

No. 17-1647

In The
Supreme Court of the United States

—◆—
In re KEITH ROMAN HENDERSON,
YAHYA AZIM WATSON, and MAJER HAFIZ,

Petitioners.

—◆—

PETITION FOR REHEARING

—◆—

MARGARET M. CROWLEY
Counsel of Record
41 Sutton Crest
Manhasset, New York 11030
(917) 282-8487
mcrowleylaw@aol.com

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PETITION FOR REHEARING.....	1
REASONS FOR GRANTING REHEARING.....	1
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CASES	
<i>Albrecht v. United States</i> , 273 U.S. 1 (1927).....	7
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	5
<i>Coffin v. United States</i> , 156 U.S. 432 (1895)	3
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968)	8
<i>Great Southern Fire Proof Hotel Co. v. Jones</i> , 177 U.S. 449 (1900)	7
<i>Mansfield, C. & L. M. R. Co. v. Swan</i> , 111 U.S. 379 (1884)	8
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803)	9
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	3
<i>Nelson v. Colorado</i> , 581 U.S. ___, 137 S.Ct. 1249 (2017)	2
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928).....	10
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	5
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995)	7
CONSTITUTIONAL PROVISIONS	
U.S. Const., amend. V	<i>passim</i>
U.S. Const., amend. VI	3, 5
U.S. Const., art. III	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
STATUTES	
28 U.S.C. § 2255	4
28 U.S.C. § 2255(h)(2)	4
Sentencing Reform Act of 1984 (Act)	<i>passim</i>
United States Sentencing Guidelines (USSG).....	<i>passim</i>
OTHER AUTHORITIES	
2 J. Story, Commentaries on the Constitution of the United States §§ 1779, 1780 (4th ed. 1873).....	7
2016 Sentencing Guidelines.....	6
§ 1B1.1(H).....	6
§ 1B1.3	6
Judiciary Act of 1789	8

PETITION FOR REHEARING

Petitioners respectfully move this Court for an order (1) vacating its order of October 1, 2018, which denied the petition for writ of habeas corpus filed by Petitioners on June 7, 2018, and (2) granting the petition for writ of habeas corpus. The grounds for rehearing are stated below.



REASONS FOR GRANTING REHEARING

The United States Sentencing Guidelines (USSG) are undermining the integrity of this Court.

1. The Fifth Amendment provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” This requirement defines, with respect to the Judicial Branch, the idea of separation of powers on which the federal government is founded: Legislative Branch’s Law, Executive Branch’s execution of the Law, and the Judicial Branch’s adjudication of the Law based on the essential facts specified by the grand jury in the indictment. The indictment establishes the jurisdiction of the federal court to try the case, as Article III of the Constitution limits the jurisdiction of the district court to “cases” and “controversies” in which the United States is a party. On petition for rehearing, Petitioners raise a substantial constitutional question: whether the application of the Sentencing Reform Act of 1984 (Act) and the USSG empowers the district court with jurisdiction over baseless allegations, “relevant

conduct,” in violation of the Fifth Amendment, Article III, the separation of powers, and the presumption of innocence, thereby compromising the integrity of this Court. As Justice Brett Kavanaugh stated:

We live in a country devoted to due process and the rule of law. That means taking allegations seriously. But if the mere allegation, the assertion of an allegation, a refuted allegation from 36 years ago is enough to destroy a person’s life and career, we will have abandoned the basic principles of fairness and due process that define our legal system and our country.

2. On this petition for rehearing, Petitioners assert that additional substantial constitutional grounds have been violated: a judgement of conviction pursuant to the Act and the implementation of the USSG’s judicial fact-finding as to “relevant conduct” denied Petitioners the presumption of innocence as to the “relevant conduct.” Absent conviction of a crime, one is presumed innocent. *Nelson v. Colorado*, 581 U.S. ___, 137 S.Ct. 1249 (2017). The district court’s findings of guilt by a preponderance of evidence as to baseless allegations, including uncharged crimes, acquitted crimes, and non-cognizable offenses, denied Petitioners the presumption of innocence, stigmatizing Petitioners far beyond any need to justify the district court’s sentence for a separate and distinct crime. Does the end justify the means? It is “axiomatic and elementary,” the presumption of innocence “lies at the foundation of our criminal

law.” *Coffin v. United States*, 156 U.S. 432, 453 (1895).

