. 29 at 115-23 of 151.

[8] *State v. Smack*, Del. Super., I.D. No. 1505015401, Parkins, J. (Nov. 17, 2016), Ltr. Ord. at 1-3. (D.I. 30 at 69-71 of 153).

[9] *Id*. at 2. (quoting *United States v. Sabhnani*, 599 F.3d 215, 258 (2d Cir. 2010) (internal quotations omitted). (D.I. 30 at 70 of 153).

[10] *Id.* at 2. (D.I. 30 at 70 of 153).

[11] *Smack*, 2017 WL 4548146, at *1; Sent. Ord. (D.I. 30 at 85-92 of 153).

Delaware Supreme Court affirmed the judgment of the Superior Court on October 11, 2017.[12] The United States Supreme Court denied Smack's petition for writ of certiorari on April 16, 2018.[13]

On April 16, 2019, Smack filed the instant petition for federal habeas relief[14] and, on February 3, 2020, he filed his opening brief.[15] On February 28, 2020, the American Civil Liberties Union (ACLU) and the Office of Defense Services (ODS) filed Amicus Briefs in support of Smack's petition.[16] This is the Respondent's answer.

Timeliness

Smack's petition is timely under 28 U.S.C. § 2244(d). Because Smack's petition was filed on January 15, 2018, it is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became effective on April 24, 1996.[17] By the terms of section 2244(d)(1), a federal habeas petitioner must file the petition within one year from the latest of: (A) the date the state court judgment became final upon the conclusion of direct review; (B) the date the government no longer interfered with the filing of an action; (C) the date on which the Supreme Court recognized a newly applicable constitutional right made retroactive to cases on collateral review; or (D) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."[18] Smack does not assert, nor can the

[12] *Smack*, 2017 WL 4548146, at *3.

[13] *Smack v. Delaware*, 138 S. Ct. 1548 (Apr. 16, 2018).

[14] D.I. 1.

[15] D.I. 33.

[16] D.I. 35, 36.

[17] *See generally Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (holding the AEDPA applies to "such cases as were filed after the statute's enactment."); *Lawrie v. Snyder,* 9 F. Supp. 2d 428, 433 n.1 (D. Del. 1998); *Dawson v. Snyder*, 988 F. Supp. 783, 802-03 (D. Del. 1997).

[18] *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 n.6 (2005) (noting the Supreme Court has summarized the four possible starting points for the statutory year under 2244(d)(1) as: (A) "date

Respondents discern, any basis to apply section 2244(d)(1)(B), (C), or (D). Accordingly, the one-year period of limitations began to run when Smack's conviction became final under section 2244(d)(1)(A).[19]

Smack pleaded guilty in March 2016 and was sentenced on November 23, 2016.[20] On October 11, 2017, the Delaware Supreme Court affirmed Smack's conviction and sentence.[21] The United States Supreme Court denied Smack's petition for certiorari review on April 16, 2019.[22] Thus, Smack's conviction became final on April 16, 2018, and the limitations period began running the following day. Smack had until April 16, 2019,[23] to file his federal habeas petition without running afoul of section 2244(d). Smack's petition, dated April 16, 2019, is thus timely filed.

Legal Principles Governing Petition

A state petitioner seeking habeas relief must exhaust all remedies available in the state courts.[24] The purpose of the exhaustion doctrine is "to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts."[25] A claim is exhausted if it has been fairly presented to the state's highest court.[26]

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of final judgment;" (B) "governmental interference;" (C) "new right made retroactive;" and (D) "new factual predicate").

[19] *See, e.g., Gibbs v. Carroll*, 2004 WL 1376588, at *2 (D. Del. June 17, 2004).

[20] *See* D.I. 29 at 13 (Crim D.I. 35) of 151; D.I. 29 at 16 of 151.

[21] *See* D.I. 29 at 18 of 151.

[22] *Smack v. Delaware*, 138 S. Ct. 1548 (Apr. 16, 2018).

[23] *See* Fed. R. Civ. P. 6.

[24] 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

[25] *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

[26] *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

Once a state's highest court adjudicates a federal claim on the merits, the federal habeas court must review the claim under the deferential standard contained in 28 U.S.C. § 2254(d). Pursuant to 28 U.S.C. § 2254(d), federal habeas relief may only be granted if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or the state court's decision was an unreasonable determination of the facts based on the evidence adduced in the trial.[27] A claim has been "adjudicated on the merits" for the purposes of section 2254(d) if the state court decision finally resolves the claim on the basis of its substance, rather than on a procedural or some other ground.[28] The deferential standard of section 2254(d) applies even "when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied" because "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."[29]

In determining whether the state court reasonably applied clearly established federal law, this Court does not look at the decision of the state courts to see whether it would have reached the same result in the first instance. Instead, this Court must determine what argument supported, or could have supported, the state court's decision and then determine whether it is possible that fair-minded jurists could disagree that those arguments are inconsistent with a prior decision of the United States Supreme Court.[30] This standard is difficult for a petitioner to meet, and it was

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[27] 28 U.S.C. § 2254(d)(1) & (2); *see also Williams v. Lanzo*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001).

[28] *Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009).

[29] *Harrington v. Richter*, 562 U.S. 86, 98-99 (2011); *see also Johnson v. Williams*, 568 U.S. 289, 293 (2013) (holding that when a state court rules against a defendant and issues an opinion that addresses some issues but does not expressly address defendant's federal claim, a federal habeas court must presume, subject to rebuttal, that the claim was adjudicated on the merits).

[30] *Richter*, 562 U.S. at 101-02.

meant to be.[31] "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."[32]

In addition, a federal court must presume that the state court's determinations of factual issues are correct.[33] This presumption of correctness applies to both explicit and implicit findings of fact, and a petitioner must present clear and convincing evidence to the contrary to rebut the presumption.[34]

Discussion

In his petition for federal habeas relief, Smack raises two claims: 1) the Superior Court violated Smack's due process rights during his sentencing hearing by considering unproven aggravated sentencing facts under an erroneous minimal indicia of reliability evidentiary standard; and 2) the Superior Court erred in concluding that Smack was not entitled to an evidentiary hearing to challenge the State's presentation of contested aggravating factors during Smack's sentencing hearing. (D.I. 34 at 2 of 47). Smack presented each of these claims to the Delaware Supreme Court on direct appeal of the sentencing. (D.I. 30 at 102-03 of 153). The Delaware Supreme Court rejected the claims on their merits.[35] Therefore, Smack has exhausted his claims,[36] but, for the reasons set forth below, he is not entitled to relief.

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[31] *Id*. at 102.

[32] *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

[33] 28 U.S.C. § 2254(e)(1).

[34] 28 U.S.C. § 2254(e)(1); *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000).

[35] *See Smack v. State*, 2017 WL 4548146, at *1-2 (Del. Oct. 11, 2017).

[36] *See Bodnari v. Phelps*, 2009 WL 1916920, at *2 (D. Del. July 6, 2009) ("A petitioner satisfies the exhaustion requirement by demonstrating that the habeas claims were 'fairly presented' to the state's highest court, either on direct appeal or in a post-conviction proceeding.").

Claim 1 – Evidentiary standard at sentencing

Clearly established federal law

Smack claims that the state court deprived him of a constitutionally fair sentencing by failing to require the State to prove disputed facts by a preponderance of the evidence.[37] Smack asserts that the clearly established United States Supreme Court precedent controlling this claim is *McMillan v. Pennsylvania*,[38] and its progeny, including *Nichols v. United States*,[39] and *United States v. Watts*.[40] But, Smack's reliance on these cases in seeking habeas relief is misplaced. These cases stand for the broad proposition that the Government need not establish disputed sentencing facts used to enhance a sentencing range by more than a preponderance of the evidence to satisfy due process. None of the cases discuss the admissibility of evidence standard where the facts are not disputed, nor what standard of proof is required regarding disputed facts within the sentencing range.

In *McMillan*, the Supreme Court held that a Pennsylvania statute allowing for a five-year minimum statutory sentencing enhancement if the government proved by a preponderance of the evidence that defendant visibly possessed a firearm during the commission of a felony satisfied due process.[41] In *Nichols*, the Supreme Court held that a federal sentencing court could consider a defendant's previous uncounseled misdemeanor conviction when applying a sentencing enhancement under the United States Sentencing Guidelines ("USSG.").[42] In *Watts*, the Supreme

[37] D.I. 34 at 20 of 47.

[38] 477 U.S. 79 (1986).

[39] 511 U.S. 738 (1994).

[40] 519 U.S. 148 (1997).

[41] 477 U.S. at 91.

[42] 511 U.S. at 746-47.

Court held that a federal sentencing court could consider conduct for which a defendant was acquitted to enhance their sentence under the USSG, "so long as that conduct has been proved by a preponderance of the evidence."[43] Smack acknowledges that the Supreme Court did not hold, in any of these cases, that a state sentencing hearing requires the state court to use a preponderance of the evidence standard in considering disputed facts that would not alter the sentencing range available to the court.

AEDPA "requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established by United States Supreme Court precedent at the time the state court conviction became final."[44] The Supreme Court has consistently held that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [it]."[45] Thus, Smack's reliance on Supreme Court cases that do not provide holdings requiring the desired rule of law is unavailing. This Court's review is limited to the application of clearly established rules of law found in Supreme Court precedent available to the states at the time of decision.

Rather than the cases cited by Smack, the relevant clearly established Supreme Court precedent can be found in *United States v. Tucker*[46] and *Townsend v. Burke*.[47] In *Tucker*, the Supreme Court overturned a sentence where the sentencing court had considered two prior

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[43] 519 U.S. at 158.

[44] *Williams v. Taylor*, 529 U.S. 362, 380 (2000).

[45] *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (internal quotations omitted). *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." (internal quotations omitted)).

[46] 404 U.S. 443 (1972).

[47] 334 U.S. 736 (1948).

convictions that were later invalidated. In *Townsend*, the Supreme Court found a due process violation where the sentencing court relied on materially false information about a defendant's criminal history in making its sentencing decision. *Tucker* and *Townsend* stand for the general proposition that a criminal defendant has a due process right to be sentenced on the basis of accurate information.[48]

In addition, the Supreme Court, in *Williams v. New York*,[49] held that a defendant who did not challenge the accuracy of the presentence report was not entitled under due process clause to an opportunity to confront and cross-examine sources of information used in that report. In a subsequent plurality opinion, the Supreme Court qualified *Williams* in the specific context of capital cases, holding that the defendant had a due process right not to receive the death penalty on the basis of information that he had no opportunity to deny or explain.[50]

The Delaware Supreme Court's decision was not contrary to, nor an unreasonable application of, *Tucker* and *Townsend*. Smack failed to point to materially false information relied upon by the sentencing court. Further, Smack did not allege that anything in the presentence report was, in fact, inaccurate. Smack had the opportunity – and took that opportunity - to argue that he was not a drug kingpin, but rather a retail drug entrepreneur. Smack admitted to the drug dealing alleged in the indictment. The only specific factual challenge was to Smack's relationship to Price and the contraband seized from Price's residence. The prosecutor asked the sentencing judge not

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[48] *See United States v. Baylin,* 696 F.2d 1030, 1040 (3d Cir. 1982) ("as a matter of due process, factual matters may be considered as a basis for a sentence only if they have some minimal indicium of reliability").

[49] 337 U.S. 241 (1949). *See also Specht v. Patterson*, 386 U.S. 605, 608 (1967) (adhering to *Williams v. New York*; but declining to extend it to commitment proceedings).

[50] *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

to consider those charges in the indictment,[51] and there is no indication that the judge considered those counts at the subsequent sentencing hearing. Smack was not sentenced on the basis of inaccurate information that Smack did not have an opportunity to explain or deny. Thus the Delaware Supreme Court's decision was a reasonable application of the relevant federal precedent.

Moreover, even under the cases upon which Smack relies, his claim fails. The common thread in each of the cases upon which Smack relies is the presence of a state statutory or federal sentencing guideline enhancement. Smack's case, however, did not involve a statutory sentencing enhancement provision.[52] The prosecutor in Smack's case was arguing in support of a sentence that was *within* statutory sentencing range, not an increase of the sentencing range.[53] As the Delaware Supreme Court found:

> Under the federal sentencing guidelines, the judge must find facts at sentencing using evidentiary burdens because those factual determinations can cause an increase in the sentencing ranges under the guidelines. Here, Smack's guilty plea resulted in a sentencing range of two to seventy-six years. To fix the sentence *within* that statutory range, the judge was entitled to consider all facts that had a minimal indicia of reliability—including the intercepted text messages and phone conversations that led to the seventy-seven charges of drug dealing brought against Smack.[54]

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[51] *See* D.I. 30 at 68 of 153.

[52] Generally, when making factual findings for sentencing purposes, a federal circuit court has held that a district court "may consider any information which bears sufficient indicia of reliability to support its probable accuracy." *United States v. Zuniga*, 720 F.3d 587, 590 (5th Cir. 2013) (citing *United States. v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012)). The USSG permit the sentencing court to consider certain evidence "so long as such evidence has sufficient or minimally adequate indicia of reliability and the defendant has an opportunity to rebut such evidence that he perceives is erroneous." *United States v. Christman*, 509 F.3d 299, 305 (6th Cir. 2007) (citing *United States v. Moncivais*, 492 F.3d 652, 658 (6th Cir. 2007)).

[53] *See Smack*, 2017 WL 4548146, at *2.

[54] *Id.* (internal citations omitted) (emphasis in original).

The Delaware Supreme Court properly found that the federal cases cited by Smack were inapposite. Here, the Superior Court did not use statutory or guideline-based enhancements when it sentenced Smack to fourteen years of incarceration, well within the sentencing range of two to seventy-six years.

While Smack complains that the sentencing judge failed to require the State to prove disputed sentencing facts by a preponderance of evidence in violation of due process, Smack failed to provide the state courts with any concrete objections at sentencing, beyond objecting to the prosecutor's characterization of Smack as a drug kingpin. Subsequently, Smack claimed that all facts beyond the facts Smack admitted at the plea colloquy had to be established by the State by a preponderance of evidence, regardless of whether those underlying facts were in dispute or whether there was a good faith basis upon which to challenge them. There is no established Supreme Court precedent to support that claim and the cases Smack relies upon simply do not support Smack's position. Smack's claim is thus unavailing.

Factual dispute

At Smack's originally scheduled sentencing hearing, the prosecutor described, "by way of background,"[55] the contents of an intercepted phone call between Smack and his co-defendant, Price. The prosecutor then described the contraband, including large sums of cash, a loaded handgun, and more than 150 grams of heroin packaged for sale, police discovered at Price's residence when they executed a search warrant.[56] Then, the prosecutor argued: "Mr. Smack now tells this Court that he's not a drug king pin, that the police have the wrong guy."[57] The prosecutor

[55] 6/22/2016 Sent. Hrg. at 2 (D.I. 29 at 116 of 151).

[56] 6/22/2016 Sent. Hrg. at 4-5 (D.I. 29 at 116 of 151).

[57] 6/22/2016 Sent. Hrg. at 6 (D.I. 29 at 117 of 151).

went on to discuss Smack's activities discovered by the FBI Task Force during their investigation and listed the names of fifteen people who had purchased drugs from Smack and who were now in Drug Diversion programs.[58] Finally, the prosecutor recommended, consistent with the plea agreement, that the court sentence Smack to fifteen years of incarceration followed by reduced levels of supervision.[59] Smack's counsel did not object during this recitation.

Smack, through counsel, then argued that beyond the phone call in which Smack directed Price to hide something, there was nothing to link Smack to the contents of Price's residence.[60] Although Smack pleaded guilty to possession of a firearm, the specific count of the indictment to which he pled did not list the weapon found at that house.[61] Smack's counsel further argued that Smack was not a kingpin, but rather "a small-time retail Heroin salesman."[62] In response to a question from the court, counsel stated that the court could not consider the items found at Price's residence because the State had failed to establish by a preponderance of the evidence that Smack was responsible for any of the items found there.[63] Smack's counsel claimed that he had been sandbagged and that the State's presentation had gone beyond the indictment.[64] The court then provided Smack 45 days to present all written arguments regarding the State's burden at sentencing.[65]

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[58] 6/22/2016 Sent. Hrg. at 6-10 (D.I. 29 117-18 of 151).

[59] 6/22/2016 Sent. Hrg. at 10-13 (D.I. 29 at 118 of 151).

[60] 6/22/2016 Sent. Hrg. at 18 (D.I. 29 at 120 of 151).

[61] 6/22/2016 Sent. Hrg. at 18 (D.I. 29 at 120 of 151).

[62] 6/22/2016 Sent. Hrg. at 19 (D.I. 29 at 120 of 151).

[63] 6/22/2016 Sent. Hrg at 21 (D.I. 29 at 120 of 151).

[64] 6/22/2016 Sent. Hrg at 21 (D.I. 29 at 120 of 151).

[65] 6/22/2016 Sent. Hrg. at 26-30 (D.I. 29 at 122-23 of 151).

In his written pleading, Smack asserted that the State had the burden of proving all factual assertions by a preponderance of the evidence before the court could consider any proffered facts. Further, Smack argued that he should be able to "cross examine any witness who purports a disputed fact."[66] Smack then argued that if the State intended to assert that the court should consider any criminal acts beyond those offenses to which Smack had pleaded guilty, then the State should be required to present witness testimony to establish the facts, subject to cross examination.[67]

In its answer, the State noted that the indictment against Smack and his numerous co-defendants came as the result of an FBI Task Force investigation with Smack as the target. The charges were based almost exclusively on Smack's intercepted communications from a wiretap authorized by the court. The presentence report also noted that multiple raids resulted in three firearms, over $16,000 in cash, and various quantities of heroin, crack cocaine and marijuana that were located and seized from the co-defendant's residence. Price pleaded guilty to maintaining a drug property for Smack. The State did not argue that Smack could not challenge any of the factual allegations as being inaccurate or that Smack could not present information to counter the State's claims or any inaccuracies in the presentence report.[68]

Finally, Smack responded that he was entitled to present live witnesses to rebut the State's evidence and to support his argument that the State had failed to prove the disputed facts by a preponderance of the evidence.[69]

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[66] D.I. 29 at 128 of 151.

[67] D.I. 29 at 128 of 151.

[68] D.I. 29 at 130-36 of 151.

[69] D.I. 30 at 39-41 of 153.

The sentencing court allowed oral argument at Smack's request. At argument, the State asserted that it intended to rely on all counts of drug dealing in the indictment for which Smack was named as the defendant.[70] Smack's counsel then conceded that "[m]y expectation is the – the vast majority of any of the drug deals, which are small drug deals that are outlined within the indictment, is something that Mr. Smack would take responsibility for."[71] Smack's counsel then stated that "[w]e're disputing the conduct beyond conviction."[72]

After the argument, the State, based on Price's statements at his own sentencing that he intended to sell the drugs found in his home, informed the court that, at Smack's sentencing, the State would not ask the court to consider the drugs or other contraband found at Price's residence.[73]

At Smack's November 23, 2016 sentencing hearing, the prosecutor began with the following remarks:

> Your Honor, the State did make a presentation on the sentencing I think back in June, and at that time asked Your Honor to impose a 15 year sentence. That comes from the plea agreement.
>
> The plea agreement indicates that Mr. Smack has pled guilty to two offenses, each of which require a two-year minimum mandatory sentence.
>
> Pursuant to the plea agreement, Mr. Smack has agreed to request no less than eight years here today, and the State has agreed that it will ask for no more than 15, which the State has done previously, and continues to do today.
>
> That number is within the guidelines.
>
> On each of the Tier IV drug dealing charges, it is within the guidelines for those offenses.
>
> On the first, the SENTAC Guidelines are two to ten, and on the second they are two to five.
>
> Additionally, the remaining Drug Dealing counts, which are no tier weight, are guidelines up to two years;
>
> The Firearm charge is up to one year;
>
> The Conspiracy charge is up to one year, all at Level V.

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[70] 11/9/2016 Oral Arg. at 23 (D.I. 30 at 64 of 153).

[71] 11/9/2016 Oral Arg. at 24 (D.I. 30 at 65 of 153).

[72] 11/9/2016 Oral Arg. at 24 (D.I. 30 at 65 of 153).

[73] 11/11/2016 Ltr. (D.I. 30 at 68 of 153).

> And, so, the State's recommendation is within the guidelines on the Tier IV charges alone; the higher end, but within the guidelines.
>
> As far as the SENTAC aggravating factors are concerned, Mr. Smack has one prior violent offense that was listed in the presentence report. It is a juvenile conviction; however, because he was 17 at the time SENTAC does allow this Court to consider it.
>
> That offense was for robbery and for a handgun charge. And, according to SENTAC, specifically Page 133, that is why his initial drug dealing charge, the presumptive is a two to ten.[74]

At the Court's request, the prosecutor then informed the court about the sentences three other somewhat comparable co-defendants received for their offenses in the indictment. Thereafter Smack's counsel argued that Smack "was no kingpin. He was a retail drug dealer.... He wasn't a supplier of other individuals."[75] Counsel discussed Smack's difficult upbringing and difficulties finding and keeping employment to support his family. Counsel argued, consistent with the plea agreement, for an 8-year prison sentence.

Before hearing from Smack, the court asked the prosecutor if she wished to comment on counsel's observation that the defendant was not a kingpin.[76] The prosecutor responded:

> Your Honor, I think if you can gather sufficient evidence to charge 77 counts of drug dealing in two months of intercepted phone calls, that would suggest that that is certainly a full-time job. And that suggestion is backed up by all of the cases that Your Honor has sentenced. Your Honor has sentenced numerous people, not only for purchasing drugs in this case, but in wrapping up all of their other cases.
>
> Your Honor actually is in such a unique position to have seen individuals who were committing other crimes in order to feed their drug habit, and has such a unique picture on the, sort of, global problem that this was creating.
>
> And the General Assembly has seen that to charge, to enable the court to give higher minimum mandatories, or enable the prosecutors to ask for higher minimum mandatories when there is a greater quantity of drugs. But, having seen those faces, Your Honor knows, and the State knows, and certainly Mr. Smack ought to know, that when you are directly supplying an addict, this is someone who becomes known to you. And, so, many of the problems that Your Honor heard

[74] 11/23/2016 Sent. Trans. at 4-6 (D.I. 30 at 74-75 of 153).

[75] 11/23/2016 Sent. Trans. at 10 (D.I. 30 at 76 of 153).

[76] 11/23/2016 Sent. Trans. at 20 (D.I. 30 at 78 of 153).

> about, many of the mothers who came in with their children at sentencing many of the loved ones speaking of children who are affected by their loved one's heroin abuse are, certainly, people who maybe weren't known to Mr. Smack, but he knew them as people.
>
> And, so, is there a statutory difference in the way that we treat people who supply large quantities of heroin and profit the most? Yes. But, there is something different about the act of supplying daily heroin to a person with a family that is counting on them, as opposed to showing up at a parking lot with a trunk full of heroin and dropping it off as a distributor.
>
> Yes, they are punished differently; absolutely. Moving lots of weight and profiting in great amounts is certainly something that the State sees as a significant problem. But we can't minimize seeing the same people again and again.
>
> And, again, they are on the indictment, people who bought on a regular basis from Mr. Smack. And, so, the State's position is as it always has been. He is a significant drug dealer.[77]

When asked to summarize the aggravating circumstances the State was relying upon, the prosecutor noted, under the SENTAC guidelines, Smack's prior violent criminal conduct – the violent offense of robbery and the handgun - which were committed 8 years earlier when Smack was 17 years old.[78] The prosecutor also reminded the court that it was not bound by the guidelines as long as the court set forth with particularity the reasons for the deviation.[79]

After his counsel responded again with the idea that Smack was not a kingpin, Smack spoke directly to the court. Smack explained:

> [T]he prosecutor is making me sound like a person that really I'm not.
>
> And, um. I was really out there. I was selling drugs. I was selling drugs to drug dealers. But she was saying that I was doing a large amount of – some large amount drugs here and there. I wasn't, you see what I'm saying.
>
> I was trying to – I was really trying to make it happen because I've never had nothing.
>
> ***

[77] 11/23/2016 Sent. Trans. at 20-23 (D.I. 30 at 78-79 of 153).

[78] 11/23/2016 Sent. Trans. at 23 (D.I. 30 at 79 of 151).

[79] 11/23/2016 Sent. Trans. at 24 (D.I. 30 at 79 of 153).

> And, like you said, I knew what I was doing. I was sacrificing myself. But, at the same time, like, my kids – like, we just had to live.[80]

Ultimately, the Superior Court, having taken into account Smack's difficult life situation not of his own making, was concerned about the victims who were addicted to drugs and being preyed upon.[81] The court imposed a sentence of 14 years in prison followed by probation.

At no time did Smack point to any errors in the presentence report or the prosecutor's remarks. Smack asserted that the court could not consider any indicted charges to which Smack did not plead guilty, unless proven by a preponderance of the evidence at a hearing. When asked which charges Smack specifically disputed, the only charges at issue appeared to be those related to the contraband at Price's residence. Because the prosecutor asked the court not to consider those specific charges at sentencing, and the court did not refer to them at sentencing, there were no disputed facts other than the title of kingpin. That reference came from the presentence report and Smack did not object to the presentence report or ask that the reference be removed from the report. Thus, even if the United States Supreme Court cases could be read to require a preponderance of the evidence standard for the admission at a sentencing hearing of disputed facts, Smack failed to present the Delaware courts with any dispute regrading facts used at the sentencing. To the extent Smack objected to the prosecutor's presentation at the first sentencing hearing, the objected to statements were not included in the second sentencing hearing at which the prosecutor made no reference to Price or his charges and did not refer to Smack as a kingpin. The Delaware Supreme Court correctly determined that the sentencing court did not violate Smack's due process rights by considering comments made by a prosecutor at sentencing, when those comments were not based on disputed facts.

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[80] 11/23/2016 Sent. Trans. at 30-32 (D.I. 30 at 81 of 153).

[81] *See* 11/23/2016 Sent. Trans. at 36-37 (D.I. 30 at 82-83 of 153).

The prosecutor's characterization of Smack's role as a "kingpin" in a drug dealing enterprise did not introduce a disputed fact for the sentencing court's consideration, the prosecutor did not refer to Smack as a "kingpin" at his final sentencing hearing, and Smack had the opportunity to rebut the prosecutor's characterization.

Smack's claim is unavailing, and this Court should deny relief.

Claim 2 – Petitioner was not entitled to an evidentiary hearing

In Claim Two, Smack asserts that the Delaware Superior Court is required to hold an evidentiary hearing regarding disputed facts to be used at a sentencing hearing. (D.I. 33 at 10 of 47). Because the Delaware Supreme court denied the claim on the merits, this Court must review the claim under the deferential standard contained in 28 U.S.C. § 2254(d). Pursuant to 28 U.S.C. § 2254(d), federal habeas relief may only be granted if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or the state court's decision was an unreasonable determination of the facts based on the evidence adduced in the trial.[82] Smack has failed to offer any United States Supreme Court decision in support of this claim, much less a clearly established rule of law. This Court should dismiss the claim on that basis.

The claim also simply lacks merit. On appeal to the Delaware Supreme Court, Smack argued that the Superior Court's denial of his request for an evidentiary hearing violated his due process rights. The Delaware Supreme Court rejected Smack's due process argument, finding that the Superior Court "did not abuse its discretion in denying an evidentiary hearing because Smack had, and took, the opportunity to argue he was a middleman in the conspiracy and not the

[82] 28 U.S.C. § 2254(d)(1) & (2); *see also Williams v. Lanzo*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001).

kingpin."[83] The Delaware Supreme Court, in denying Smack's claim, cited to its prior decisions which, in turn, cited to federal cases for the proposition that due process did not require a full evidentiary hearing to determine the reliability of the information in a presentence report.[84]

Smack never contested that he was a drug dealer. When he pleaded guilty to four counts of Drug Dealing, Smack acknowledged that he either possessed, with the intent to deliver, or delivered, various quantities of heroin on separate occasions.[85] At his original aborted sentencing hearing, the State informed the court that Smack was someone who had been "known to the police for a long time," that many people had purchased drugs from Smack, that Smack could be heard on the phone telling people to be mindful of police and undercover cars, that with Smack's history and the quantity of money and drugs in his possession Smack deserved fifteen years of incarceration.[86] Smack described his drug dealing activity as that of a "small-time retail [h]eroin salesman."[87] Smack again acknowledged that he was a "retail drug dealer" at his second sentencing hearing.[88] The prosecutor and Smack both described his criminal activity as the sale of heroin to individual addicts. Smack simply takes umbrage at the prosecutor's use of the term "kingpin" at the initial sentencing hearing, preferring the term "retail drug dealer."[89] Smack's disagreement with the prosecutor's characterization of his conduct does not amount to a "disputed

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[83] *Smack*, 2017 WL 4548146 at *2.

[84] *See, e.g., id.* at *2 n.3 (citing to *Lake v. State*, 1984 WL 997111, at *1 (Del. Oct. 29, 1984) (citing *United States v. Baylin,* 696 F.2d 1030, 1040 (3d Cir. 1982) and *United States v. Papajohn,* 701 F.2d 760, 763 (8th Cir. 1983))).

[85] D.I. 29 at 111-13 of 151.

[86] D.I. 29 at 117-18 of 151.

[87] D.I. 29 at 120 of 151.

[88] D.I. 30 at 226 of 153.

[89] D.I. 30 at 226 of 153.

fact" or a materially inaccurate fact upon which the Superior Court relied to apply a statutory or guideline-based sentencing enhancement. Because there is no actual dispute of fact, and because nothing here enhanced the sentencing range available to the court based on Smack's plea, there is no basis for this Court to grant habeas relief.

Records

Smack's plea, sentencing, and other relevant hearing transcripts are included in the State Court Records provided to the Court. Should the Court direct the production of any transcript not provided, Respondents cannot state with specificity when such transcript would be available. However, Respondents reasonably anticipate that such production would take 90 days from the issuance of any such order by the Court.

Conclusion

For the foregoing reasons, the petition for a writ of habeas corpus should be denied without further proceedings.

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Dated: July 6, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADRIN SMACK,	:	
Petitioner,	:	**No. 1:19-cv-00691-LPS**
	:	
v.	:	
	:	
THERESA DELBALSO, Superintendent,	:	
SCI Mahanoy	:	
Respondent,	:	
	:	
ATTORNEY GENERAL OF THE	:	
STATE OF DELAWARE,	:	
Respondent.	:	

REPLY TO THE RESPONDENTS' ANSWER TO THE OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

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Date: August 28, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS

Federal Cases

I. The United States Supreme Court decisions in *McMillan*, *Nichols*, and *Watts* clearly establish that the applicable burden of proof for contested facts presented during a state sentencing hearing must be proven by a preponderance of the evidence.

The Respondents erroneously assert that Mr. Smack's reliance on the United States Supreme Court decisions in *McMillan v. Pennsylvania*,[1] *Nichols v. United States*,[2] and *United States v. Watts*[3] is misplaced.[4] In support of this contention, the Respondents argue that "[n]one of the cases discuss the admissibility of evidence standard where the facts are not disputed, nor what standard of proof is required regarding disputed facts within the sentencing range."[5] The Respondents are incorrect.

Contrary to assertion of the Respondents, the United States Supreme Court decisions in *McMillan*, *Nichols*, and *Watts* clearly establish that the Due Process Clause of the Fourteenth Amendment requires disputed facts presented during a sentencing hearing to be proven by a preponderance of the evidence.[6] As noted in Mr. Smack's opening brief,[7] the United States Supreme Court in *McMillan* held that Pennsylvania's Mandatory Minimum Sentencing Act complied with the Due Process Clause of the Fourteenth Amendment as the sentencing act required the contested sentencing fact of being visibly in possession of a firearm at the time of the offense to be proven by a preponderance of the evidence.[8] Similarly, in *United States v. Watts*, the Supreme Court held that

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[1] *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

[2] *Nichols v. United States*, 511 U.S. 738 (1994).

[3] *United States v. Watts*, 519 U.S. 148 (1997).

[4] Respondents' July 6, 2020 Answer to Mr. Smack's Opening Brief at 8, hereinafter cited as "Answer at _."

[5] *Id.*

[6] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. 84-87, 91-93.

[7] Opening at 17-18.

[8] Petitioner's February 3, 2020 Opening Brief in Support of Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254 at 17-18 (citing *McMillan*, 477 U.S. at 81, 84-87, 89-93), hereinafter cited as "Opening at __."

acquitted conduct, which the petitioner asserted could never serve as a basis for a sentencing enhancement, could be used to enhance a sentence under the United States Sentencing Guidelines so long as the acquitted conduct had been proven by a preponderance of the evidence.[9] Furthermore, in *Nichols*, the United States Supreme Court held that the use of a defendant's prior un-counseled misdemeanor at sentencing was constitutional as it had been proven by a preponderance of the evidence.[10]

In each of the above cases, the United States Supreme Court held that at a sentencing hearing, the constitution's Due Process Clause was satisfied when a sentencing court considered and more importantly resolved a contested sentencing fact, only if the disputed fact at least met the preponderance of the evidence burden of proof standard.[11] Thus, contrary to the Respondents' assertion, the United States Supreme Court's decision in *McMillan*, *Watts*, and *Nichols* clearly establish the pertinent federal constitutional law applicable to this matter and that is that the Due Process Clause of the Fourteenth Amendment requires contested sentencing facts to be proven by a preponderance of the evidence.[12]

As the United States Supreme Court's decision in *McMillan*, *Nichols*, and *Watts* clearly establish that the Due Process Clause of the Fourteenth Amendment requires contested sentencing facts to be proven by a preponderance of the evidence, the Delaware courts continued adherence to the "minimal indicia of reliability" burden or proof is "contrary to" the above described clearly established federal law. The amicus filings clearly illustrate the error in the Delaware Supreme

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[9] Opening at 18-19 (citing *Watts*, 519 U.S. at 149, 154, 155-57).
[10] Opening at 20 (citing *Nichols*, 511 U.S. at 740, 747-48).
[11] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. 84-87, 91-93
[12] *Id*.

Court's holding in Smack as the filings describe how the Delaware Supreme Court had erroneously "equat[ed] the threshold standard of minimal indicia of reliability for admission of evidence that the Court could consider in making a factual determination with the actual evaluation of admitted evidence standard, which by federal constitutional mandate is proof by a preponderance of the evidence."[13] Thus, it is apparent that the Delaware Supreme Court's belief that the "minimal indicia of reliability" burden of proof for sentencing hearing disputed facts is the product of a mistaken interpretation of *McMillan*, *Nichols*, and *Watts* applying only to federal sentencing guideline fact situations.[14] In Smack, the Delaware Supreme Court failed to recognize that the ultimate holdings in *McMillan*, *Nichols*, and *Watts* were premised on the requirement that factual disputes at sentencing hearings must comply with the Due Process Clause of the Fourteenth Amendment which requires disputed facts to be proven by at least the preponderance of the evidence.[15] Thus, the Delaware Supreme Court's application of the "minimal indicia of reliability" burden of proof to the contested facts presented at Mr. Smack's sentencing hearing is contrary to the clearly established federal law set forth in *McMillan*, *Watts*, and *Nichols.*

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[13] February 28, 2020 Brief of Amicus Curaie Office of Defender Services of the State of Delaware at 5; February 28, 2020 Brief of Amicus Curaie American Civil Liberties Union Foundation of Delaware at 5-7.

[14] SR589 (citing *McMillan*, 477 U.S. 79; *Watts*, 519 U.S. 148; *Nichols*, 511 U.S. 738; *United States v. McDowell*, 888 F.2d 285 (3d Cir. 1989)).

[15] *McMillan*, 477 U.S. at 84-87, 91-93; *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49.

The Respondents disagree that Mr. Smack has demonstrated that the Delaware Supreme Court's decision was contrary to clearly established federal law.[16] Mr. Smack recognizes that pursuant to 28 U.S.C. § 2254(d) federal habeas relief may only be granted if the Delaware court's decision to apply the "minimal indicia of reliability" as the burden of proof to resolve disputed facts presented at a sentencing hearing was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States."[17]

A state court decision is "contrary to" clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts."[18] Similarly in *Early v. Packer*,[19] the United State Supreme Court provided further guidance in relation to the "contrary to clearly established federal law" standard when it stated that:

> A state court decision is "contrary to" our clearly established precedents if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent."[20]

The "contrary to" standard serves as "a guard against extreme malfunctions in the state criminal justice systems. . . ."[21]

A federal law is clearly established if it is "dictated by precedent existing at the time" of the

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[16] Answer at 10.

[17] 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001).

[18] *Lambert v. Warden Greene SCI*, 861 F.3d 459, 467 (3d Cir. 2017) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999).

[19] 537 U.S. 3 (2002).

[20] *Id*. at 8 (quoting *Williams*, 529 U.S. at 405-06).

[21] *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (internal quotation marks omitted).

relevant state court decision.[22] A rule that "breaks new ground or imposes a new obligation on the States or the Federal Government" is not clearly established.[23]

Mr. Smack's argument that the Delaware Supreme Court's decision to apply the "minimal indicia of reliability" as the burden of proof to resolve disputed facts presented at a sentencing hearing is "contrary to . . . clearly established federal law"[24] is supported by the multiple Third Circuit and district court habeas decisions in which a state court's action was found to be "contrary to clearly established federal law."[25] For the convenience of this Court, Mr. Smack will only

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[22] *Williams*, 529 U.S. at 381 (quoting *Teaque v. Lane*, 489 U.S. 288, 301 (1989)).

[23] *Id*.

[24] 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412; *Appel*, 250 F.3d at 210.

[25] *Pierce v. Adm'r N.J. State Prison*, No. 18-319, at 6-7 (3d Cir. Apr. 8, 2020) (attached hereto as Exhibit D); *Dennis v. Sec'y Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir 2016); *Brown v. Superintendent Greene SCI*, 834 F.3d 506, 519-20 (3d Cir. 2016) (holding that "the Pennsylvania Supreme Court acted contrary to U.S. Supreme Court law by apparently requiring prosecutors to act in bad faith for protections to arise, and it misapplied *Bruton*, *Frazier*, *Richardson*, and *Gray* by not requiring a mistrial"); *Adamson v. Cathel*, 633 F.3d 248, 259 (3d Cir. 2011) (holding that the New Jersey state court's "failure to instruct the jury regarding the proper use of the accomplice statements, statements which facially incriminated Adamson, was plain and obvious error that was directly contrary to *Street*'s holding."); *Pazden v. Maurer*, 424 F.3d 303, 319 (3d Cir. 2005) (holding that the New Jersey state court's "rejection of Pazden's Sixth Amendment claim was contrary to the pronouncements of *Johnson*. Pazden's waiver of counsel was not voluntary in the constitutional sense."); *Lewis v. Johnson*, 359 F.3d 646, 654, 659 (3d Cir. 2004); *Halloway v. Horn*, 355 F.3d 707, 729 (3d Cir. 2004) (holding that application of Pennsylvania law was "at odds with *Batson*'s first step because it places a burden upon the defendant to make a record of largely irrelevant information in order to raise an inference that the prosecutor excluded members of the venire on account of race."); *Constant v. Pa. Dep't of Corr.*, 912 F.Supp. 2d 279, 308 (W.D.Pa. 2012) (holding that "the exclusion of the petitioner's wife and the general public from jury selection was contrary to . . . long standing, controlling United States Supreme Court precedent. . . ."); *Mack v. Folino*, 383 F.Supp. 2d 780, 789 (E.D.Pa. 2005) (holding that "the procedure employed by the trial court at the hearing, and specifically the complete prohibition on any cross-examination of Mosley, was constitutionally flawed because it violated the basic requirements of the Due Process Clause."); *Wallace v. Price*, 265 F.Supp. 2d 545, 558 (W.D.Pa. 2003); *McFarland v. English*, 111 F.Supp. 2d 591, 602 (E.D.PA. 2000) (holding that the Pennsylvania state court's decision to allow a defendant to appear in prison clothes over the defendant's objection was contrary to the Supreme Court's decision in *Estelle v. Williams.*).

highlight a few of these decisions.

In *Pierce*, the Third Circuit considered the New Jersey state court's analysis of *Strickland's* prejudice component which required the criminal defendant "to show 'by a preponderance of the evidence that the result of his criminal proceeding would have been different.'"[26] The Third Circuit found that this "standard required Pierce to prove more than what *Strickland* requires" and that this standard was "'diametrically different,' 'opposite in character or nature,' and ' mutually opposed' to our clearly established precedent in *Strickland* and therefore contrary to clearly established federal law."[27]

In *Dennis*, the Third Circuit considered Pennsylvania's state court's *Brady* analysis which included a requirement that the defendant "affirmatively show that the [*Brady* materials] were admissible."[28] The Third Circuit held that "The Pennsylvania Supreme Court's characterization of admissibility as a separate, independent prong of *Brady* effectively added admissibility as a requirement. This runs afoul of Supreme Court precedent."[29]

In *Lewis*, the defendant appealed the denial of his 2254 petition in which he alleged that Pennsylvania Supreme Court's decision to deny his ineffective assistance of counsel claim for counsel's failure to file a notice of appeal was contrary to clearly established federal law.[30] The Third Circuit agreed, finding Pennsylvania case law which held that counsel could never be ineffective for failing to file a notice of appeal when a defendant did not request an appeal to be filed was contrary to clearly established federal law which imposed a mandatory obligation for attorney

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[26] *Pierce*, No. 18-3192, at 6.
[27] *Id*. at 6-7 (quoting *Williams*, 529 U.S. at 406).
[28] *Dennis*, 834 F.3d at 307.
[29] *Id*. at 310.
[30] *Lewis*, 359 F.3d at 649, 651.

to consult with their client about the filing of an appeal.[31]

Like *Pierce*, *Dennis*, and *Lewis*, the present matter presents this Court with a situation in which the state courts misinterpret clearly established federal law.[32] Rather than applying the preponderance of the evidence evidentiary standard required by the United States Supreme Court's decisions in *McMillan*, *Watts*, and *Nichols*,[33] the Delaware Supreme Court misinterpreted these cases, refuted their applicability, and upheld the use of the erroneous "minimal indicia of reliability" standard.[34] As the application of the "minimal indicia of reliability" as a burden of proof to resolve fact disputes at sentencing is "diametrically different, opposite in character or nature, and mutually opposed to [the] clearly established precedent"[35] of *McMillan*, *Watts*, and *Nichols*, the Third Circuit opinions of *Pierce*, *Dennis*, and *Lewis* are controlling and require this Court to find that the Delaware Supreme Court's decision to uphold the application of the "minimal indicia of reliability" standard is contrary to clearly established federal law.

The District Court for the Western District of Pennsylvania's decision in *Wallace v. Price*[36] also provides support for Mr. Smack's argument. In *Wallace*, the defendant asserted that the Pennsylvania state court's evidentiary rulings barring the introduction of his co-defendant's prior statement and confession violated the confrontation clause of the Sixth Amendment.[37] The Third Circuit agreed and held that "the trial court's evidentiary rulings barring Wallace from exposing to

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[31] *Id*. at 654, 659.

[32] *Pierce*, No. 18-3192, at 6-7; *Dennis*, 834 F.3d at 310; *Lewis*, 359 F.3d at 649, 651.

[33] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. 84-87, 91-93.

[34] SR589-90.

[35] *Pierce*, No. 18-3192, at 6-7 (quoting *Williams*, 529 U.S. at 406) (internal citations omitted).

[36] *Wallace*, 265 F.Supp. 2d 545.

[37] *Id*. at 558.

the jury the facts concerning Brown's statement that he 'shot the girl' rose to the level of a violation of the confrontation clause of the Sixth Amendment."[38] Although Mr. Smack's case does not involve a violation of the confrontation clause like in *Wallace*, the holding in *Wallace* nevertheless provides support for Mr. Smack's argument that the Delaware State Courts' evidentiary ruling that the applicable burden of proof for disputed facts presented at a Delaware sentencing hearing was a "minimal indicia of reliability" violated Mr. Smack's due process rights under the Fourteenth Amendment.[39]

II. The Respondents' argument that no disputed facts were presented at Mr. Smack's sentencing hearing is factually inaccurate, should not be entitled to the rebuttable presumption of correctness, but in any event, because it is factually inaccurate there is clear and convincing evidence to rebut any presumption.

The Respondents' claim that "[t]he Delaware Supreme Court correctly determined that the sentencing court did not violate Smack's due process rights by considering comments made by a prosecutor at sentencing, when those comments were not based on disputed facts" and that this Court "must presume that the state court's determination of factual issues are correct."[40] However, the Respondents are incorrect as the Delaware Courts did not find that no disputed facts were presented during Mr. Smack's sentencing hearings. Even if such a finding was made, there is clear and convincing evidence in the record to rebut the presumption of correctness as there were a multitude of disputed facts, which included 64 indicted counts of which Mr. Smack was not convicted, relied upon by the judge when sentencing Mr. Smack.[41]

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[38] *Id*.

[39] SR589-90; *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. 84-87, 91-93.

[40] Answer at 7 (citing 28 U.S.C. § 2254(e)(1); Answer at 18.

[41] SR230-31.

Pursuant to 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct."[42] "Factual issues" are "'what happened,' 'scene-and action-setting questions,' as well as matters that turn on the appraisal of witness credibility or demeanor. . . ."[43] Although a determination of a factual issue is presumed to be correct,[44] the "[d]eference accorded a state court's determination of fact is not limitless and 'does not by definition preclude relief.'"[45] This is because a petitioner may rebut the presumption by clear and convincing evidence.[46]

While the Respondents assert "that the sentencing court did not violate Mr. Smack's due process right by considering comments made by a prosecutor at sentencing, when those comments were not based on disputed facts" is entitled to the presumption of correctness,[47] a review of the record makes it apparent that the Delaware Supreme Court made no such finding.[48] Thus, the Respondents' incorrect assertion that there were no disputed facts presented during Mr. Smack's sentencing hearing is not entitled to the presumption of correctness.

However, assuming *arguendo*, that this Court finds that the Delaware Supreme Court did make the factual determination that no disputed facts were presented at Mr. Smack's sentencing hearing, which it can not, there is clear and convincing evidence on the record to rebut the presumption of correctness.

As Mr. Smack painstakingly described in his Opening Brief, the record is clear that multiple

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[42] 28 U.S.C. § 2254(e)(1).

[43] *Washington v. Sobina*, 509 F.3d 613, 621 (3d Cir. 2007) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

[44] 28 U.S.C. § 2254(e)(1).

[45] *Washington*, 509 F.3d at 621 (quoting *Miller-El*, 537 U.S. at 340).

[46] *Id*; 28 U.S.C. § 2254(e)(1).

[47] Answer at 18.

[48] SR591 (holding that the "Superior Court did not err by applying a minimal indicia of reliability standard or by denying the evidentiary hearing.").

disputed facts were presented at Mr. Smack's sentencing hearing and were relied upon when sentencing by the judge. In particular, Mr. Smack described how during the June 22, 2016 hearing, which was the continued first stage of Mr. Smack's sentencing hearing, that the evidence did not support the State's characterization of Mr. Smack as a drug kingpin and asserted that the State was essentially "sandbagging" Mr. Smack by making arguments that were "beyond the indictment."[49] More importantly, Mr. Smack noted, during the November 9, 2016 oral argument, that he contested "the other uncharged aspects, such as Mr. Price's residence and what [was] found in Mr. Price's residence" as well as all "conduct beyond conviction."[50] Additionally, after the oral argument, Mr. Smack filed a November 18, 2016 letter to the Sentencing Judge specifically identifying the counts of the indictment that he contested.[51] Mr. Smack asserted that he would not contest "the Court's consideration at sentencing under the minimal indicium of reliability burden of proof" of 57 of the indicted counts that Mr. Smack was not convicted of, but would contest 7 non-convicted counts of the indictment which did not meet the erroneous "minimal indicia of reliability" burden of proof.[52] However, the Sentencing Court ultimately rejected this argument at the November 23, 2016 sentencing hearing when it noted "we have had this discussion and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts."[53] Thus, the record is crystal clear that facts contested by Mr. Smack, the 64 non-convicted counts of the indictment, were resolved and relied upon by the Sentencing Judge at Mr. Smack's sentencing hearing and therefore, there is clear and convincing evidence to rebut any

[49] Opening at 8-9; SR117.
[50] Opening at 10; SR213.
[51] Opening at 11, 24-25; SR220-21.
[52] *Id*.
[53] SR230; *see also* SR219.

potentially applicable presumption of correctness to the Respondents' incorrect argument that no disputed facts were presented at Mr. Smack's sentencing hearing.

Mr. Smack's argument that there is clear and convincing evidence to rebut any applicable presumption of correctness to the Respondents' incorrect argument is buttressed by the United States Supreme Court decision in *Wiggins v. Smith* as well as the decisions of other circuit courts and other district courts in the Third Circuit.[54] In *Wiggins,* the Supreme Court found that a petitioner overcame the presumption of correctness.[55] In that case, the Supreme Court held that the "Maryland Court of Appeals' application of *Strickland's* governing legal principles was objectively unreasonable."[56] In support of this finding, the Supreme Court noted that the Maryland Court of Appeals holding that counsel's mitigation investigation was adequate was "based . . . in part, on a clear factual error– that the 'social service records . . . recorded incidences of . . . sexual abuse.'"[57] The Supreme Court continued on to note that "the records contain[ed] no mention of sexual abuse, much less of the repeated molestations and rapes of petitioner" and for this reason, "[t]he state court's assumption that the records documented instances of abuse has been shown to be incorrect by 'clear and convincing

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[54] *Wiggins v. Smith*, 539 U.S. 510, 528 (2003); *Richards v. Quarterman*, 566 F.3d 553, 570 (5th Cir. 2009) (holding that "[i]n light of the absence of any credible explanation for . . . fail[ing to introduce medical records], we agree with district court that the state court's . . . factual findings were rebutted by clear and convincing evidence."); *Mitchell v. Mason*, 325 F.3d 732, 747 (6th Cir. 2003) (holding that there was clear and convincing evidence to rebut the Michigan Supreme Court's finding that the petitioner was represented by counsel prior to his trial.); *Scott v. Mullin*, 303 F.3d 1222, 1229-30 (10th Cir. 2002) (holding that the petitioner "rebutted the presumption that he could have raised his *Brady* claim . . . on direct apeal."); *Torres v. Prunty*, 223 F.3d 1103, 1110, n.6 (9th Cir. 2000) (holding that the petitioner rebutted the presumption of correctness for the state court's finding that there was no bona fide doubt in relation to the petitioner's competency.); *Showers v. Beard*, 586 F.Supp. 2d 310, 329 (M.D.Pa. 2008).

[55] *Wiggins*, 539 U.S. at 528.

[56] *Id*. at 527.

[57] *Id*. at 528.

evidence.'"[58]

In *Showers*, the petitioner contended that trial counsel was ineffective "for failing to present rebuttal expert testimony" during petitioner's trial.[59] The Middle District Court of Pennsylvania agreed finding that the Pennsylvania Superior Court's "holding rests in part on the inappropriate factual determination that trial counsel's cross-examination of [the Commonwealth's expert witness] effectively elicited testimony helpful to the defense, and that his closing argument to the jury negated the merit of" petitioner's claim.[60]

As outlined above,[61] should this Court find that the presumption of correctness should apply to the Respondents' assertion that no disputed facts were presented at Mr. Smack's sentencing hearing, which it can not, the record provides clear and convincing evidence to rebut this presumption as was the case in *Wiggins*. Thus, like the Supreme Court in *Wiggins* and the Middle District Court of Pennsylvania, this Court must find that the Respondents' assertion that no disputed facts were presented during Mr. Smack's sentencing hearing is "plainly controverted by the evidence in the state court record" and therefore, Mr. Smack has rebutted the presumption of correctness.

In further support of their argument that Mr. Smack is not entitled to habeas relief, the Respondents make a series of unsupported factual assertions which include: 1) "Smack failed to point to materially false information relied upon by the sentencing court"; 2) "Smack did not allege that anything in the presentence report was, in fact, inaccurate"; 3) "Smack admitted to the drug

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[58] *Id*. (quoting 28 U.S.C. § 2254(e)(1)).

[59] 586 F.Supp. 2d at 313.

[60] *Id*. at 328; *Id*. at 329 ("Further, the Superior Court's factual determination that trial counsel meaningfully prepared for the guilt phase by relying solely on his cross-examination of the Commonwealth's expert and on his own closing argument is plainly controverted by the evidence in the state court record.").

[61] *Supra* at 9-10.

dealing alleged in the indictment"; and 4) "[t]he only specific factual challenge was to Smack's relationship to Price and the contraband seized from Price's residence."[62] As described below, none of the Respondents' unsupported factual assertions can serve as a ground for denying Mr. Smack relief.

The Respondents' assertion that "Smack failed to point to materially false information relied upon by the sentencing court" and "[t]he only specific factual challenge was to Smack's relationship to Price and the contraband seized from Price's residence"[63] are factually inaccurate. As described above,[64] Mr. Smack, during the June 22, 2016 hearing, argued that the evidence did not support the State's characterization of Mr. Smack as a drug kingpin and that the State was essentially "sandbagging" Mr. Smack by making arguments that were "beyond the indictment."[65] At the November 9, 2016 oral argument, Mr. Smack clearly indicated that he was not only contesting "the other uncharged aspects, such as . . . what [was] found in Mr. Price's residence" but also all "conduct beyond conviction."[66] Additionally, in Mr. Smack's November 18, 2016 letter, Mr. Smack specifically identified the specific counts of the indictment which were so lacking in evidence that they did not even meet the erroneous "minimal indicia of reliability" standard of proof.[67] Furthermore, during the November 23, 2016 sentencing hearing, Mr. Smack argued that Mr. Smack "was no[t a] kingpin, but rather a "retail drug dealer"[68] as well as presented argument to rebut the illogical argument that Mr. Smack's actions were a greater harm than those of the wholesale drug

[62] Answer at 10.
[63] Answer at 10.
[64] *Supra* at 9-10.
[65] Opening at 8-9; SR117.
[66] Opening at 10; SR213.
[67] Opening at 11, 24-25; SR220-21.
[68] Opening at 12, 25; SR224.

supplier.[69] Nevertheless, the Sentencing Court rejected Mr. Smack's argument and considered all of the indicted counts.[70] Additionally, the Sentencing Court largely adopted the State's sentencing argument when crafting Mr. Smack's ultimate sentence.[71] Thus, the record clearly refutes the Respondents' assertions that "Smack failed to point to materially false information relied upon by the sentencing court" and "[t]he only specific factual challenge was to Smack's relationship to Price and the contraband seized from Price's residence"[72]

Additionally, the Respondents' assertion that "Smack admitted to the drug dealing alleged in the indictment"[73] is overly broad and misleading. As noted in the Opening Brief,[74] Mr. Smack was indicted on five counts of Drug Dealing in violation of 16 *Del. C.* § 4752(1) and sixty-six counts of

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[69] Opening at 12, 25-26; SR228 ("But I think what the State is essentially, making an argument is that the street-level dealer is more of an aggravating person than the individual who is the nefarious, more shadowy wholesaler supplier and the people above them. First, 77 drug deals that are recorded within a two month time period, Your Honor, that . . . indicative of retail sales"); SR228 ("what we are talking about, slightly more than one heroin deal per day over a two month time period. Your Honor, that's not even a reasonably high-level retail dealer as far as what retail sales would be. Individuals at a corner, if we step back, are we expecting that they only make two sales within a day, or less than two sales within a day? So I think this characterization is completely undermined by the irrefutable facts of what the State knows. Secondarily, the danger is not the street corner individuals.").

[70] SR230 ("we have had this discussion and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts.").

[71] SR230-31 ("I think of all of the victims of his crime. And not only the people who purchases the drugs which he sells, but also their loved ones and families. I think about all of the lives that he has destroyed. I think about the fact that he has willingly destroyed them because it provides him with money. And I believe that, in addition to the value of punishment, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.").

[72] Answer at 10.

[73] Answer at 10.

[74] Opening at 7.

Drug Dealing in violation 16 *Del. C.* § 4754(1).[75] However, Mr. Smack only pled guilty[76] to two counts of Drug Dealing Heroin in a Tier 4 Quantity (Counts 36, 37)[77] and two counts of Drug Dealing Heroin no tier weight (Counts 40, 122).[78] Thus, the Respondents' assertion, which implies that Mr. Smack admitted to all drug dealing counts of the indictment, is materially incorrect, overly broad, and has no merit.

Furthermore, the Respondents' reference to *Williams v. New York* and its assertion that "Smack did not allege that anything in the presentence report was, in fact, inaccurate"[79] is meaningless as the record is clear that Mr. Smack presented multiple disputed facts during his sentencing proceedings which included 64 indicted counts of which Mr. Smack was not convicted.[80] Thus, the state court record clearly refutes the accuracy of all of the Respondents' assertions which should hold no weight in this Court's analysis of Mr. Smack's claim for relief.

III. Federal case law permits sentencing judges to consider any information when sentencing a defendant that has "probable accuracy", which means information that rises to a level of a preponderance of the evidence.

The Respondents assert that the applicable clearly established law "can be found in *United States v. Tucker* and *Townsend v. Burke*"[81] and that these cases "stand for the general proposition that a criminal defendant has a due process right to be sentenced on the basis of accurate information.[82]

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[75] SR4, DE# 3, SR16-102.
[76] SR103, SR106-11.
[77] SR30.
[78] SR31, SR56.
[79] Answer at 10.
[80] *Supra* at 9-10, 13-14.
[81] Answer at 9-10 (citing *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736 (1948)).
[82] Answer at 10 (citing *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982) ("as a matter of due process, factual matters may be considered as a basis for a sentence only if they have some minimal indicium of reliability")).

Mr. Smack firmly agrees with the "general proposition that a criminal defendant has a due process right to be sentenced on the basis of accurate information."[83] Accurate information simply must mean information that is probably accurate which is the same as more likely than not which is the preponderance of the evidence standard. It would be impossible to define the important phrase "accurate information" as meaning anything less than information that meets the preponderance of the evidence standard of proof. Thus, *Townsend* and *Tucker* can be considered by this Court as logical precursors to *McMillan*, *Nichols*, and *Watts* and provide additional support for Mr. Smack's arguments.

Additionally, the Respondents, in trying to support its argument that *McMillan*, *Watts*, and *Nichols* do not support Mr. Smack's arguments, cite to, in footnote 52 of it's Answer, language from a series of cases that mix the appellate standard of review of trial court fact findings with the issue before this Court which is the standard of proof for disputed facts presented during a sentencing hearing.[84] However, a full reading of the cases cited in footnote 52 demonstrate that the cited cases do not conflict with *McMillan*, *Nichols*, and *Watts* as they all quote language from the Federal Sentencing Guidelines and case law that fact findings that are based on probably accurate information can be considered for sentencing purposes.[85] Furthermore, the Respondents' cited case

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[83] *Id*.

[84] Answer at 11, n. 52 (citing *United States v. Zuniga*, 720 F.3d 587 (5th Cir. 2013); *United States v. Harris*, 702 F.3d 226 (5th Cir. 2012); *United States v. Christman*, 509 F.3d 299 (6th Cir. 2007) (*United States v. Moncivais*, 492 F.3d 652 (6th Cir. 1007)).

[85] *Zuniga*, 720 F.3d at 590 ("When making factual findings for sentencing purposes, a district court 'may consider any information which bears sufficient indicia of reliability to support its probable accuracy.'"); *Harris*, 702 F.3d at 230 (quoting *United States v. Johnson*, 648 F.3d 273, 277 (5th Cir. 2011)) ("In *Johnson*, we noted that our precedent 'left room for a court to consider arrests if sufficient evidence corroborates their reliability.' This rule is consistent with the constitutional due process requirement that 'sentencing facts' must be established by a preponderance of the evidence.'"); *Christman*, 509 F.3d at 305 (quoting *Moncivais*, 492 F.3d at

of *United States v. Harris* expressly notes that "the constitutional due process requirement [is] that 'sentencing facts must be established by a preponderance of the evidence.'"[86] In any event, the Respondents can not change the fact that federal case law is consistent with the guidelines and in particular the commentary note of U.S.S.G. § 6A1.3 which has read for well over a decade that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."[87]

In the context of Mr. Smack, the most substantial component of disputed facts was the 64 non-convicted counts of the indictment of which the holding in *United States v. Watts*, is directly on point as it stands for the principle that non-convicted criminal conduct can be relied upon when sentencing only if there is evidence to support the illegal conduct that rises to the level of a preponderance of the evidence.[88] The Superior Court's bald reliance on 64 mere allegations, shortly and summarily described in an indictment, in no way rose to a level of proof of illegal conduct on the preponderance of the evidence standard.

Mr. Smack's constitutionally premised argument that facts relied upon when issuing a sentence by a judge must meet the preponderance of the evidence standard is not particularly novel or earth shattering as it is essentially common sense. If various facts are presented to a judge to

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658) ("U.S.S.G. § 6A1.3(a) does establish a minimum indicia-of-reliability standard that evidence must meet in order to be admissible in Guidelines sentencing proceedings."); *Moncivais*, 492 F.3d at 658 (same).

[86] *Harris*, 702 F.3d at 230 (quoting *Johnson*, 648 F.3d at 277).

[87] U.S.S.G, § 6A1.3 cmt.

[88] *Watts*, 519 U.S. at 157 ("We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.").

influence how a judge should sentence, any fact that a judge considers must be shown to be probably true in order to comply with due process.

IV. An evidentiary hearing is warranted in the event that this Court finds that the record is incomplete at present to grant relief.

As described above and within the Opening Brief,[89] Mr. Smack asserts that the state court record clearly establish the constitutional error in the Delaware Supreme Court's adherence to the "minimal indicia of reliability" burden of proof during Delaware sentencing hearings. As such, Mr. Smack asserts that an evidentiary hearing is warranted only in the event that this Court finds that the record is inadequate at present to grant Mr. Smack's habeas claim.[90]

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[89] *Supra* at 1-8; Opening at 15-32**.**

[90] *Townsend v. Sain*, 372 U.S. 293, 313 (1963) ("hold[ing] that a federal court must grant an evidentiary hearing to a habeas applicant . . . if . . . the materials facts were not adequately developed at the state court-hearing. . . ."); *Marshall v. Hendricks*, 307 F.3d 36, 117 (3d Cir. 2002) (noting "that our sister courts of appeal have likewise remanded for further factual development when the record has been inadequate to make a proper legal determination of a claim raised on habeas appeal post-AEDPA, in some instances expressly requiring an evidentiary hearing, and in others merely noting its availability as a tool for the district court to use in its development of the record."); *Gaither v. United States*, 759 A.2d 655, 657 (D.C. 2000) (holding that "[b]ecause the motions court failed to make necessary factual findings and applied an incorrect legal standard to Gaither's post-conviction *Brady* claims, we remand the case for the court to make factual findings and apply the correct rule of law."); *Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997) (remanding "the record to the trial court for a hearing and determination of whether Miles' complaint to the CCRB was *Brady* material and, if so, whether had it been disclosed to the defense, there is a possibility that the result of the trial would have been undermined.").

CONCLUSION

Based on the arguments made above and within the Opening Brief regarding the merits of his claims for relief, Mr. Smack respectfully requests that this Court grant him a writ of habeas corpus so that he may be discharged from his unconstitutional confinement and restraint. This Court must recognize that Mr. Smack's sentence was the result of the Delaware state court's application of an erroneous minimal indicia of reliability burden of proof to resolve disputed facts considered by the court when imposing sentence in violation of the Due Process Clause of the Fourteenth Amendment and controlling United States Supreme Court precedent interpreting the Due Process Clause. As such, Mr. Smack's conviction must be vacated and this matter must be remanded back to the Delaware State Courts for a new sentencing hearing that fully complies with the Due Process Clause of the Fourteenth Amendment.

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Date: August 28, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1600

ADRIN SMACK,
APPELLANT,

v.

SUPERINTENDENT MAHANOY SCI,
APPELLEE,

and

ATTORNEY GENERAL OF THE STATE OF DELAWARE,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE (D. Del. No. 1:19-cv-00691-GBW)

BRIEF OF APPELLANT AND APPENDIX VOLUME I
(Pages 1-32)

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Dated: October 16, 2023

TABLE OF CONTENTS
BRIEF

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

UNITED STATES CONSTITUTION

FEDERAL STATUTES

STATE STATUTE

OTHER

STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

On April 16, 2019, Adrin Smack timely filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Delaware ("District Court"). (Appendix[1] 34; Docket Entry[2] 1). Following briefing, the District Court dismissed Mr. Smack's habeas petition on March 3, 2023. (A2-31; A36-38; DE33; DE40-41; DE43; DE48; DE50-51). Mr. Smack timely filed a notice of appeal on March 31, 2023. (A1; A38; DE52). The District Court had underlying jurisdiction over Mr. Smack's habeas petition pursuant to 28 U.S.C. § 2254(a). This Court has jurisdiction to review the District Court's order and memorandum opinion denying Mr. Smack's habeas petition pursuant to 28 U.S.C. § 2253(a).

[1] Hereinafter "A_."
[2] Hereinafter "DE_."

STATEMENT OF THE ISSUES FOR REVIEW

Whether the District Court erred in finding that the Delaware state courts did not fail to apply the clearly established federal law of *McMillan v. Pennsylvania*, *Nichols v. United States*, and *United States v. Watts* in order to deny Mr. Smack relief even though Mr. Smack's state court sentencing hearing did not comply with the Due Process Clause of the Fourteenth Amendment. This issue was exhausted in the Delaware state courts as it was raised to the Superior Court before Mr. Smack's sentencing hearing and on direct appeal to the Delaware Supreme Court as well as raised and ruled upon by the District Court. (A2-31; A154-58; A160-64; A225-27; A229-53; A258-59; A300-27; A348-62; A430-57; A506-24).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. This case is not related to any pending matters before this Court.

STATEMENT OF THE CASE

On May 26, 2015, Mr. Smack was charged by indictment with one count of giving a firearm to a person prohibited, five counts of drug dealing in violation of 16 Del. C. § 4752(1), sixty six counts of drug dealing in violation of 16 Del. C. § 4754(1), one count of possession of marijuana, two counts of conspiracy second degree, two counts of possession of a firearm by a person prohibited in violation of 11 Del. C. § 1448(a)(9), and three counts of possession of a firearm by a person prohibited in violation of 11 Del. C. § 1448. (A42; A67-76; A78-79; A81-82; A84-88; A94-95; A97-00; A104-06; A109-10; A112-13; A115; A118-20; A131-32; A135-37; A139; DE3).

On March 31, 2016, Mr. Smack pleaded guilty to two counts of drug dealing heroin in a tier 4 quantity (counts 36 and 37 of the indictment), two counts of drug dealing no tier weight (counts 40 and 122 of the indictment), and singular counts of possession of a firearm by a person prohibited (count 39 of the indictment) and conspiracy second degree (count 238 of the indictment). (A48;A141; A146-48; DE35).

On June 22, 2016, Mr. Smack was scheduled to be sentenced, however, the hearing was continued to allow the parties to brief the issue of what the applicable burden of proof was for contested facts presented during the sentencing hearing.

(A157-58; DE38-39). On August 15, 2016, Mr. Smack filed his pre-sentence motion in response to the court's June 22, 2016 order regarding the scope of consideration at Mr. Smack's sentencing hearing. (A159-64; DE43). The State filed their response on October 3, 2016. (A165-71; DE44). On October 11, 2016, Mr. Smack filed a letter requesting oral argument which was subsequently held on November 9, 2016. (A225-53; DE45; DE46).

On November 17, 2016, the Superior Court issued an order finding that Mr. Smack was not entitled to an evidentiary hearing and that the Court may consider any information meeting the minimal indicia of reliability burden of proof. (A255-57; DE48).

On November 23, 2016, Mr. Smack was sentenced to an aggregate prison sentence of 14 years followed by 12 years of descending levels of probation. (A269; A271-73; DE50).

On December 23, 2016, Mr. Smack timely appealed his sentencing to the Delaware Supreme Court. (A281; DE53; DE60; DE62). The Delaware Supreme Court affirmed the judgment of the Superior Court on October 11, 2017. (A278; A363-68; DE62). Thereafter, Mr. Smack timely filed a cert petition to the United States Supreme Court on January 9, 2018. (A278; A369-96). Following the State's brief in opposition, the United States Supreme Court denied cert. (A278; A397-10).

On April 16, 2019, Mr. Smack timely filed his writ of habeas corpus in the United States District Court for the District of Delaware ("District Court"). (A34; DE1). Following briefing and the submission of two amicus briefs, the District Court dismissed Mr. Smack's habeas petition on March 3, 2023. (A2-31; A36-38; A411-524; DE33; DE40-41; DE43; DE48; DE50-51).

On March 31, 2023, Mr. Smack timely filed a notice of appeal to this Court. (A1; A38; DE 52). Thereafter, Mr. Smack moved for the issuance of a certificate of appealability on May 1, 2023, which this Court granted on July 26, 2023. (A32).

STATEMENT OF FACTS

In 2014 and 2015, Mr. Smack was involved in possessing with an intent to distribute heroin in the State of Delaware. (A205-14; A222-24). As a result of his actions, Mr. Smack was charged by indictment with one count of giving a firearm to a person prohibited, seventy one counts of drug dealing, one count of possession of marijuana, two counts of conspiracy second degree, and five counts of possession of a firearm by a person prohibited. (A42; A67-76; A78-79; A81-82; A84-88; A94-95; A97-00; A104-06; A109-10; A112-13; A115; A118-20; A131-32; A135-37; A139; DE3).

On March 31, 2016, Mr. Smack pleaded guilty to two counts of drug dealing heroin in a tier 4 quantity (counts 36 and 37 of the indictment), two counts of drug dealing no tier weight (counts 40 and 122 of the indictment), and singular counts of possession of a firearm by a person prohibited (count 39 of the indictment) and conspiracy second degree (counts 238 of the indictment). (A48;A141; A146-48; DE35). As a condition of the plea agreement, the State agreed to not recommend a prison sentence greater than 15 years and Mr. Smack agreed to not request a prison sentence of less than 8 years. (A141; A144).

Mr. Smack was originally scheduled to be sentenced on June 22, 2016, however, the hearing was continued to allow Mr. Smack and the State to brief the

applicable burden of proof for contested facts presented during the sentencing hearing. (A151; A157-58). The continuance was needed because the State argued to the Sentencing Judge that facts involving conduct beyond the admitted/pled counts of the indictment should have been considered by the Sentencing Court when determining Mr. Smack's sentence. (A151-54). Mr. Smack asserted that contested facts presented by the State to be relied upon when sentencing needed to be proven by a preponderance of the evidence while the State advanced that the applicable burden of proof was only a minimal indicia of reliability. (A155; A157-58).

In a series of filings,[3] Mr. Smack asserted that the State bore the burden of proof for any contested factual allegations presented during a sentencing hearing and that the applicable burden of proof was a preponderance of the evidence. (A161-62). The State responded by arguing that the applicable burden of proof for contested facts presented at a sentencing hearing was minimal indicia of reliability. (A167-69).

On November 9, 2016, the Delaware Superior Court held oral argument on the applicable burden of proof for contested facts presented at a sentencing hearing. (A228-30). Consistent with his filing, Mr. Smack asserted that the applicable burden

[3] Smack filed a Pre-Sentence Motion in Response to the Court's June 22, 2016 Order Regarding the Scope of Consideration at Mr. Smack's Sentencing Hearing on August 15, 2016. (A159-64). The State filed their Memorandum Regarding Sentencing on October 3, 2016. (A165-24). Smack filed a letter replying to the State's memorandum on October 11, 2016. (A225-27).

of proof was a preponderance of the evidence. (A233-36). The Superior Court rejected Mr. Smack's assertion and held that the applicable burden of proof was only a minimal indicia of reliability. (A237). The Superior Court also sought clarification as to which specific facts Mr. Smack would contest in light of the court's ruling. (A238-46; A249). Mr. Smack indicated that it was "the assertion of the other uncharged aspects, such as Mr. Price's residence and what [was] found in Mr. Price's residence that we dispute." (A251). Mr. Smack further specified that it was "the conduct beyond conviction that was being disputed." (A251). Counsel for Mr. Smack also indicated that he would "respond in writing" with more detail in relation to what indicted counts were at dispute. (A251).

On November 17, 2016, the Superior Court issued an order finding that the applicable burden of proof for disputed facts presented at a sentencing hearing was a minimal indicia of reliability. (A255-57). The order further stated "that the State may rely upon (in addition to the Presentence Investigation) the indictment and the affidavit submitted by the State in support of its application to obtain a warrant" as "the[y] bear the requisite indicia of reliability. . . ." (A257). It was also clear from the language of the order that the Superior Court was free to consider all of the indicted counts when determining Mr. Smack's sentence. (A257).

On November 18, 2016, Mr. Smack filed a letter asserting that "Mr. Smack

[would] not be contest[ing] the Court's consideration at sentencing, under the minimal indicia of reliability burden of proof standard ruled to be applicable by the Superior Court, of seventy four non-convicted indicted counts. (A258). However, Mr. Smack also identified seven non-convicted indicted counts that he asserted did not satisfy the minimal indicia of reliability standard. (A258-59).

During the November 23, 2016 sentencing hearing, the State renewed its request for a fifteen year sentence. (A260). In response, Mr. Smack asserted that an eight year sentence was sufficient as Mr. Smack was not a drug kingpin and was only involved in drug dealing to support his family. (A261-64). The State countered by asserting that seventy-seven drug dealing counts within a two month time span suggested that Mr. Smack's illegal activity was a full-time job, that Mr. Smack was a significant drug dealer, and that retail drug sales were a greater evil than distributing large amounts of drugs, all of which justified a harsher sentence. (A264-65). Mr. Smack responded that seventy-seven drug deals within a two month time period was indicative of a retail seller, not supplier, and that it was illogical for the State to argue that "the drug dealer is considered a greater evil than the wholesale individuals that are supplying them." (A266-67).

The Superior Court sentenced Mr. Smack to an aggregate prison sentence of 14 years followed by 12 years of descending levels of probation. (A269-73). In

support of the sentence, the Superior Court rejected Mr. Smack's arguments and considered all of the indicted counts, noting "we have had this discussion and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts." (A268). The Sentencing Court's statement made it clear that it considered all of the indicted not-pled to counts when issuing its sentence,[4] finding that the non-pled-to-yet-indicted conduct met the minimal indicia of reliability standard.

On December 23, 2016, Mr. Smack timely appealed his sentencing and the Delaware Superior Court's ruling on the applicable burden of proof for disputed facts presented at a sentencing hearing to the Delaware Supreme Court. (A281). In his appellate filings, Mr. Smack asserted that the Superior Court abused its discretion by resolving disputed aggravating sentencing facts by applying the minimal indicia of reliability standard, rather than the preponderance of the evidence standard. (A300-15; A352-62). Mr. Smack also asserted that the Due Process Clause required the application of the preponderance of the evidence standard to resolve disputed facts

[4] The non-convicted counts included 67 counts of drug dealing, 4 counts of possession of a firearm by a person prohibited, and singular counts of giving a firearm to a person prohibited, possession of marijuana, and conspiracy second degree. *Compare* A42; A67-76; A78-79; A81-82; A84-88; A94-95; A97-00; A104-06; A109-10; A112-13; A115; A118-20; A131-32; A135-37; A139 with A48; A141; A146-48.

raised at sentencing hearings. (A300-15; A352-62).

The Delaware Supreme Court affirmed the judgment of the Superior Court on October 11, 2017, finding that it used the proper evidentiary standard for fact finding at sentencing which is a minimal indicia of reliability as noted in *Mayes v. State*, 604 A.2d 839 (Del. 1992). (A366-67). The Delaware Supreme Court also noted that the federal case law cited by Mr. Smack was inapposite as those cases involved sentencing under the federal sentencing guidelines. (A367).

On January 9, 2018, Mr. Smack timely filed a petition for writ of certiorari to the United States Supreme Court. (A369-96). The Supreme Court declined to hear the case on April 16, 2018. (A410).

On April 16, 2019, Mr. Smack timely filed his writ of habeas corpus in the United States District Court for the District of Delaware. (A34; DE1-3). Mr. Smack asserted that the Delaware State Courts erred because the courts failed to consider controlling United States Supreme Court precedent interpreting the Due Process Clause of the Fourteenth Amendment as requiring disputed facts presented during a sentencing and considered by the sentencing judge to be proven by a preponderance of the evidence. (A420; A430-47; A457; A506-13; A520-23; A524). The District Court dismissed Mr. Smack's habeas petition on March 3, 2023. (A2-31).

SUMMARY OF THE ARGUMENT

The District Court for the District of Delaware erred in finding that *McMillan*, *Nichols*, and *Watts* do not constitute clearly established federal law which require disputed facts raised at a sentencing hearing to be proven by a preponderance of the evidence standard.

ARGUMENT

I. The District Court erred when it determined that Mr. Smack was not deprived of his Fourteenth Amendment due process rights when the State Court at his sentencing hearing considered disputed facts based upon a minimal indicia of reliability burden of proof rather than a preponderance of the evidence.

A. Standard of Review.

When a district court in a 2254 habeas litigation "based its decision on a review of the state court record and did not conduct an evidentiary hearing, . . . [appellate] review of its order is plenary. . . ."[5] As such, this Court applies "'the same standard [of review] that the District Court was required to apply.'"[6] Therefore, this Court must determine whether the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court

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[5] *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 280 (3d Cir. 2016) (citing *Branch v. Sweeney*, 758 F.3d 226, 232 (3d Cir. 2014); *Brown v. Wenerowicz*, 663 F.3d 619, 627 (3d Cir. 2011)).

[6] *Hairston v. Hendricks,* 578 Fed. Appx. 122, 125, 125 (3d Cir. 2014) (quoting *Lewis v. Horn*, 581 F.3d 92, 100 (3d Cir. 2009)); *see also Dennis*, 834 F.3d at 280; *Vazquez v. Wilson*, 550 F.3d 270, 276 (3d Cir. 2008) (quoting 28 U.S.C. § 2254(d)(1)) ("Under the AEDPA we must review the state court proceedings and affirm the denial of the petition unless we are satisfied that Vazquez has demonstrated that the Pennsylvania Superior Court, the highest-level state court . . . made a determination that 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'").

proceeding."[7]

B. Argument.

Mr. Smack asks this Court to make a finding that at first blush appears would be an easy to make finding that when disputed facts are raised by a prosecutor at a sentencing hearing, and those facts are objected to by a defendant, that a sentencing judge can only consider those disputed facts when sentencing a defendant if those disputed facts are proven by the preponderance of the evidence standard. The State of Delaware counters, which was adopted by the District Court for the District of Delaware, that disputed facts raised at a sentencing hearing and relied on by a sentencing judge need to be proven at the sentencing hearing by merely a minimal indicia of reliability standard. (A12-15; A257; A366-67). Meaning that disputed facts at sentencing can be relied upon by a judge when sentencing even if those facts are not probable. The State of Delaware and the District Court of Delaware conclusions are erroneous as it is based upon misapplication of federal case law relating to an appellate standard of review of sentencing hearing fact findings, as well as a misapplication of a series of United States Supreme Court cases which involve how disputed facts raised in a sentencing hearing are ruled upon by a sentencing judge. (A12-15; A257; A366-67).

[7] 28 U.S.C. § 2254(d)(1); 28 U.S.C. § 2254(d)(2).

The United States Supreme Court in *McMillan v. Pennsylvania*, *Nichols v. United States*, and *United States v. Watts* held that the Due Process Clause of the Fourteenth Amendment requires disputed facts presented during a sentencing hearing and considered by the sentencing judge be proven by a preponderance of the evidence.[8] This clearly established federal law is consistent with long standing United States Supreme Court precedent that a defendant's sentence can not be based upon "materially false" information.[9] Despite this clearly established federal law, the District Court failed to properly apply *McMillan*, *Nichols*, and *Watts* and erroneously affirmed the Delaware State Court's application of a minimal indicia of reliability burden of proof for disputed facts raised at a sentencing hearing and relied upon and factored into the sentence ultimately issued. (A12-15). Similarly, the District Court erred when it concluded that Mr. Smack failed to demonstrate that materially false information was presented to the sentencing court and that the sentencing court relied on materially false information when sentencing Mr. Smack. (A15-22).

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[8] *United States v. Watts*, 519 U.S. 148, 156-57 (1997); *Nichols v. United States*, 511 U.S. 738, 747-49 (1994); *McMillan v. Pennsylvania*, 477 U.S. 79, 84-87, 91-93 (1986).

[9] *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

1. *McMillan, Nichols, Watts, Townsend,* and *Tucker* clearly establish that disputed sentencing facts must be proven by a preponderance of the evidence.

Although the District Court correctly acknowledged that due process precludes a sentence based on materially false information,[10] the District Court, following the lead of the State Courts,[11] incorrectly interpreted the United States Supreme Court's holdings in *McMillan*, *Nichols*, and *Watts* to find that those cases do not apply to Mr. Smack's case "where the sentence is within statutory limits and there is no statutory sentencing enhancement."[12]

Pursuant to the Antiterrorism and Effective Death Penalty Act, a habeas petitioner is entitled to relief if a state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States".[13] Clearly established federal law is defined as "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision."[14] And a state court decision is contrary to clearly established federal law if the state court

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[10] A16 (citing *Tucker*, 404 U.S. at 447; *Townsend*, 334 U.S. at 741).

[11] *Compare* A12 with A14.

[12] A14.

[13] *Dennis*, 834 F.3d at 280 (quoting 28 U.S.C. § 2254(d)) (internal quotations omitted).

[14] *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)) (internal quotations omitted).

"(1) 'applies a rule that contradicts the governing law' set forth in Supreme Court precedent or (2) 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different' from that reached by the Supreme Court."[15]

Contrary to the District Court's findings, *McMillan*, *Nichols*, and *Watts* clearly establish that due process requires disputed sentencing facts to be proven by a preponderance of the evidence.[16] In *McMillan*, the United States Supreme Court considered the constitutionality of Pennsylvania's sentencing scheme which required sentencing facts relevant to sentencing considerations to be proven by a preponderance of the evidence.[17] In particular, the Supreme Court was asked to determine whether due process required a sentencing factor, which calls for a fact analysis and ruling, to be proven by a burden of proof *greater* than a preponderance of the evidence.[18] Ultimately, the Supreme Court held that Pennsylvania's sentencing scheme, which requires facts to be proven by a preponderance of the evidence, was constitutional and met the requirements of due process.[19]

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[15] *Id*. (quoting *Williams*, 529 U.S. at 405-06).

[16] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. at 84-87, 91-93.

[17] *McMillan*, 477 U.S. at 81.

[18] *Id*. at 84.

[19] *Id*. at 84, 86, 91-93

McMillan is controlling clearly established federal law and it directs this Court to hold that the District Court erred in not properly applying the preponderance of the evidence standard as being applicable to Mr. Smack's sentencing hearing. *McMillan* is directly on point in that it requires the preponderance of the evidence standard to be applied when the state has a sentencing in which a disputed facts affects the ultimate sentence issued. Here, the Sentencing Court relied upon the 74 indicted yet not pled guilty to counts of the indictment as being "proven for purposes of sentencing" and were relied upon by the Sentencing Judge when calculating the ultimate sentence issued to Mr. Smack. (A268).

In *Nichols*, the Supreme Court ruled on the constitutionality of considering a defendant's prior uncounseled misdemeanor conviction during sentencing.[20] In reaching its holding, the Supreme Court analyzed its prior decision in *McMillan*, and found that the use of a defendant's prior uncounseled misdemeanor conviction at sentencing was constitutional noting that "the state needs to prove such conduct only by a preponderance of the evidence."[21] In doing so, the Supreme Court clearly indicated that due process requires disputed aggravating sentencing facts be proven,

[20] *Nichols*, 511 U.S. at 740.
[21] *Id.* at 747-48.

at a minimum, by a preponderance of the evidence.[22]

In *Watts*, the Supreme Court accepted jurisdiction to decide whether acquitted conduct, proven by a preponderance of the evidence, could be used to enhance a sentence under the United States Sentencing Guidelines.[23] Relying on its holding in *McMillan* and *Nichols*,[24] the Court rejected the argument that acquitted conduct could never serve as a basis for a sentencing enhancement,[25] finding "that the application of the preponderance of the evidence at sentencing generally satisfies due process."[26] While the Supreme Court did not expressly state that the preponderance of the evidence standard was the minimum burden of proof for use of acquitted conduct for a sentencing enhancement, the language chosen by the Court – "[w]e therefore hold that a jury verdict of acquittal does not prevent the sentencing court from considering

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[22] *Id*. at 748 ("[C]onsistent[] with due process, petitioner . . . could have been sentenced more severely based simply on . . . the underlying conduct that gave rise to the previous DUI offense", proven by a preponderance of the evidence, "then, it must be constitutionally permissible to consider a prior . . .misdemeanor conviction . . . proved beyond a reasonable doubt.").

[23] 519 U.S. at 149.

[24] *Id*. at 156 (citing *Nichols*, 511 U.S. at 747-48; *Dowling v. United States*, 493 U.S. 342, 349 (1990); *McMillan*, 477 U.S. at 91-92) ("For these reasons, 'an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof' . . . and we have held that application of the preponderance standard at sentencing generally satisfies due process.").

[25] *Id*. at 149, 154, 156-57.

[26] *Id*.

conduct underlying the acquitted conduct, so long as that conduct has been proven by a preponderance of the evidence"[27] – established just that.

The Supreme Court's holding in *Watts* is significant not only for what it says, but also for what it does not say. While the Supreme Court acknowledged that a standard of proof less stringent than beyond a reasonable doubt was permissible,[28] the Court left open the possibility that in some circumstances, a burden of proof *stronger* than a preponderance of the evidence, such as clear and convincing evidentiary standard may be required.[29] However, the Supreme Court never suggested that an evidentiary burden of proof *less* than a preponderance of the evidence would be sufficient.[30] Accordingly, the *Watts* decision makes it clear that

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[27] *Id*. at 157.

[28] *Watts*, 519 U.S. at 155-56.

[29] *Id*. at 156 (citing *Kinder v. United States*, 504 U.S. 946, 948-49 (1992) (White, J., dissenting from denial of certiorari); *McMillan*, 477 U.S. at 88; *United States v. Lombard*, 72 F.3d 170, 186-87 (1st Cir. 1995); *United States v. Gigante*, 39 F.3d 42, 48 (2d Cir. 1994), amended 94 F.3d 53, 56 (2d Cir. 1996); *United States v. Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993); *United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 (D.C. Cir. 1992); *United States v. Trujillo*, 959 F.2d 1377, 1382 (7th Cir. 1992); *United States v. Restrepo*, 946 F.2d 654, 656, n.1 (9th Cir. 1991); *United States v. Townley*, 929 F.2d 365, 369 (8th Cir. 1991); *United States v. Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990)) ("We acknowledge a divergence of opinion among the Circuit as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue.").

[30] *Id*.

a sentencing court's consideration of acquitted conduct when imposing a harsher sentence is constitutional in most instances so long as that conduct has been proven by at least a preponderance of the evidence.[31] Mr. Smack's situation is a parallel to *Watts* in that non-convicted conduct, the 74 counts of the indictment not pled guilty to, was considered by the Sentencing Judge based upon the erroneous minimal indicia of reliability standard.

Despite the express language of the Supreme Court in each of the above described cases, the District Court affirmed the State Court's erroneous application of the minimal indicia of reliability standard. In doing so, the District Court narrowly interpreted the facts of *McMillan*, *Nichols*, and *Watts* in order to find that those cases did not apply to Mr. Smack's case as they apply to situations involving "state statutory or federal guideline enhancement[s]."[32] As such, the District Court misinterpreted *McMillan*, *Nichols*, and *Watts* and failed to consider the United States Supreme Court's ultimate holdings – that contested aggravating sentencing facts must be proven by a preponderance of the evidence – were premised on the requirement

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[31] *Id*. at 157 ("We therefore hold that jury's verdict of acquittal does not prevent the sentencing court from considering the conduct underlying the acquitted conduct, so long as that conduct has been proved by a preponderance of the evidence.").

[32] A14.

that sentencing hearings must comply with due process.[33] The presence of sentencing guidelines in *McMillan*, *Nichols*, and *Watts* was simply irrelevant to the Supreme Court's analysis and ultimate holding as the Supreme Court's decision was driven by what was required by due process.[34] As such, it is illogical from a legal prospective for the District Court, and the State Courts, to conclude that a sentencing evidentiary standard less than preponderance, i.e. minimal indicia of reliability, does not violate the Fourteenth Amendment's Due Process Clause.[35]

This conclusion is buttressed by the fact that the minimal indicia of reliability standard applied by the Delaware state courts was clearly intended to be an appellate review standard, not an evidentiary standard to resolve disputed facts at a sentencing

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[33] *Watts*, 519 U.S. at 156 (citing *McMillan*, 477 U.S. at 91-92; *Nichols*, 511 U.S. at 747-48) ("[W]e have held that application of the preponderance standard at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 ("Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 91 ("Like the court below, we have little difficulty concluding that in this case the preponderance standard satisfies due process.").

[34] *Id*.

[35] *See McMillan*, 477 U.S. at 92 (rejecting the defendant's argument that due process required a sentencing consideration to be proven by clear and convincing evidence and noting that "it would be extraordinary if the Due Process Clause as understood in *Patterson* plainly sanctioned Pennsylvania's scheme, while the same Clause explained in some other line of less clearly relevant case imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment.").

hearing. The seminal case relied upon by the Delaware state courts to deny Mr. Smack's argument that disputed sentencing facts must be proven by a preponderance of the evidence was *Mayes v. State*, 604 A.2d 839 (Del. 1992).[36] In that case, the Delaware Supreme Court articulated that "a sentencing court *abuses its discretion* if it sentences on the basis of inaccurate or unreliable information, Moreover, the due process clause of the Fifth Amendment prohibits a criminal defendant from being sentenced on the basis of information which is either false or which lacks minimal indicia of reliability."[37] The Delaware Supreme Court went on to note that "in reviewing a sentence within statutory limits, this Court will not find *error of law* or *abuse of discretion* unless it is *clear from the record below* that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability."[38]

It is clear from the language employed by the Delaware Supreme Court in *Mayes* that the Delaware Supreme Court did not analyze or articulate the applicable evidentiary standard for disputed facts at a sentencing hearing. The express language plainly indicates that the minimal indicia of reliability standard was an appellate

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[36] A257; A366
[37] *Mayes*, 604 A.2d at 843 (emphasis added).
[38] *Id*. (Emphasis added).

review standard of facts found by the sentencing court.[39] Thus, no deference should be given to the Delaware state courts adherence to minimal indicia of reliability evidentiary standard when that standard was clearly intended to be used as an appellate review standard.

The District Court additionally erred when it held that the clearly established federal law was found in *United States v. Tucker* and *Townsend v. Burke* which stand for the proposition that a defendant may not be sentenced based upon "materially untrue" information.[40] However, the District Court's error in interpreting and applying *Tucker* and *Townsend* was that the District Court failed to consider how the phrase "materially untrue" in relation to disputed facts is interpreted. Mr. Smack asserts that "materially untrue" in relation to fact findings must mean information that is more likely than not untrue, or stated otherwise, information that does not meet the preponderance of the evidence standard. Furthermore, *Townsend* and *Tucker* should have been considered by the District Court in how the opinions are affected by the holdings in *McMillan*, *Nichols*, and *Watts*[41] as the District Court could not ignore the holdings in those three cases when determining the present day effect of the *Townsend* and *Tucker* holdings.

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[39] *Id.*
[40] A16.

Furthermore, Mr. Smack did not argue "that the Delaware state courts unreasonably refused to extend the preponderance of the evidence standard to Delaware sentencing proceeding" and therefore, the District Court's reliance on *White v. Woodall* to deny Mr. Smack relief is misplaced.[42] In *White*, the Supreme Court clarified its previous rejection of "the unreasonable-refusal-to-extend rule" stating that "[s]ection 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error."[43] Unlike the defendant in *White*, Mr. Smack has repeatedly argued that due process requires disputed sentencing facts to be proven by a preponderance of the evidence and the Delaware state courts adherence to the minimal indicia of reliability evidentiary standard "resulted in a decision that was contrary to . . . clearly established federal law" as described in *McMillan*, *Nichols*, and *Watts.* Thus, as Mr. Smack has not argued that the Delaware State Court have unreasonably refused to extend the preponderance of the evidence standard to Delaware sentencing hearings, the Supreme Court decision in *White* should not bar Mr. Smack from relief.

The United States Supreme Court clearly established in *McMillan*, *Nichols,*

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[42] A15.

[43] *White v. Woodall*, 572 U.S. 415, 426 (2014).

and *Watts* that due process requires disputed sentencing facts to be proven, at a minimum, by a preponderance of the evidence.[44] As such, the District Court, and the State Courts, erred by concluding that *McMillan*, *Nichols*, and *Watts* were not applicable to Mr. Smack's case and did not constitute clearly established federal law.

2. Delaware state sentencing hearing must comply with the Due Process Clause of the Fourteenth Amendment.

It is well recognized that a sentence based on inaccurate and/or unreliable information, i.e. information not proven by a preponderance of the evidence, violates a defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.[45] It is also well recognized that the Due Process Clause of the Fourteenth Amendment has been incorporated to the states

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[44] *Watts*, 519 U.S. at 156 (citing *McMillan*, 477 U.S. at 91-92; *Nichols*, 511 U.S. at 747-48) ("[W]e have held that application of the preponderance standard at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 ("Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 91 ("Like the court below, we have little difficulty concluding that in this case the preponderance standard satisfies due process."); *Tucker*, 404 U.S. at 447; *Townsend*, 334 U.S. at 741.

[45] *See Watts*, 519 U.S. at 156; *Nichols*, 511 U.S. 747-48; *McMillan*, 477 U.S. at 91-92; *Townsend*, 334 U.S. at 741; *United States v. Agyemang*, 876 F.2d 1264, 1270 (7th Cir. 1989); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970).

and in particular, state sentencing proceedings.[46]

Accordingly, the Fourteenth Amendment's due process rights guaranteed to defendants at federal sentencing are equally guaranteed to defendants at state sentencing. Thus, in determining whether a defendant in a state sentencing proceeding is entitled to a specific right held by a defendant in a federal sentencing hearing, the central question is whether the right in question is statutorily based or based on the Due Process Clause of the Fourteenth Amendment. If the right is guaranteed by the Due Process Clause, the right is equally held by both federal and state criminal defendants.

For the reasons described above and below, Mr. Smack asserts that the

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[46] *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968)) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing hearing."); *see also Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 763-65, n. 13 (2010)) ("With only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States."); *McDonald*, 561 U.S. at 763-65, n.13 ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict,) . . . the only rights not fully incorporated are (1) the Third Amendment's protection against quartering soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines."); *Albright v. Oliver*, 510 U.S. 266, 272 (1994).

preponderance of the evidence burden of proof for disputed sentencing facts that has been applied in federal court is clearly based on the Due Process Clause of the Fourteenth Amendment[47] is therefore equally applicable to state sentencing proceedings.[48] Thus contested sentencing facts presented at a state sentencing proceeding and relied upon when determining the ultimate sentence, like Mr. Smack's, must be proven by a preponderance of the evidence so as to comply with due process.

However, even if this Court determines that this particular due process protection has not yet been incorporated to the states, this Court has the discretion[49] to find the right to be incorporated.[50] In so doing, the constitutionality mandated

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[47] *Watts*, 519 U.S. at 156 (citing *McMillan*, 477 U.S. at 91-92; *Nichols*, 511 U.S. at 747-48) ("[W]e have held that application of the preponderance standard at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 ("Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 91 ("Like the court below, we have little difficulty concluding that in this case the preponderance standard satisfies due process.").

[48] *Gardner*, 430 U.S. at 358 (citing *Witherspoon*, 391 U.S. at 521-23); *see also Timbs*, 139 S.Ct. at 687 (citing *McDonald*, 561 U.S. at 763-65, n. 13); *McDonald*, 561 U.S. at 763-65, n.13; *Albright*, 510 U.S. at 272.

[49] *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982) (agreeing with the "district court that the Third Amendment is incorporated into the Fourteenth Amendment for application to the states.").

[50] *Timbs*, 139 S.Ct. At 686-87 (citing *McDonald*, 571 U.S. at 767).

minimal burden of proof for contested sentencing facts in a federal sentencing hearing – a preponderance of the evidence – can be deemed as being incorporated and fully applicable to the states.

The United States Supreme Court has expressly recognized that "[a] Bill of Rights protection is incorporated . . . if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition."[51] If a right has been incorporated, the "Bill of Rights guarantees are 'enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"[52] Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."[53]

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[51] *Id.*

[52] *Id.* (Noting that this Court has never decided whether the Third Amendment or Eighth Amendment's prohibition on excessive fines are applicable to the state through the Due Process Clause).

[53] *Id.* (quoting *McDonald*, 561 U.S. at 766, n.14) (noting that "[t]he sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. *Apodaca v. Oregon*, 406 U.S. 404 (1972). As we have explained, that 'exception to th[e] general rule . . . was the result of an unusual division among the Justices,' and it 'does not undermine the well established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.'")); *McDonald*, 561 U.S. at 766 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)) (noting that the United States Supreme Court has "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'"); *Id.* (noting that the United States Supreme

As sentencing hearings are a "critical stage of the criminal proceeding", it is well-settled "that the sentencing process, as well as trial itself, must satisfy the requirement of the Due Process Clause."[54] As such, "[t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of a sentence even if he may have no right to object to a particular result of the sentencing process."[55]

The express language of the United States Supreme Court, as explained above, establishes that the minimum burden of proof for contested sentencing facts, as required by due process, is a preponderance of the evidence. The Supreme Court had the occasion to consider the constitutionality the use of the preponderance of the evidence standard at sentencing for: sentencing considerations under a state sentencing scheme; the use of acquitted conduct as a sentencing enhancement; and the use of a defendant's prior uncounseled misdemeanor conviction to enhance a defendant's sentence in *McMillan*,[56] *Nichols,*[57] and *Watts*,[58] and respectively and in each case, the United States Supreme Court found that the application of the

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Court recognized that "it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court'").

[54] *Gardner*, 430 U.S. at 358.

[55] *Id*. (citing *Witherspoon*, 391 U.S. at 521-23).

[56] 477 U.S. 79.

[57] 511 U.S. 738.

[58] 519 U.S. 148.

preponderance of the evidence standard passed constitutional muster.[59]

The holdings in *McMillan*, *Nichols*, and *Watts* make it clear that the application of the preponderance of the evidence burden of proof for contested facts presented during a sentencing hearing is a right guaranteed by the Due Process Clause of the Fourteenth Amendment as the United States Supreme Court's express language in those opinions make it clear that this right/protection is "'fundamental to our scheme of ordered liberty,' [and/]or 'deeply rooted in this Nation's history and tradition.'"[60] As such, this due process protection must be incorporated and be "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[61]

This conclusion is buttressed by the United States Supreme Court's decision in *Timbs v. Indiana* in which the Supreme Court determined whether "the Eighth Amendment's Excessive Fine Clause [was] an 'incorporated' protection applicable to the States under the Fourteenth Amendment's Due Process Clause."[62] In reaching the conclusion that the Excessive Fines Clause was incorporated, the United States Supreme Court expressly noted that there was "only 'a handful'" of protections that

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[59] *Watts*, 519 U.S. at 156; *Nichols*, 511 U.S. at 748; *McMillan*, 477 U.S. at 85-86.

[60] *Timbs*, 139 S.Ct. at 686-87 (citing *McDonald*, 571 U.S. at 767).

[61] *McDonald*, 571 U.S. at 765, n.13.

[62] 139 S.Ct. at 686.

the Supreme Court had not yet held to be incorporated.[63]

The decision in *Timbs* clearly illustrates the intent of the United States Supreme Court to narrow the number of rights that are not incorporated and held to be applicable to the States through the Due Process Clause of the Fourteenth Amendment as the Supreme Court in *Timbs* incorporated one of the few remaining non-incorporated rights.[64] This intent was further demonstrated by the comments of Justice Gorsuch and Justice Kavanaugh during oral argument in *Timbs* when both Justices satirically questioned why the incorporation of the Bill of Rights was still being litigated in 2018.[65] Thus, in the event that this Court finds that this

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[63] *Id*. at 687 (citing *McDonald*, 571 U.S. at 764-65, n. 12-13).

[64] *McDonald*, 561 U.S. at 764-65, n.13 ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict. . .) the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines. We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause.").

[65] ALM Media, *Gorsuch, Kavanaugh and Sotomayor Sound Skeptical of States' Civil Forfeiture*, Yahoo Finance (Nov. 28, 2018), https://finance.yahoo.com/news/gorsuch-kavanaugh-sotomayor-sound-skeptical-082359663.html (last visited April 2, 2019) (noting Justice Gorsuch's comment to Indiana Solicitor General Thomas Fisher, "[h]ere we are in 2018 still litigating incorporation of the Bill of Rights. Really?" and Justice Kavanaugh's supporting comment "[w]hy do you have to take into account all of the history, to pick up on Justice Gorsuch's question? Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated?").

right/protection has yet to be incorporated, this Court, in its discretion, may still find that this protection is "'fundamental to our scheme of ordered liberty,' [and/]or 'deeply rooted in this Nation's history and tradition'"[66] and therefore, incorporated and applicable to the states.

3. The District Court incorrectly concluded that no disputed facts were presented at Smack's sentencing hearing.

The District Court also held that Mr. Smack was not entitled to relief because Mr. Smack failed to "demonstrate that the information before the sentencing court was materially false and that the Court relied on false information when imposing [Mr.] Smack's sentence." (A16). In support, the District Court concluded that Mr. Smack's sentence was not "based on any 'disputed' facts" because Mr. Smack conceded "that the Superior Court could consider all counts of the indictment under the minimal indicia of reliability standard. . . ." (A19-20). However, as described below, the sentencing record refutes the District Court's finding that no disputed facts were presented during Mr. Smack's sentencing hearing.

As described in subsection 1, the District Court incorrectly affirmed the State's Court's application of the minimal indicia of reliability evidentiary standard. As such, it logically, but erroneously, follows that the District Court would similarly

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[66] *Timbs*, 139 S.Ct. at 686-87 (citing *McDonald*, 571 U.S. at 767).

conclude that Counsel's concession that "the Superior Court could consider all the counts of the indictment under the minimal indicia of reliability standard" would preclude Mr. Smack's argument that the Sentencing Court relied on false information when imposing Mr. Smack's sentence. However, because the District Court incorrectly affirmed the State Courts erroneous application of the minimal indicia of reliability evidentiary standard, Counsel's concession under the erroneous standard does not now preclude Mr. Smack from arguing that disputed facts were presented and considered by the Sentencing Court.

Additionally, it is factually inaccurate and therefore, an error by the District Court in finding that Mr. Smack conceded "that the Superior Court could consider all counts of the indictment under the minimal indicia of reliability standard. . . ."[67] (A19-20). During the November 9, 2016 oral argument, after ruling that the applicable burden of proof was only a minimal indicia of reliability, the Superior Court sought clarification as to which specific facts Mr. Smack was still contesting in light of the court's ruling on the burden of proof. (A237-46; A249). In response Mr. Smack indicated that he was disputing "the other uncharged aspects, such as Mr. Price's residence and what [was] found in Mr. Price's residence" and "the conduct

[67] This conclusion was solely made by the District Court as such a finding was not made by the Delaware Superior Court or Delaware Supreme Court.

beyond conviction". (A251). Mr. Smack also advised that he would "respond in writing" with more detail in relation to what indicted counts were in dispute. (A251).

In accordance with his representation during the oral argument, Mr. Smack filed a letter with the Superior Court on November 18, 2016. (A258-59). In this letter, Mr. Smack indicated that in light of the Superior Court ruling "that the burden of proof, for purposes of considering aggravating facts/factors at sentencing, is a minimum indicium of reliability, not a preponderance of the evidence", Mr. Smack was only contesting 7 non-convicted counts of the indictment. Mr. Smack further indicated that even "under a minimum indicium of reliability there [was] insufficient evidence for [the Superior Court] to find that [the 7 non-convicted counts were] aggravating facts/factors for purposes of sentencing."[68] (A258-29). The factual record makes it clear that Mr. Smack's November 18, 2016 letter was not a concession to a burden of proof less than a preponderance of the evidence and that "the Superior Court could consider all the counts of the indictment under the minimal indicia of reliability standard". (A19-20; A258-59). Rather, Mr. Smack's letter was

[68] *See also* A259 ("'Thus, under a minimum indicium of reliability, there is insufficient evidence for this Court to find that indicted Count 248 is an aggravating fact/factor for determining Mr. Smack's sentence."); *Id*. ("As Mr. Smack was not physically in possession of the .32 caliber firearm nor in construction possession of the firearm, there is insufficient evidence under the minimum indicium of reliability for this Court to find these indicted counts admissible as aggravating facts/factors for determining Mr. Smack's sentence.").

a direct and detailed response to the Superior Court's question as to what facts were still in contention in light of the Superior Court's ruling that the applicable burden of proof was a minimal indicia of reliability. (A237-46; A249; A258). Thus, the District Court's finding that Mr. Smack conceded that "the Superior Court consider all the counts of the indictment under the minimal indicia of reliability standard" is not supported by the factual record. (A19-20). What is supported by the factual record is that Mr. Smack objected to the consideration by the Sentencing Judge for sentencing purposes of the 74 indicted, but not convicted, counts of the indictment. (A151-54; A155; A157-58; A161-62; A238-46; A249; A251; A258-59).

Additionally, contrary to the District Court's holding, the sentencing record is replete with disputed facts, not proven by a preponderance of the evidence, that were relied upon by the sentencing judge. In his opening brief in support of his habeas petition, Mr. Smack described how he argued during the June 22, 2016 hearing that the evidence did not support the State's characterization of Mr. Smack as a drug kingpin and asserted that the State was "sandbagging" Mr. Smack by making argument that were "beyond the indictment." (A155; A423-24; A439). Mr. Smack also noted during the November 9, 2016 oral argument that he contested "the other uncharged aspects, such as Mr. Price's residence and what [was] found in Mr. Price's residence" as well as all "conduct beyond conviction." (A251; A425). Moreover,

after the oral argument, Mr. Smack submitted a letter to the Sentencing Court on November 18, 2016 which specially identified the counts of the indictment that he contested. (A258-59; A426; A439-40). In that letter, Mr. Smack expressly stated that he would not contest "the Court's consideration at sentencing under the minimal indicium of reliability burden of proof" of 57 of the indicted counts that Mr. Smack was not convicted of, but would contest 7 non-convicted counts of the indictment which did not meet the erroneous "minimal indicia of reliability" burden of proof. (A258-59).

Nevertheless, the Sentencing Court rejected Mr. Smack's argument during the November 23, 2016 sentencing hearing when it stated "we have had this discussion and I have written in the opinion to you guys that there is sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts." (A257; A268). Thus, the record is clear that facts not proven by a preponderance of the evidence were resolved and relied upon by the Sentencing Judge at Mr. Smack's sentencing hearing and therefore, the District incorrectly concluded that no disputed facts were presented and relied upon during Mr. Smack's sentencing.

CONCLUSION

WHEREFORE, Adrin Smack respectfully requests that this Honorable Court overturn the District Court's denial order and opinion and remand this case to the District Court with instructions that the District Court grant Mr. Smack a writ of habeas corpus directing the State of Delaware to conduct a new sentencing hearing with Mr. Smack in which disputed facts raised at the sentencing hearing must be proven by a preponderance of the evidence.

Respectfully Submitted,
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Dated: October 16, 2023

No. 23-1600

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ADRIN SMACK,

Appellant,

vs.

SUPERINTENDENT, MAHANOY SCI; ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND RULES

COUNTERSTATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

The district court had jurisdiction over this matter under 28 U.S.C. § 2254. The district court entered a memorandum and order denying Appellant Adrin Smack's ("Smack") petition for habeas corpus relief ("Habeas Petition") on March 3, 2023. A3–31.[1] This Court has jurisdiction over this Habeas Petition under 28 U.S.C. § 1291 and 28 U.S.C. § 2253(c)(1), as Smack appeals from a final order denying habeas relief of the United States District Court for the District of Delaware and has received a certificate of appealability from this Court (A32).

[1] "A#" refers to pages in Smack's Appendix to the Opening Brief in this Case.

COUNTERSTATEMENT OF THE ISSUES PRESENTED ON APPEAL

Whether the Delaware Supreme Court's decision – "Here, Smack's guilty plea resulted in a sentencing range of two to seventy-six years. To fix the sentence *within* that statutory range, the judge was entitled to consider all facts that had a minimal indicia of reliability—including the intercepted text messages and phone conversations that led to the seventy-seven charges of drug dealing brought against Smack." – was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. *See Smack v. State*, 2017 WL 4548146, at *2 (Del. Oct. 11, 2017) (footnote omitted).

RELATED CASES AND PROCEEDINGS

Appellees are unaware of any related proceedings in this matter.

COUNTERSTATEMENT OF THE CASE

A. Factual Background[2]

On or around August 2014, an FBI Task Force began investigating a drug trafficking organization known as the Sparrow Run Crew. "Evidence obtained during the investigation indicate[d] that this organization [was] responsible for distributing heroin and cocaine base to a wide network of distributors and sub-distributors. The heroin [was] distributed by [Mr. Smack] in quantities ranging from multiple bundles to multiple logs per transaction." Law enforcement believed that Mr. Smack and his Co-Defendant, Miktrell Spriggs, were "co-leaders of the organization and that they pool[ed] money to buy heroin and cocaine from source(s) of supply." The FBI Task Force's investigation included the use of confidential sources to conduct controlled purchases, as well as to enable law enforcement to monitor phone calls between Mr. Smack and these confidential sources.

On April 10, 2015, Resident Judge Richard R. Cooch signed an order authorizing law enforcement to intercept the wireless communications to and from Mr. Smack's cell phone. On April 18, 2015, a phone call between Mr. Smack and his Co-Defendant, Al-Ghaniyy Price, was intercepted. During this call, Mr. Price informed Mr. Smack that he was hiding something behind a radiator in Mr. Price's

[2] This recitation of facts is taken from Smack's Opening Brief on direct appeal to the Delaware Supreme Court (footnotes and citations to the record omitted). A290-91.

residence. In response, Mr. Smack advised Mr. Price to make sure that no one saw him hide the object behind the radiator. Later on that day, law enforcement intercepted a text message from Mr. Price to Mr. Smack advising that "Yo bro it's there." A subsequent search of Mr. Price's residence revealed a military style tactical vest, $16,108, a loaded black Taurus .9-millimeter handgun, and 803 bundles of heroin.

B. Procedural History

On May 26, 2015, a New Castle County grand jury returned a 261-count indictment against multiple defendants, including the appellant, Adrin Smack. A54-140. Smack was charged with seventy-one counts of Drug Dealing (16 *Del. C.* § 4752), one count of Giving a Firearm to a Person Prohibited (11 *Del. C.* § 1454), one count of Possession of Marijuana (16 *Del. C.* § 4674), two counts of Conspiracy Second Degree (11 *Del. C.* § 512), and five counts of Possession of a Firearm by a Person Prohibited ("PFBPP") under two different subsections (11 *Del. C.* § 1448 (a)(4) and (a)(9)). On March 31, 2016, Smack pleaded guilty to four counts of Drug Dealing, one count of PFBPP, and one count of Conspiracy Second Degree. *Smack v. State*, 2017 WL 4548146, at *1 (Del. Oct. 11, 2017). As part of the plea agreement, the State agreed to limit its sentencing recommendation to no more than fifteen years of unsuspended incarceration, and Smack agreed that he would request no less than eight years of unsuspended incarceration. A141.

At Smack's June 22, 2016 sentencing hearing, the prosecutor recounted facts underlying the charges in Smack's indictment and noted that Smack asserted he was not a "kingpin" in a drug dealing enterprise. A151-52. Smack disagreed with the prosecutor's characterization of him as a "kingpin," argued that he was a "retail" level drug dealer, and requested an evidentiary hearing to dispute the "kingpin" characterization. A154-55. The Superior Court continued Smack's sentencing to allow him to develop his claim that he was entitled to an evidentiary hearing. A157-58. After considering the submitted briefing and oral argument, the Superior Court, on November 17, 2016, denied Smack's request for an evidentiary hearing, finding that Delaware Superior Court Criminal Rule 32(a) did not mandate an evidentiary hearing. A255-57. The court determined "all 'that [was] required [was] that the court afford the defendant some opportunity to rebut the Government's allegations,'"[3] and the prosecution was "not required to call witnesses to support its contention that the Defendant was heavily involved in drug trade." A256.

On November 23, 2017, the Superior Court sentenced Smack to an aggregate of fourteen years of incarceration, followed by decreasing levels of supervision. *Smack*, 2017 WL 4548146, at *1; A271-77. Smack appealed, and the Delaware Supreme Court affirmed the judgment of the Superior Court on October 11, 2017.

[3] A256 (quoting *United States v. Sabhnani*, 599 F.3d 215, 258 (2d Cir. 2010) (internal quotations omitted)).

Id. at *3. The United States Supreme Court denied Smack's petition for writ of certiorari on April 16, 2018. *Smack v. Delaware*, 138 S. Ct. 1548 (Apr. 16, 2018).

On April 16, 2019, Smack, through counsel, filed a Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus in the District Court for the District of Delaware. A34; DE1. On March 3, 2023, the District Court denied Smack's petition. *Smack v. DelBalso*, C.A. No. 19-691, 2023 WL 2351917 (D. Del. Mar. 3, 2023); A38. The court declined to issue a certificate of appealability. A38.

On April 4, 2023, Smack filed an appeal from the District Court's denial of his Habeas Petition. On May 1, 2023, Smack filed an application for a certificate of appealability and, on July 26, 2023, this Court granted a certificate of appealability as to Smack's claim that "the trial court deprived him of due process by relying on disputed facts at sentencing without first finding those facts by a preponderance of the evidence." D.I. 9. On October 16, 2023, Smack, through appointed counsel, filed his Opening Brief and Appendix.

C. Sentencing History

Plea Hearing

At Smack's plea hearing on March 31, 2016, the state prosecutor recited the six counts of the indictment to which Smack had agreed to plead guilty, and followed by stating:

> The parties are requesting a presentence investigation to prepare for sentencing. However, there has been an agreement reached. Mr.

> Smack has agreed that he will request no less than eight years of unsuspended Level V time. In turn, the State has agreed that it will cap its recommendation of unsuspended Level V time to 15 years.
>
> This agreement is based upon the early acceptance of responsibility.

A144. After a thorough plea colloquy with Smack, the Superior Court judge found the plea to be knowing, intelligent, and voluntary, and the judge adjudicated Smack guilty of the counts listed in the plea agreement and to which Smack pleaded guilty. A148. The court set sentencing for May 13, 2016. A148. That date was continued to June 22, 2016, at Smack's request. *See* A (Dkt. at 11).

Initial Sentencing Hearing, June 22, 2016

At the June 2016 sentencing hearing, the state prosecutor stated the results of the plea hearing and proffered the following:

> Your Honor, by way of background in this case, during the time in which the FBI Task Force was intercepting Mr. Smack's phone calls, on April 18th, police intercepted a phone call between defendant and a young man named Al-Ghaniyy Price. Price was just barely 18 years old at the time of this call.
>
> During the call, Price told Smack that he was hiding something behind a radiator in his house. He told Smack that it would be in his opening behind the radiator. Mr. Smack then counselled Price to make sure that no one watched him hide the item.
>
> Just a few minutes later, like a good soldier, Mr. Price then texted Mr. Smack back and said, "Yo, Bro, it's there."
>
> How would Mr. Smack, who lives on 4th Street in the City of Wilmington, who lived there throughout this investigation, despite his assertions now to this court that he was homeless – he lived there with

Akia Harley (ph) and her mother and the children – how would he transport his drugs from 4th Street to Sparrow Run and avoid detection?

As Your Honor knows, because the Court took the plea from his sister, Tiffany Smack, he would have somebody else drive him, somebody with no criminal history, who had no reason to be stopped by the police.

Then, he would, because he's undeniably smart, have someone else within the community of Sparrow Run, hold on to his drugs and guns, and so, the police searched the home of Al-Ghaniyy Price, which was on Kemper Drive. A [f]ew blocks from there.

When police searched this house, this is what they found: A military style tactical vest in a trash bag outside the back door of the residence, $11,853 inside a shoe box. In a different shoe box, police found $4,255. They also found a black Taurus .9-millimeter handgun, loaded with one round in the chamber.

THE COURT: Was there any rounds in the clip?

[PROSECUTOR]: Yes, fully loaded; a silver .32-caliber revolver.

Then, inside one duffle bag, police found 777 bundles of Heroin, and Your Honor, as long as I [have] been doing drug cases, I'm really bad at this math. That's 10,101 bags of Heroin, which amounts to 151.515 grams of Heroin.

* * * * *

Inside yet another bag in this residence on Kemper Drive, police found an additional 26 bundles. So an additional 328 bags.

DNA, of course, was run on those guns, and the result provided, quote, "strong support that Mr. Smack was a contributor to the DNA on the magazine of the Taurus."

* * * * *

> Mr. Smack now tells this Court that he's not a drug king pin, that the police got the wrong guy. No one wants to be a drug king pin in here, in this courtroom, in the walls in which Your Honor is presiding. No one wants –
>
> THE COURT: Did he identify for the State the king pins, so to speak?
>
> [PROSECUTOR]: He gave a statement to the police where he admitted to selling Marijuana only.
>
> * * * * *
>
> In court, instead of wanting to be identified as a drug king pin, someone to afraid of, he wants to be identified as someone with a difficult upbringing. He says that he's homeless. The phone calls do not support that. They simply do not. He lived on 4th Street. He lived with his children. He traveled to Sparrow Run every day. It was like his job.

A151-52. The State recited Smack's criminal history, and then requested fifteen years of unsuspended prison time, followed by three years of probation. A153-54.

After a discussion with Smack's counsel, the prosecutor asked to make a record about the materials the State had provided to Smack in discovery, including: the search warrant for Kemper Drive; the return from this executed search warrant; the DNA lab report regarding which of the guns seized from Kemper Drive included and excluded Smack; and the availability of the two Chief Investigating Officers to answer any questions about additional information regarding the items from Kemper Drive, to which the officers had responded that they had no additional information. A154.

Smack's counsel, after some introductory remarks, explained why Smack was not a kingpin and why the State had failed to establish his connection to Kemper Drive and the evidence recovered from that location. A155. Then Smack complained that he was sandbagged by the State's presentation because it went beyond the indictment. A155. The prosecutor responded:

> There's been nothing said this morning by the State that was not included in the massive indictment that has been presented to this Court. All of the drugs that were found in Kemper Drive were charged to both Mr. Price and Mr. Smack, and I must correct the record that the law in the State of Delaware, pursuant to *Mayes v. State*, 604 A.2d 839, which Counsel advises me he is aware of, very clearly indicates that this Court can consider the entire indictment at sentencing.
>
> THE COURT: Is that correct?
>
> [DEFENSE COUNSEL]: I am in agreement that we can certainly consider the entire indictment at sentencing in a case such as this, where we – where there's a broad amount of arguments that the State could be making, and the State could have insisted on a count on which Mr. Smack is taking responsibility for all the items within that residence.
>
> I don't think *Mayes v. State* stands for the principle that – especially when items given to the defense, as part of discovery, doesn't necessarily mean that the State, at the time of the Sentencing Hearing, is going to make an argument that the individual should be responsible for that. Those are two different things.
>
> But – and if what we need to do, Your Honor, is to have every single phone call transcribed and to present it to the Court, I'll need a delay to present every bit of evidence so that Your Honor can see what – the only evidence that we have here, retail sales.

A156. The judge then allowed the parties to confer, but they could not reach an agreement. A156-57. The court provided Smack an opportunity to make his arguments in writing, specifically requiring Smack "to make all of the arguments that are available to you in your first filing." A157. Sentencing was rescheduled for October 21, 2016. A158.

Post-hearing Briefing Regarding Sentencing

On August 15, 2016, Smack filed his *Pre-Sentence Motion in Response to the Court's June 22, 2016 Order Regarding the Scope of Consideration at Mr. Smack's Sentencing Hearing* ("Pre-Sentence Motion"). In that motion, Smack wrote: "[] Mr. Smack does not contest the scope of what the court may consider at his sentencing as it is readily apparent that the Court may even consider arguments of criminal conduct beyond which Mr. Smack has entered a plea of guilty. However, what is at issue is the burden of proof and whether direct testimony subject to cross examination is needed if asserted facts could result in a significantly increased sentence." A161. Smack asserted that the State was required to prove all factual assertions by a preponderance of the evidence for consideration at sentencing (A161), but then noted, "As such, the preponderance of the evidence standard must be the standard of proof for disputed facts at a Delaware criminal sentencing hearing." (A162). Smack concluded: "Where the claims of factual conduct are such that if the claims are believed that it could add a significant time to a sentence, due

process requires that a defendant must be given the ability to cross examine a witness who purports a disputed fact." A162-63.

The State responded to Smack's motion, citing to the Delaware Superior Court Criminal Rule 32 and *Mayes v. State*, 604 A.2d 839 (Del. 1992), as the relevant and controlling authority for the scope and consideration of information at sentencing. *See* A166-70. The State's response included as exhibits copies of the search warrant for Kemper Drive and the Affidavit of Probable Cause and Order for the wiretap of Smack's phone. *See* A174-224. The State asserted that, under Delaware law, Smack could dispute any factual assertions in the Presentence Investigation Report ("PSI") by alerting the court and presenting any information regarding the inaccuracies if the court allows, or the court may elect not to consider the challenged facts. A167. Moreover, the Delaware Supreme Court in *Mayes* specifically held that "[t]o the extent that these allegations were contained in the indictment, the sentencing court was clearly entitled to rely on them because the indictment itself provides sufficient reliability to meet the constitutional standards." *See* A168 (quoting *Mayes*, 604 A.2d at 844).

Post-briefing Hearing

On November 9, 2016, the Superior Court conducted a hearing "solely to determine what information [it] may or may not consider when imposing sentence on Mr. Smack." A229. Specifically, the court wanted the parties to address whether

the court could consider affidavits of probable cause and the application for the wiretap as having sufficient indicia of reliability required for sentencing purposes. A231.

The State asserted that the court could rely on those documents based on the Delaware Supreme Court's decision in *Davenport v. State*, 2016 WL 6156170 (Del. Oct. 21, 2016), which cited to *Mayes* with approval. The Delaware Supreme Court, in a footnote, noted:

> Due process requires that information used in sentencing meet a "'minimal indicium of reliability beyond mere allegation' standard," but the evidence that the Superior Court considered regarding Davenport's past domestic abuse of and violence toward Wilson was sufficiently reliable. *Mayes v. State*, 604 A.2d 839, 840 (Del. 1992) (quoting *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982)). The conduct the Superior Court cites in its sentencing statement was supported by arrest warrants and affidavits, testimony from Wilson's son ([contained in a police report]), and police interview records with other identified individuals in a position to personally observe Wilson's conduct and interactions with Davenport.

Davenport, 2016 WL 6156170, at *3 n.22 (citations to the record omitted).

In response, Smack argued that the minimum indicia of reliability standard applied only to appellate review of sentences in Delaware, not to the burden of proof at the sentencing itself. *See* A233-34. Smack contended that "if you stop and you look at some of the words and you start to break down the individualized words of Mayes, even though they're not coming out and saying that it is a preponderance of the evidence standard, I think, reading between the words, they are." A234. When

questioned by the judge on that point, Smack responded: "So to answer your question, Your Honor, I would assert, most likely in most cases, the minimum indicia of reliability would be the standard of proof." A236. Smack limited that remark by noting that Davenport did not challenge his sentence under the burden of proof. A236.

The Superior Court found that the Delaware Supreme Court maintained that the standard was minimum indicia of reliability. A237. Smack continued to argue that the State had not provided him with sufficient information regarding the facts beyond his conviction so he could challenge that information at sentencing. *See* A243-46. The court asked the State to inform them as to what documentary proof the State intended to rely upon at sentencing. A246-48. The State noted that Smack had not pointed to any specific facts in dispute, making it difficult for the State to determine what additional documents were required. A249-50. Smack's counsel responded, "Your Honor, I – being put on the spot, I can say this much: I'd like to be able to go through the indictment with Mr. Smack. My expectation is the – the vast majority of any of the drug deals, which are small drug deals that are outlined within the indictment, is something that Mr. Smack would take responsibility for. It is the assertion of the other uncharged aspects, such as Mr. Price's residence and what is found in Mr. Price's residence we dispute." A251. The court reserved decision. A252.

Before the Superior Court issued its decision, the State sent the judge a letter referencing Smack's remarks limiting his dispute to what was recovered from Mr. Price's home. A254. Because Price, for the first time at his own sentencing, asserted that he intended to sell the drugs found in his home, "the State will not ask the Court to consider those drugs at sentencing." A254.

On November 17, 2016, the Superior Court issued its decision on Smack's motion, holding: "(1) Defendant is not entitled to an evidentiary hearing and (2) the court may consider matters so long as they are accompanied by a minimal indicia of reliability." A255. In light of the Superior Court's decision, Smack asked the court not to consider Counts 248-253 and Count 258 of the indictment, based on his review of the police reports in which he contended that there was not enough evidence to establish minimum indicia of reliability. A258-59.

Sentencing Hearing, November 23, 2016

At the November 2016 sentencing hearing, the prosecutor recited the relevant terms of the plea agreement and listed the guidelines adopted by the Delaware Sentencing Accountability Commission ("SENTAC") for each of the charges to which Smack pleaded guilty, noting that the State's recommendation of a total of fifteen years of incarceration for the charges listed in the plea agreement was within those guidelines. A260-61. The court accepted the prosecutor's offer to put Smack's

charges in context with other sentenced defendants charged in the same indictment. A261.

Smack's counsel then presented his arguments as to why the court should limit Smack's jail time to eight years. A261-64. Counsel specifically argued that Smack was not a kingpin, instead portraying him as a retail drug dealer. A262. Counsel reminded the court about Smack's childhood hardships and his inability to find gainful employment to support his children. A262. The judge noted that "I fully believe that Mr. Smack probably came into this life with two strikes against him, and he lives in an environment where it is difficult to succeed. But what I don't believe is that this gives him license to prey on other people and make their lives even worse than his." A262. Before having Smack speak directly to the judge, his counsel closed his presentation by reminding the court that he had "outlined all of the counts that we believed would meet the minimum indica of reliability standard." A264.

The court offered the State an opportunity to address Smack's claim that he was not a kingpin, to which the prosecutor responded:

> Your Honor, I think if you can gather sufficient evidence to charge 77 counts of drug dealing in two months of intercepted phone calls, that would suggest that that is certainly a full-time job. And that suggestion is backed up by all of the cases that Your Honor has sentenced.
>
> Your Honor has sentenced numerous people, not only for purchasing drugs in this case, but in wrapping up all of their other cases.

So, Your Honor actually is in such a unique position to have seen individuals who were committing other crimes in order to feed their drug habit, and has such a unique picture on the, sort of, global problem that this was creating.

And the General Assembly has seen that to charge, to enable the court to give higher minimum mandatories when there is a greater quantity of drugs.

But, having seen those faces, Your Honor knows, and the State knows, and certainly Mr. Smack ought to know, that when you are directly supplying an addict, this is someone who becomes known to you.

And, so, many of the problems that Your Honor heard about, many of the mothers who came in with their children at sentencing, many of the loved ones speaking of children who are affected by their loved one's heroin abuse are, certainly, people who maybe weren't known to Mr. Smack, but he knew them as people.

And, so, is there a statutory difference in the way that we treat people who supply large quantities of heroin and profit the most? Yes.

But, there is something different about the act of supplying daily heroin to a person with a family that is counting on them, as opposed to showing up at a parking lot with a trunk full of heroin and dropping it off as a distributor.

Yes, they are punished differently; absolutely.

Moving lots of weight and profiting in great amounts is certainly something that the State sees as a significant problem.

But we can't minimize seeing the same people again and again.

And, again, they are on the indictment, people who bought from Mr. Smack.

> And, so, the State's position is as it always has been. He is a significant drug dealer.

A264-65.

In rebuttal, Smack's counsel contended that "slightly more than one heroin deal per day over a two month time period" was "not even a reasonably high-level retail dealer." A266. He maintained that the State provided "no support for this theory that the retail drug dealer is considered a greater evil than the wholesale individuals that are supplying them." A267. Smack then addressed the court and explained, "So, if the drug – I'm not calling them up and telling them to come see me. They come to the neighborhood, and I'm right there. So, this, like – basically, I had to just make a way for me and my kids to live...." A267.

Ultimately, the judge expressed his reasoning for Smack's sentence:

> I fully understand Mr. Smack's contentions and [his counsel's] contentions, essentially that, through no real fault of his own, Mr. Smack lives in an environment where he has really no means of supporting himself other than illegal conduct.
>
> I can understand that.
>
> I understand that Mr. Smack did not choose to be born into the life in which he has lived.
>
> But on the other side of the coin is, I think of all the victims of his crime. And not only the people who purchased the drugs which he sells, but also their loved ones and families.
>
> I think about all of the lives he has destroyed.

> I think about the fact that he has willingly destroyed them because it provides him with money.
>
> And I believe that, in addition to the value of punishment, there is also here a need to try to deter others from doing this. And, also, frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.
>
> I have to balance those.
>
> The General Assembly has, in the large part, done that balancing for me by specifying the realm of the sentences to be imposed.

A268-69. The judge then sentenced Smack to an aggregate of fourteen years of incarceration, followed by eighteen months of probation. A269.

D. The Delaware Supreme Court's Decision on Appeal

Smack appealed, alleging that the Superior Court violated his due process rights by denying him an evidentiary hearing and applying the wrong burden of proof. *See* A282-327. The Delaware Supreme Court disagreed: "Because this Court has previously upheld the use of a minimal indicia of reliability standard to consider evidence offered at a sentencing hearing, and due process does not require an evidentiary hearing, we affirm the Superior Court's decision." A364; *Smack v. State*, 2017 WL 4548146, at *1 (Del. Oct. 11, 2017). The court then explained its rationale regarding the evidentiary standard at sentencing:

> First, this Court settled the evidentiary standard in *Mayes v. State*, holding that "in reviewing a sentence within statutory limits, this Court will not find error of law or abuse of discretion unless it is clear from the record below that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal

> indicium of reliability." Smack argues *Mayes* does not apply because the standard was not contested. But the fact the standard was not at issue is irrelevant—the Court explicitly stated the sentencing judge "comported with due process by relying on information meeting the 'minimal indicium of reliability beyond mere allegation' standard." Subsequent cases rely on *Mayes* in applying this standard.
>
> Smack relies on a series of federal cases where the court applied a preponderance of the evidence standard to establish facts warranting a sentence enhancement under the federal sentencing guidelines. According to Smack, the same burden of proof should apply to the State when it argued for a harsher sentence based on Smack's status as a drug kingpin. The federal cases, however, are inapposite. Under the federal sentencing guidelines, the judge must find facts at sentencing using evidentiary burdens because those factual determinations can cause an increase in the sentencing ranges under the guidelines. Here, Smack's guilty plea resulted in a sentencing range of two to seventy-six years. To fix the sentence *within* that statutory range, the judge was entitled to consider all facts that had a minimal indicia of reliability—including the intercepted text messages and phone conversations that led to the seventy-seven charges of drug dealing brought against Smack. The court could and did find from these facts that Smack was more than a street-level drug dealer.

A366-67; *Smack*, 2017 WL 4548146, at *2 (cleaned up and footnotes omitted).

Petition for Writ of Certiorari

After the Delaware Supreme Court denied his claims, Smack sought to challenge the state court by filing a petition for writ of certiorari in the United States Supreme Court on January 9, 2018. A369-96. Smack asked the Supreme Court to decide whether "the Due Process Clause of the Fourteenth Amendment to the United States Constitution require[s] disputed facts presented at a sentencing hearing to be proven by a preponderance of the evidence standard[.]" A370. In his petition,

Smack argued, in relevant part: "Precedent of this Court all but expressly mandates that aggravating sentencing facts must be proven by a preponderance of the evidence under due process, but there is a need for this supposition to be conclusively stated, so as to prevent the states' inadvertent infringement of a criminal defendant's due process rights during sentencing." A394.

On March 12, 2018, the State filed a brief in opposition, asserting that no disputed facts were presented at the sentencing hearing. A402.

On April 16, 2018, the United States Supreme Court denied the petition for a writ of certiorari. A410.

E. The District Court's Denial of Smack's Habeas Petition

In his Habeas Petition, Smack claimed that the state courts deprived him of his due process rights by failing to require a preponderance of the evidence standard regarding disputed facts at sentencing and that he was entitled to an evidentiary hearing to challenge the contested facts. A420. The State Respondents argued, *inter alia*, that Smack's Habeas Petition should be denied because the state courts' decisions were not contrary to, or an unreasonable application of, clearly established federal law because his reliance on certain United States Supreme precedent was misplaced. A487, A489. Respondents noted that the cases cited by Smack "stand for the broad proposition that the Government need not establish disputed sentencing facts used to enhance a sentencing range by more than a preponderance of the

evidence to satisfy due process" and that "[n]one of the cases discuss the admissibility of evidence standard where the facts are not disputed, nor what standard of proof is required regarding disputed facts within the sentencing range." A487. Respondents contended that "[t]he common thread in each of the cases upon which Smack relies is the presence of a state statutory or federal sentencing guideline enhancement," which Smack's case did not involve. A490. Respondents also asserted that the state courts' rulings that denied Smack's request for an evidentiary hearing was meritless under the deferential standard contained in 28 U.S.C. § 2254(d), as "Smack has failed to offer any United States Supreme Court decision in support of this claim, much less a clearly established rule of law." A498.

In denying Smack's habeas petition, the District Court found Smack's reliance on cases involving statutory enhancement provisions was misplaced, noting that:

> even if the aforementioned cases could, or should, be viewed as articulating a general proposition that state sentencing courts must apply a preponderance of evidence standard when considering disputed facts that will alter a sentencing range, they do not constitute clearly established Supreme Court precedent mandating a preponderance of the evidence standard in a state sentencing proceeding where the sentence is within statutory limits and there is no statutory sentencing enhancement.

A14; *Smack*, 2023 WL 2351917, at *5. In rejecting Smack's arguments about the absence of an evidentiary hearing, the District Court further concluded that "Petitioner does not identify any Supreme Court precedent requiring a state court to hold an evidentiary hearing in circumstances similar to this" and that his claim "does

not warrant relief even if it were to consider Federal Rule of Criminal Procedure 32 as providing guidance in this situation." *Id.* at *9.[4]

[4] Smack has since abandoned his due process claim regarding an evidentiary hearing.

SUMMARY OF THE ARGUMENT

The United States Supreme Court has consistently held that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [it]." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2000). Smack failed to identify any United States Supreme Court decision promulgating a rule that disputed facts raised at a sentencing hearing must be proven by a preponderance of the evidence. Therefore, to the extent Smack established that he disputed any facts relied upon by the sentencing judge, the Delaware state courts' application of the minimal indicia of reliability standard does not warrant relief under 28 U.S.C. § 2254(d). *See Carey v. Musladin*, 549 U.S. 70, 76-77 (2006) (noting that a lack of Supreme Court holdings on a specific issue precludes finding that the state court decision on that issue was contrary to or unreasonable application of clearly established federal law).

ARGUMENT

I. Standard and Scope of Review

This Court's review of the District Court's decision is plenary because no evidentiary hearing was held. *Lewis v. Horn,* 581 F.3d 92, 100 (3d Cir. 2009). Thus, this Court reviews the Delaware courts' decisions under "the same standard that the District Court was required to apply," namely, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Id.* (quotation omitted).

AEDPA imposes a "highly deferential standard for evaluating state-court rulings" on *habeas* review, which "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett,* 559 U.S. 766, 773 (2010) (quotations omitted). AEDPA's "difficult to meet" standard, *Harrington v. Richter,* 562 U.S. 86, 102 (2011), establishes "a substantially higher threshold for obtaining relief than *de novo* review," *Renico,* 559 U.S. at 773 (quotation omitted). Thus, AEDPA "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Richter,* 562 U.S. at 102-03 (quotation omitted).

AEDPA prohibits federal courts from granting habeas relief unless the state court's decision "was contrary to" federal law then clearly established in the holdings of the United States Supreme Court, or "involved an unreasonable application of" such law, or "was based on an unreasonable determination of the

facts" in light of the record before the state court. 28 U.S.C. § 2254(d)(1), (2); *see Richter,* 562 U.S. at 100 (citing *Williams v. Taylor,* 529 U.S. 362, 412 (2000)).

A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth" in Supreme Court precedent, *Williams,* 529 U.S. at 405, or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different" from that reached by the Supreme Court, *id.* at 406.

A state court decision is "an unreasonable application of" clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id*. at 407-08. This Court may not grant habeas relief merely because it believes that "the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Renico,* 559 U.S. at 773 (quotation omitted). "Rather, that application must be objectively unreasonable." *Id.* (quotation omitted). Thus, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter,* 562 U.S. at 102 (citation omitted).

A state court decision is based on "an unreasonable determination of the facts" only if the state court's factual findings are "'objectively unreasonable in light of the evidence presented in the state-court proceeding.'" *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003) (quoting 28 U.S.C. § 2254(d)(2)). Moreover, the factual

determinations of state trial and appellate courts are presumed to be correct. *Duncan v. Morton,* 256 F.3d 189, 196 (3d Cir. 2001). This presumption applies to implicit factual findings as well. *Washington v. Sobina*, 509 F.3d 613, 621 (3d Cir. 2007). The petitioner bears the burden of "rebutting the presumption by 'clear and convincing evidence.'" *Rice v. Collins,* 546 U.S. 333, 339 (2006) (quoting 28 U.S.C. § 2254(e)(1)).

The Court's analysis under AEDPA first requires a determination of "what arguments or theories supported or ... could have supported, the state court's decision." *Richter,* 562 U.S. at 102. The Court must then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* The Court may only grant habeas relief if the petitioner demonstrates that the state court decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 103.

II. Clearly Established Law Governing Evidentiary Standard for Disputed Facts at Sentencing

Smack asserts that *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), *Nichols v. United States*, 511 U.S. 738 (1994), *United States v. Watts*, 519 U.S. 148 (1997), *Townsend v. Burke*, 334 U.S. 736 (1948), and *United States v. Tucker*, 404 U.S. 443 (1972), constitute the clearly established United States Supreme Court precedent

governing the due process rights of defendants at sentencing, and that they establish that due process requires disputed facts to be proven by a preponderance of the evidence. O.B. at 17. Not so. In fact, Smack acknowledged in his petition for a writ certiorari that the United States Supreme Court "has never explicitly articulated the burden of proof to be applied to contested sentencing facts in a state sentencing proceeding." A386.

The cases that Smack asserts are controlling do not clearly provide the holding he seeks. In *McMillan*, the Supreme Court held that a Pennsylvania statute allowing for a five-year minimum statutory sentencing enhancement if the state proved a fact (that defendant visibly possessed a firearm during the commission of a felony) by a preponderance of the evidence satisfied due process. 477 U.S. at 91. In *Nichols*, the Supreme Court held that a federal sentencing court could consider a defendant's previous uncounseled misdemeanor conviction when applying a sentencing enhancement under the United States Sentencing Guidelines ("USSG"). 511 U.S. at 746-47. Likewise, in *Watts*, the Supreme Court held that a federal sentencing court could consider conduct for which a defendant was acquitted to enhance their sentence under the USSG, "so long as that conduct has been proved by a preponderance of the evidence." 519 U.S. at 158. Each of the cases upon which Smack relies relates to a state statutory or federal sentencing guideline enhancement. Smack's case, however, did not involve a statutory sentencing enhancement

provision. The prosecutor in Smack's case was arguing in support of a sentence that was *within* the statutory sentencing range, not an increase of it. *See Smack*, 2017 WL 4548146, at *2.

Notably, Smack argues that the Delaware Supreme Court's decision was contrary to clearly established federal law based not on what the United States Supreme Court has held, but "for what it does not say." O.B. at 21. Smack seeks reversal because "the Supreme Court never suggested that an evidentiary burden of proof *less* than a preponderance of the evidence would be sufficient." O.B. at 21. But AEDPA "requires federal habeas courts to deny relief that is contingent on a rule of law not clearly established by United States Supreme Court precedent at the time the state court conviction became final." *Williams*, 529 U.S. at 380. Because the holdings Smack asserts are controlling have all, to the extent they even address the issue presented here, been made in the context of statutory sentencing provisions where the evidence in dispute would change the sentencing range, the cases cannot be construed as clearly established federal law controlling Smack's claim in federal habeas. *See Carey*, 549 U.S. at 76 (holding that the state court's decision was not contrary to or an unreasonable application of clearly established federal law where "[i]n contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct ... is an open question in our jurisprudence."); *see also Rosen v. Superintendent Mahanoy SCI*, 972 F.3d 245, 261 (3d Cir. 2020)

(denying habeas relief where petitioner failed to establish that state court's admissibility ruling was petitioner's "credible argument about where the Supreme Court *should* draw the line ... does not satisfy the deferential standard under AEDPA" and noting that "[i]t is not enough that Rosen's argument is persuasive; it must be required by law and the state court's contrary decision must not just be incorrect, but unreasonable.").

> This Court has set out a two-step analysis under Section 2254(d):
>
> > whereby "federal habeas courts first ... identify whether the Supreme Court has articulated a rule specific enough to trigger 'contrary to' review; and second, only if it has not, ... evaluate whether the state court unreasonably applied the relevant body of precedent." The plain language of § 2254(d)(1) applies to "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law"—applying the latter to both the "contrary to" and "unreasonable application" prongs of § 2254(d)(1).
> >
> > * * * * *
> >
> > "Clearly established" Supreme Court law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Furthermore, in determining what is "clearly established," Supreme Court decisions cannot be viewed "at a broad level of generality," but instead must be viewed on a "case-specific level." The "clearly established Federal law" provision requires Supreme Court decisions to be viewed through a "sharply focused lens."

Rosen, 972 F.3d at 253 (citing, *inter alia*, *Williams*, 529 U.S. at 412; *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999); *Fischetti v. Johnson*, 384 F.3d 140, 148 (3d Cir. 2004)); *accord House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) ("Supreme Court holdings – the exclusive touchstone for clearly

established federal law – must be construed narrowly and consist only of something akin to on-point holdings.").

The District Court's analysis is consistent with this Court's framework:

> The Supreme Court has consistently held that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [it]." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2000). Therefore, the Delaware state courts' refusal to apply a preponderance of the evidence standard during Petitioner's sentencing, and its application of the of the minimal indicia of reliability standard, does not, on its own, warrant relief under § 2254(d). *See Carey v. Musladin*, 549 U.S. 70, 76-77 (2006) (noting that a lack of Supreme Court holdings on a specific issue precludes finding that the state court decision on that issue was contrary to or unreasonable application of clearly established federal law).

See A14-15; *Smack*, 2023 WL 2351917, at *4 (footnote omitted).

Unlike the cases upon which he relies, Smack's case did not involve a statutory sentencing enhancement provision. The prosecutor in Smack's case was arguing in support of a sentence that was *within* the statutory sentencing range, not an increase of it. *See Smack*, 2017 WL 4548146, at *2. As the Delaware Supreme Court found:

> Under the federal sentencing guidelines, the judge must find facts at sentencing using evidentiary burdens because those factual determinations can cause an increase in the sentencing ranges under the guidelines. Here, Smack's guilty plea resulted in a sentencing range of two to seventy-six years. To fix the sentence *within* that statutory range, the judge was entitled to consider all facts that had a minimal indicia of reliability—including the intercepted text messages and phone conversations that led to the seventy-seven charges of drug dealing brought against Smack.

Id. (internal citations omitted) (emphasis in original).

The Delaware Supreme Court properly found that the federal cases cited by Smack were inapplicable. Moreover, when making factual findings for sentencing purposes, federal circuit courts have also generally held that a district court "may consider any information which bears sufficient indicia of reliability to support its probable accuracy." *United States v. Zuniga*, 720 F.3d 587, 590 (5th Cir. 2013) (citing *United States. v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012)). The USSG permit the sentencing court to consider certain evidence "so long as such evidence has sufficient or minimally adequate indicia of reliability and the defendant has an opportunity to rebut such evidence that he perceives is erroneous." *United States v. Christman*, 509 F.3d 299, 305 (6th Cir. 2007) (citing *United States v. Moncivais*, 492 F.3d 652, 658 (6th Cir. 2007)). *See also United States v. Gibson*, 816 Fed. Appx. 698, 703 (3d Cir. 2020) ("Because the Federal Rules of Evidence do not apply in sentencing proceedings, however, hearsay evidence need only have minimal indicia of reliability to be considered. *United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007). The District Court could certainly have found such minimal indicia of reliability satisfied by Probation Officer McVay's account of her call to the Magisterial Judge's chambers.").

Similarly, under Delaware law, "a defendant has no legal or constitutional right to appeal a statutorily authorized sentence simply because it does not conform

to the sentencing guidelines established by the Sentencing Accountability Commission." *Mayes*, 604 A.2d at 845; *accord Morris v. State*, 2014 WL 641988, at *1 (Del. Feb. 6, 2014). To the extent the Delaware Supreme Court was interpreting State law, this Court is bound by that interpretation. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law ... binds a federal court sitting in habeas corpus.").

III. Smack's Sentencing Complied With the Due Process Clause of the Fourteenth Amendment.

As the United States Supreme Court has explained:

> We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. See, *e.g., Williams v. New York,* 337 U.S. 241, 246 (1949) ("[B]oth 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 discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed *within limits fixed by law* " (emphasis added)). As in *Williams,* our periodic recognition of judges' broad discretion in sentencing-since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range, Note, The Admissibility of Character Evidence in Determining Sentence, 9 U. Chi. L.Rev. 715 (1942)-has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature. See, *e.g., United States v. Tucker,* 404 U.S. 443, 447 (1972) (agreeing that "[t]he Government is also on solid ground in asserting that a sentence imposed by a federal district judge, *if within statutory limits,* is generally not subject to review" (emphasis added));

> *Williams,* 337 U.S., at 246, 247 (explaining that, in contrast to the guilt stage of trial, the judge's task in sentencing is to determine, "within fixed statutory or constitutional limits[,] the type and extent of punishment after the issue of guilt" has been resolved).

Apprendi v. New Jersey, 530 U.S. 466, 481–82 (2000). And the District Court also properly noted the parameters of due process rights in sentencing:

> Sentencing courts have long "exercise[d] a wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams v. New York*, 337 U.S. 241, 246 (1949); *see Witte v. United States*, 515 U.S. 389, 399-401 (1995) (noting that the Due Process Clause does not provide convicted defendants at sentencing the same constitutional protections afforded to defendants at a criminal trial). Nevertheless, a sentencing court violates a defendant's right to due process if it bases a defendant's sentence on information that is materially false and if the defendant was not given notice and an opportunity to contest the facts upon which the sentencing court relied in imposing the sentence. *See United States v. Tucker*, 404 U.S. 443, 447 (1972) (finding a due process violation when the "sentence [was] founded at least in part upon misinformation of constitutional magnitude."); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (finding that the sentencing proceedings violated due process due to "the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide."). In order to prevail on a claim that a sentence Sentencing courts have long "exercise[d] a wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams v. New York*, 337 U.S. 241, 246 (1949); *see Witte v. United States*, 515 U.S. 389, 399-401 (1995) (noting that the Due Process Clause does not provide convicted defendants at sentencing the same constitutional protections afforded to defendants at a criminal trial). Nevertheless, a sentencing court violates a defendant's right to due process if it bases a defendant's sentence on information that is materially false and if the defendant was not given notice and an opportunity to contest the facts upon which the sentencing court relied in imposing the sentence. *See United States v. Tucker*, 404

> U.S. 443, 447 (1972) (finding a due process violation when the "sentence [was] founded at least in part upon misinformation of constitutional magnitude."); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (finding that the sentencing proceedings violated due process due to "the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide."). In order to prevail on a claim that a sentence was based on materially false information or on a material misapprehension of fact, a defendant must demonstrate that the information before the sentencing court was materially false and that the court relied on the false information when imposing the sentence. *See Tucker*, 404 U.S. at 447. was based on materially false information or on a material misapprehension of fact, a defendant must demonstrate that the information before the sentencing court was materially false and that the court relied on the false information when imposing the sentence. *See Tucker*, 404 U.S. at 447.

A15-16; *Smack*, 2023 WL 2351917, at *6.

Smack was charged with seventy-seven counts of Drug Dealing and pleaded guilty to four counts of Drug Dealing, a weapons charge and conspiracy. He did not contest the facts underlying the indictment or the charges to which he pled guilty. Indeed, Smack never contested that he was a drug dealer. In pleading guilty to the Drug Dealing counts, Smack acknowledged that he either possessed, with the intent to deliver, or delivered, various quantities of heroin on separate occasions. A146-49. At his original aborted sentencing hearing, the State informed the court that Smack was someone who had been "known to the police for a long time," that many people had purchased drugs from Smack, that Smack could be heard on the phone telling people to be mindful of police and undercover cars, and that with Smack's

history and the quantity of money and drugs in his possession he deserved fifteen years of incarceration. A152-53. Smack described his drug dealing activity as that of a "small-time retail Heroin salesman." A155. Smack again acknowledged that he was a "retail drug dealer" at his second sentencing hearing. A262. The prosecutor and Smack both described his criminal activity as the sale of heroin to individual addicts. Smack simply takes umbrage at the prosecutor's use of the term "kingpin" at the initial sentencing hearing, preferring the term "retail drug dealer." A262. Moreover, to the extent Smack complained about the drug charges related to Price's residence, the prosecutor specifically informed the court ahead of the second sentencing hearing not to consider the drugs found at Price's home. A254. Smack's disagreement with the prosecutor's characterization of his conduct does not amount to a "disputed fact" upon which the Superior Court relied to apply a statutory or guideline-based sentencing enhancement.

Smack's claim of disputed facts was a moving target in state court. He objected to the sentencing court's reliance on the indictment other than the counts to which he entered a guilty plea, but he later acknowledged that he would likely accept responsibility on the majority of the indicted counts. A251. Smack appeared to contend that the State was required to provide additional evidence regarding each and every count, which the State did in fact do. The State proffered the affidavit of probable cause for the search warrant and the application for the wiretap.

Significantly, beyond his claims about the drugs in Price's home, Smack has not alleged that any of the documents provided to the sentencing judge included any materially false or inaccurate information. As the prosecutor noted at the second sentencing, the judge had personally sentenced other defendants included in the same indictment and thus was familiar with evidence in the case.

Smack had ample opportunity to review the evidence and the PSI, and he heard the prosecutor's initial remarks at the first sentencing hearing. The Superior Court judge gave Smack the opportunity to review the evidence and to make written and oral arguments. Smack did not point to any misinformation in the PSI, but he challenged only the prosecutor's assertion that he was a kingpin and that the drugs at Kemper Drive could be attributed to him. The prosecutor made neither assertion at the second and final sentencing hearing. Indeed, the prosecutor and Smack both argued that he was a retail drug salesman. Smack cannot point to any lack of process or resulting prejudice. The judge sentenced Smack well within the sentencing range agreed upon by the State and Smack in the plea agreement, which was also well below the statutory maximum.

CONCLUSION

For the reasons set forth above, Appellees respectfully request that this Court affirm the District Court's decision below.

Respectfully submitted,

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December 15, 2023

N THE UN TED STATE COURT O APPE LS
FOR THE THIRD CIRCUIT

No. 23-1600

ADRIN SMACK,
APPELLANT,

v.

SUPERINTENDENT MAHANOY SCI,
APPELLEE,

and

ATTORNEY GENERAL OF THE STATE OF DELAWARE,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE (D. Del. No. 1:19-cv-00691-GBW)

REPLY BRIEF OF APPELLANT

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Dated: January 23, 2024

TABLE OF CONTENTS
BRIEF

TABLE OF AUTHORITIES

FEDERAL CASES

UNITED STATES CONSTITUTION

UNITED STATES SUPREME COURT RULES

UNITED STATES SENTENCING GUIDELINES

ARGUMENT

I. The United States Supreme Court clearly established that to comply with United States Constitution, due process requires disputed facts relied upon to sentence a defendant be proven by a preponderance of the evidence.

A. Due process mandates that disputed facts relied upon by the sentencing judge must be proven by a preponderance of the evidence.

Although the United States Supreme Court clearly established in *McMillan v. Pennsylvania*, *Nichols v. United States*, and *United States v. Watts* that due process requires disputed sentencing facts to be proven by a preponderance of the evidence,[1] the Respondents continue to erroneously assert that the holdings in these cases do not apply to Mr. Smack because Mr. Smack's case did not involve state statutory or federal sentencing guideline enhancement."[2] The fact that Mr. Smack's case did not involve a statutory or federal sentencing guideline enhancement is irrelevant as the Supreme Court's holdings in *McMillan*, *Nichols*, and *Watts* were premised on what is the burden of proof for disputed fact that is relied upon by a sentencing court in order to meet the Due Process Clause of either the Fifth or Fourteenth Amendment.[3]

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[1] *United States v. Watts*, 519 U.S. 148, 156-57 (1997); *Nichols v. United States*, 511 U.S. 738, 747-49 (1994); *McMillan v. Pennsylvania*, 477 U.S. 79, 84-87, 91-93 (1986).

[2] Respondents' December 15, 2023 Answering Brief at 29, 30, hereinafter cited as "Answer at _."

[3] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. at 84-87, 91-93.

As noted in the Opening Brief,[4] the United States Supreme Court in *McMillan* held that Pennsylvania's Mandatory Minimum Sentencing Act complied with the Due Process Clause of the Fourteenth Amendment as the Pennsylvania statute required the contested sentencing fact of being visibly in possession of a firearm at the time of the offense to be proven by a preponderance of the evidence.[5] The United States Supreme Court in *McMillan* noted:

> Like the court below, we have little difficulty concluding that in this case the preponderance standard satisfies due process. Indeed, it would be extraordinary if the Due Process Clause as understood in *Patterson* plainly sanctioned Pennsylvania's scheme, while the same Clause explained in some other line of less clearly relevant cases imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment.[6]

Similarly, in *United States v. Watts*, the Supreme Court held that acquitted conduct, which the petitioner asserted could never serve as a basis for a sentencing enhancement, could be used as a sentencing enhancement under the United States Sentencing Guidelines so long as the acquitted conduct had been proven by a preponderance of the evidence.[7] In support of this holding, the Supreme Court expressly cited to its prior decision in *McMillan* where the Court "held that the

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[4] Mr. Smack's October 16, 2013 Opening Brief at 18-19, hereinafter cited as "Opening at _."

[5] *McMillan*, 477 U.S. at 81, 84-87, 89-93.

[6] *Id*. at 91.

[7] Opening at 20-22 (citing *Watts*, 519 U.S. 149, 154, 155-57).

application of the preponderance standard at sentencing generally satisfies due process."[8]

Furthermore, in *Nichols*, the Supreme Court ruled that "consistent[] with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."[9] As such, the Court held "consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction . . . is also valid when used to enhancement punishment at a subsequent conviction."[10]

In each of the above cases, the United States Supreme Court held that the Due Process Clause was satisfied when the disputed sentencing facts were proven by a preponderance of the evidence.[11] At no point did the United States Supreme Court condition the applicability of the Due Process Clause and what is required under the Due Process Clause at a sentencing hearing on the presence of a statutory or federal sentencing guideline enhancement.[12] Thus, contrary to the Respondents erroneous

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[8] *Watts*, 519 U.S. at 156.

[9] Opening at 19-20 (*Nichols*, 511 U.S. at 748).

[10] *Nichols*, 511 U.S. at 748-49.

[11] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. at 84-87, 91-93.

[12] *Watts*, 519 U.S. at 156 (citing *Nichols*, 511 U.S. at 747-48; *Dowling v. United States*, 493 U.S. 342, 349 (1990); *McMillan*, 477 U.S. at 91-92; U.S.S.G. §

assertion, the United States Supreme Court's decision in *McMillan*, *Nichols*, and *Watts* clearly establish the pertinent federal constitutional law applicable to Mr. Smack's case and that is that the Due Process Clause of the Fourteenth Amendment required contested sentencing facts to be proven by a preponderance of the evidence.[13]

Similarly, the Respondents assertion that *McMillan*, *Nichols*, and *Watts* do not constitute the applicable clearly established federal law because, unlike in Mr. Smack's case, those cases were decided "in the context of statutory sentencing provisions where the evidence in dispute would change the sentencing range", has no merit. Again, the Respondents' argument simply disregards the fact that the Supreme Court's holdings in *McMillan*, *Nichols*, and *Watts* are based upon what is required

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6A1.3, cmt) ("For the reasons, 'an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.' The Guidelines state that it is 'appropriate' that facts relevant to sentencing be proved by a preponderance of the evidence, and we have held that application of the preponderance standard at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (citing *McMillan*, 477 U.S. at 91) ("Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 91 ("Like the court below, we have little difficulty concluding that in this case the preponderance standard satisfies due process.").

[13] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. at 84-87, 91-93.

under the Due Process Clause, not whether or not the disputed facts would result in a different sentencing range,[14] and for this reason the argument is meritless.

Additionally, the Respondents citation to *Carey v. Musladin*, 549 U.S. 70 (2006) and *Rosen v. Superintendent Mahanoy SCI*, 972 F.3d 245 (3d Cir. 2020) do not save their argument. Unlike in *Carey* and *Rosen* where "the absence of Supreme Court precedent . . . [was] fatal to" the petitioner's habeas claim,[15] Mr. Smack has expressly identified the applicable United States Supreme Court case law (*i.e.* the clearly established federal law) and described those cases applicability to Mr.

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[14] *Watts*, 519 U.S. at 156 (citing *Nichols*, 511 U.S. at 747-48; *Dowling*, 493 U.S. at 349; *McMillan*, 477 U.S. at 91-92; U.S.S.G. § 6A1.3, cmt) ("For the reasons, 'an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.' The Guidelines state that it is 'appropriate' that facts relevant to sentencing be proved by a preponderance of the evidence, and we have held that application of the preponderance standard at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (citing *McMillan*, 477 U.S. at 91) ("Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 91 ("Like the court below, we have little difficulty concluding that in this case the preponderance standard satisfies due process.").

[15] 972 F.3d at 258 ("Given the limitations of AEDPA, the absence of Supreme Court precedent addressing the use of compelled statements given to the government's mental health expert as impeachment evidence is fatal to Rosen's claim here."); 549 U.S. at 76-77 ("Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators courtroom conduct of the kind involved here, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1).").

Smack's state sentencing proceedings. As such, the Respondents reliance on *Carey* and *Rosen* is misplaced and their assertion that *McMillan*, *Nichols*, and *Watts* do not constitute the clearly established federal law because the disputed facts would not have changed the applicable sentencing range is without merit.

The Respondents also attempt to persuade this Court that Mr. Smack's argument that *McMillan*, *Nichols*, and *Watts* constitute the applicable clearly established federal law is based on unspoken dicta by quoting and taking out-of-context specific portions of the Opening Brief.[16] In his Opening Brief,[17] Mr. Smack described the significance of the *Watts* opinion and how the facts of *Watts* parallel's Mr. Smack's situation due to the Sentencing Court considering the 74 non-convicted counts of the indictment. Specifically, Mr. Smack asserted:

> The Supreme Court's holding in *Watts* is significant not only for what it says, but also for what it does not say. While the Supreme Court acknowledged that a standard of proof less stringent than beyond a reasonable doubt was permissible, the Court left open the possibility that in some circumstances, a burden of proof *stronger* than a preponderance of the evidence, such as clear and convincing evidentiary standard may be required. However, the Supreme Court never suggested that an

[16] Answer at 30 (citing Opening at 21) ("Notably, Smack argues that the Delaware Supreme Court decision was contrary to clearly established federal law based not on what the United States Supreme Court has held but 'for what it does not say.'"); *Id*. (citing Opening at 21) ("Smack seeks reversal because 'the Supreme Court never suggested that an evidentiary burden of proof less than a preponderance of the evidence would be sufficient.'").

[17] Opening at 21-22.

> evidentiary burden *less* than a preponderance of the evidence would be sufficient. Accordingly, the *Watts* decision makes it clear that a sentencing court's consideration of acquitted conduct when imposing a harsher sentence is constitutional in most instances so long as that conduct has been proven by at least a preponderance of the evidence. Mr. Smack's situation is a parallel to *Watts* in that non-convicted conduct, the 74 counts of the indictment not pled guilty to, was considered by the Sentencing Judge based upon the erroneous minimal indicia of reliability standard.[18]

As demonstrated above and contrary to the Respondents assertion, Mr. Smack's argument that *McMillan*, *Nichols*, and *Watts* constitutes the clearly established federal law applicable to Mr. Smack's case is not based upon some unspoken dicta as the Respondents would have this Court believe. It is based on the United States Supreme Court's express wording as to what is required by the Due Process Clause.[19] Thus,

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[18] Opening at 21-22 (emphasis added) (citing *Watts*, 519 U.S. at 155-56, 157).

[19] Opening at 17-23; *Watts*, 519 U.S. at 156 (citing *Nichols*, 511 U.S. at 747-48; *Dowling*, 493 U.S. at 349; *McMillan*, 477 U.S. at 91-92; U.S.S.G. § 6A1.3, cmt) ("For the reasons, 'an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.' The Guidelines state that it is 'appropriate' that facts relevant to sentencing be proved by a preponderance of the evidence, and we have held that application of the preponderance standard at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (citing *McMillan*, 477 U.S. at 91) ("Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 91 ("Like the court below, we have little difficulty concluding that in this case the preponderance standard satisfies due process.").

the Respondents argument is incorrect and mertiless.

B. It is irrelevant what Mr. Smack argued in his cert petition to the United States Supreme Court.

In support of their argument that *McMillan*, *Nichols*, and *Watts* do not constitute clearly established federal law, the Respondents note that "Smack acknowledged in his petition for writ of certiorari to the United State Supreme Court "has never explicitly articulated the burden of proof to be applied to contested sentencing facts in a state sentencing hearing." Answer at 29 (citing A386). This argument is without merit.

In raising such an argument, the Respondents hope that this Court will consider as relevant and part of the record a document that is not relevant to the current proceedings. The United States Supreme Court in *Cullen v. Pinholster* made it explicitly clear "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."[20] In reaching this conclusion, the Supreme Court reasoned:

> Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is *limited* to the record in existence at that *same time – i.e.*, the record before the state

[20] *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

court.[21]

The alternative argument raised by Mr. Smack in his cert petition[22] before the United States Supreme Court was not an argument raised by Mr. Smack to the Delaware State Courts.[23] Mr. Smack's alternative cert petition argument was not part of the state court record "in existence at" the time "of the state-court decision".[24] Thus, any arguments presented by Mr. Smack in the cert petition are not within this Court's scope of review and cannot be considered by this Court. Therefore, contrary to the Respondents assertion, Mr. Smack's alternative argument presented to the United States Supreme Court in his cert petition is not relevant to this Court determination of whether the District Court erred when it denied Mr. Smack's habeas petition.[25]

C. The Respondents erroneously conflate the standard for evidence to be admitted at sentencing and the burden of proof standard for resolving disputed facts presented during a state sentencing hearing.

Additionally, in trying to support its argument that *McMillan*, *Nichols*, and *Watts* do not constitute the applicable clearly established federal law in relation to the

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[21] *Id*. at 181-82 (emphasis added).

[22] Sup. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.").

[23] *Compare* A161-62, A226, A301-11, A353-58 with A386.

[24] *Cullen*, 563 U.S. at 182.

[25] *Id.* at 181-82.

burden of proof for disputed facts relied upon by a sentencing court, the Respondents cite to language from a series of cases that address the evidentiary standard for the admissibility of disputed facts presented during a sentencing hearing.[26] In doing so, the Respondents are making the same mistake that the Delaware State Courts and the District Court made by conflating and misunderstanding the standard for evidence to be admitted at sentencing with the burden of proof standard for resolving disputed facts presented during a state sentencing hearing.

However, only the burden of proof for resolving disputed facts when determining a defendant's ultimate sentence is relevant to this case. As such, the Respondents' cited cases do not conflict with Mr. Smack's argument and the United States Supreme Court's holdings in *McMillan*, *Nichols*, and *Watts* as the cited case quote language from the Federal Sentencing Guidelines and case law that disputed facts that are based on probably accurate information are admissible and can be considered for sentencing purposes.[27] It also cannot go unnoticed that the

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[26] Answer at 33 (citing *United States v. Gibson*, 816 Fed. Appx. 698, 703 (3d Cir. 2020); *United States v. Zuniga*, 720 F.3d 587, 590 (5th Cir. 2013); *United States. v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012); *United States v. Christman*, 509 F.3d 299, 305 (6th Cir. 2007); *United States v. Moncivais*, 492 F.3d 652, 658 (6th Cir. 2007); *United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007))

[27] *Gibson*, 816 Fed. Appx. At 703 (citing *Robinson*, 482 F.3d at 246) ("Because the Federal Rules of Evidence do not apply in sentencing proceedings, however, hearsay evidence need only have minimal indicia of reliability to be considered."); *Zuniga*, 720 F.3d at 590 ("When making factual findings for

Respondents' cited case of *United States v. Harris* expressly notes that "the constitutional due process requirement [is] that 'sentencing facts must be established by a preponderance of the evidence.'"[28] In any event, the Respondents can not change the fact that federal case law is consistent with the guidelines and in particular the commentary note of U.S.S.G. § 6A1.3 which has read for well over a decade that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."[29] Thus, the Respondents cited case law addressing the admissibility standard for disputed facts presented at a sentencing hearing are not in opposition of Mr. Smack's argument that

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sentencing purposes, a district court 'may consider any information which bears sufficient indicia of reliability to supports its probable accuracy.'"); *Harris*, 702 F.3d at 230 (quoting *United States v. Johnson*, 648 F.3d 273, 277 (5th Cir. 2011)) ("In *Johnson*, we noted that our precedent 'left room for a court to consider arrests if sufficient evidence corroborates their reliability.' This rule is consistent with the constitution due process requirement that 'sentencing facts' must be established by a preponderance of the evidence.'"); *Christman*, 509 F.3d at 305 (quoting *Moncivais*, 492 F.3d at 658) ("U.S.S.G. § 6A1.3(a) does establish a minimum indicia-of-reliability standard that evidence must meet in order to be admissible in Guidelines sentencing proceedings."); *Moncivais*, 492 F.3d at 658 (same); *Robinson*, 482 F.3d at 246 (citing *United States v. Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990); U.S.S.G. § 6A1.3(a)) ("The admission of hearsay statements in the sentencing context is subject to the requirements of the Due Process Clause. Under the precedent of this Court, hearsay statements must have some 'minimal indicium of reliability beyond mere allegation.'").

[28] *Harris*, 702 F.3d at 230 (quoting *Johnson*, 648 F.3d at 277).

[29] U.S.S.G. § 6A1.3 cmt.

due process mandates that disputed facts presented at a state sentencing hearing must be proven by a preponderance of the evidence in order to be relied upon when issuing the ultimate sentence.

D. The Respondents continue to erroneously rely and argue incorrect facts about what occurred during the state court sentencing proceedings, making meritless arguments based upon incorrect facts.

The Respondents continue to erroneously assert that no "disputed facts" were relied upon by the Sentencing Court when issuing Mr. Smack's ultimate sentence and because of that Mr. Smack's sentencing hearing complied with the Due Process Clause of the Fourteenth Amendment. Answer at 34, 37. Specifically, the Respondents argue that Mr. Smack "simply takes umbrage at the prosecutor's use of the term "kingpin" and Mr. Smack's "disagreement with the prosecutor's characterization of the his conduct does not amount to a 'disputed fact' upon which the Superior Court relied . . . ." Answer at 37. In doing so, the Respondents, as they did in the District Court, assert a meritless argument that there were no contested sentencing facts for the Delaware Superior Court to rely upon when issuing Mr. Smack's ultimate sentence. (A497-98).

In the Opening Brief,[30] and his habeas filings,[31] Mr. Smack painstakingly

[30] Opening at 7-11; 37-38.
[31] A439-42; A514-16.

described exactly where in the sentencing record were disputed facts, not proven by a preponderance of the evidence, that were relied upon by the sentencing judge when making his sentencing determination.[32] In his opening brief,[33] Mr. Smack noted how he argued during the June 22, 2016 hearing that the evidence did not support the State's characterization of Mr. Smack as a drug kingpin and that the State was "sandbagging" when it made an argument "beyond the indictment."[34] Mr. Smack also described[35] how during the November 9, 2016 oral argument he advised the Sentencing Court that he was contesting "the other uncharged aspects, such as Mr. Price's residence and what [was] found in Mr. Price's residence" and all of the "conduct beyond conviction." (A251; A425). Additionally, Mr. Smack referenced[36] the letter he submitted to the Sentencing Court on November 18, 2016 in which he identified the specific counts of the indictment that he would still be contesting after the Sentencing Court ruled that the applicable burden of proof for disputed facts to

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[32] Opening at 37-38.

[33] Opening at 37.

[34] A155 ("The totality of the record supports the conclusion that Mr. Smack is absolutely not a king pin."); A155 ("It has not been demonstrated, even under a preponderance of the evidence, that Mr. Smack is responsible for it. This is, in essence, as much as I hate to say it, Your Honor, this is sandbagging. We show up at a Sentencing Hearing, and I'm being hit with an argument that's overwhelming, that's beyond the indictment. . . ."); A423-24; A439.

[35] Opening at 37.

[36] Opening at 37-38.

be relied upon at a sentencing hearing was the erroneous minimal indicia of reliability standard.[37]

Ultimately, the Sentencing Court rejected Mr. Smack's argument during the November 23, 2016 sentencing hearing when the Sentencing Judge stated "we have had this discussion and I have written in the opinion to you guys that there is sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts." Opening at 38 (citing A257; A268). And as argued in the Opening Brief and described above, the record is undeniably clear that disputed facts, not proven by a preponderance of the evidence standard, were relied upon by the Sentencing Judge when determining the sentence of incarceration to give Mr. Smack. Opening at 37-38.

Despite Mr. Smack specifically highlighting exactly where in the sentencing record disputed facts were presented and relied upon by the Sentencing Court based upon an evidentiary standard less than a preponderance of the evidence,[38] the Respondents continue to promote a factually inaccurate argument that no disputed

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[37] A258-59 ("Under a minimum indicium of reliability there is insufficient evidence for this Court to find that these indicted counts are aggravating facts/factors for purposes of sentencing."); A259 ("[T]here is insufficient evidence for this Court to find that these indicted counts are admissible as aggravating facts/factors for determining the appropriate sentence for Mr. Smack."); A439-40.

[38] Opening at 37-38; A439-42; A514-16.

facts were presented during Mr. Smack's sentencing hearing "upon which the Superior Court relied. . . ." Answer at 37. The Respondents generalized claim completely fails to explain why Mr. Smack is incorrect when he has outlined with detail and pointed to specific sections of the sentencing record where there were disputed facts. And although this has happened throughout Mr. Smack's habeas proceedings,[39] this Court can provide the adequate and needed factual check against the Respondents and remedy the error of the District Court's finding that no disputed facts were presented and relied upon by the Sentencing Court in determining Mr. Smack's sentence of incarceration. (A16; A19-20).

[39] *See* A497-98; Answer at 37.

CONCLUSION

WHEREFORE, Adrin Smack respectfully requests that this Honorable Court overturn the District Court's denial order and opinion and remand this case to the District Court with instructions that the District Court grant Mr. Smack a writ of habeas corpus directing the State of Delaware to conduct a new sentencing hearing with Mr. Smack in which disputed facts raised at the sentencing hearing must be proven by a preponderance of the evidence.

Respectfully Submitted,
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Dated: January 23, 2024

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ADRIN SMACK, Petitioner, v. THERESA DELBALSO, Sup't, SCI Mahanoy, and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondents.	)	Civil Action No. 19-691-LPS

ORDER APPOINTING COUNSEL

At Wilmington this 7th day of May, 2019, having determined that Petitioner Adrin Smack is unable to afford legal representation (D.I. 8 at 24-31) and that the issues presented in his federal habeas petition merit the appointment of counsel pursuant to the provisions of 18 U.S.C. 3006A *et. seq.*;

IT IS HEREBY ORDERED that Petitioner's Motion For Appointment of Counsel (D.I. 8) is **GRANTED**. Chrisotpher S. Koyste, Esquire[1] is appointed as counsel for Petitioner, and he shall be compensated in accordance with 18 U.S.C. § 3006A(d).

UNITED STATES DISTRICT JUDGE

[1]Due to his indigency, Mr. Koyste was assigned Petitioner's state criminal case on June 15, 2015. (D.I. 8 at 1) Given these circumstances, it makes sense for Mr. Koyste to continue to represent Petitioner in the instant federal habeas proceeding.