3. At sentencing, Petitioners were held to answer to uncharged infamous crimes of possession with the intent to sell a controlled substance, and were compelled, in criminal cases, to be witnesses against themselves in violation of the Fifth Amendment. Petitioners must not be denied their Fifth Amendment right to remain silent as to “relevant conduct” in order to receive a lesser sentence from the district court. The Probation Department of the Judicial Branch interrogated Petitioners about the “relevant conduct.” In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court ruled that detained criminal suspects, prior to government questioning, must be informed of their constitutional right against self-incrimination. Moreover, the interrogations and baseless accusations by the Judicial Branch as to “relevant conduct” are an abrogation of the power of the Executive Branch, emasculating the Executive Branch and compromising the integrity of this Court.
4. On September 24, 2018, eight Justices of the Supreme Court of the United States gathered to discuss an important question concerning justice in the federal courts: whether the implementation of the Act and its USSG empowered the district courts with jurisdiction over “relevant conduct,” and, if so, whether that grant of authority violated the Fifth and Sixth Amendments, and the separation of powers. On October 1, 2018, Petitioners’ writ of habeas corpus was denied. On October 8, 2018, Justice Brett Kavanaugh was appointed to the Supreme Court of the United States. This is an

intervening circumstance of a substantial and controlling effect and his wisdom is needed to decide these important questions of federal justice. A discussion with all nine justices, concerning the application of the Act and its USSG's procedural rules which aggrandize the jurisdiction of the district court to adjudicate over baseless allegations, including uncharged crimes, acquitted conduct, and non-cognizable offenses, to justify federal sentences in violation of the Fifth Amendment, Article III, the separation of powers, and the presumption of innocence and thereby compromising the integrity of this Court is warranted.

5. Only this Court can provide a new rule of constitutional law made retroactive to all federal prisoners pursuant to 28 U.S.C. § 2255(h)(2). A motion pursuant to 28 U.S.C. § 2255 is inadequate or ineffective to remedy Petitioners' claim before this Court concerning whether the federal court lacks jurisdiction to adjudicate "relevant conduct" and the detrimental effect that such adjudication has on the integrity of this Court. Rule 1.2 of the American Bar Association Model Code of Judicial Conduct states: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."
6. The public has little confidence in the independence of this Court because the adjudication of "relevant conduct" violates the separation of powers. The separation of powers and the checks and balances that the Framers built into our tripartite form of government were intended to operate as

a “self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” *Buckley v. Valeo*, 424 U.S. 1, (1976). In enacting the USSG, the Legislative Branch disregarded Article III and delegated its power to make law to the United States Sentencing Commission, an agency of the Judicial Branch. Thus, the Judicial Branch promulgated the USSG, transgressing and aggrandizing the jurisdiction of the court over “relevant conduct” at the expense of the other branches. Accusations concerning “relevant conduct” are alleged by the Probation Department of the Judicial Branch in presentence reports and not in grand jury indictments. “Relevant conduct” is arbitrarily and capriciously executed by the Judicial Branch not the Executive Branch. A fair and impartial court has no standing to accuse Petitioners of “relevant conduct” nor power to find Petitioners guilty of “relevant conduct” by a preponderance of evidence. Application of the USSG requires the Court to wear all three hats – legislative, executive, and judicial or rather judge, jury, and executioner.

7. Although the USSG increased the power of federal judges over “relevant conduct,” it stripped the district court of all discretion at sentencing. This Court rendered the USSG unconstitutional, holding judicial fact-finding violated the right to a jury trial guaranteed by the Sixth Amendment, affirming that Petitioners are entitled to the protections of the Constitution at sentencing, and making the USSG advisory. *United States v. Booker*, 543 U.S. 220 (2005). Yet, judicial fact-finding as to “relevant conduct” continues today. This has the appearance of impropriety. Furthermore, the Judicial Branch

set the policy behind the USSG not Congress, and the policy is repugnant to the Fifth and Sixth Amendments, see the 2016 Sentencing Guidelines p. 6 (emphasis added):

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged *regardless of the charges for which he was indicted or convicted* (“*real offense*” sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted (“*charge offense*” sentencing). A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The district courts sentenced Petitioners regardless of the charges for which they were indicted and convicted, usurping the power of the grand jury and petit jury in violation of the Fifth and Sixth Amendments. The Judicial Branch implemented its “real offense” policy by redefining the definition of “offense” in USSG §§ 1B1.1(H) and 1B1.3, as “the offense of conviction and relevant conduct.” Relevant conduct consists of “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant,” USSG § 1B1.3 and it all becomes part of the “real offense,” in violation of the Grand Jury Clause of the Fifth Amendment.

Disregarding the grand jury indictment and petit jury conviction does not promote public confidence in the independence and integrity of this Court. The grand jury indictment and the jury conviction are meant to preserve the historic role of the jury as intermediaries between the State and criminal defendants. See *United States v. Gaudin*, 515 U.S. 506, at 510–511 (1995) (“This right was designed ‘to guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties’” (quoting 2 J. Story, *Commentaries on the Constitution of the United States* §§ 1779, 1780, pp. 540–541 (4th ed. 1873)).

8. The federal courts have no jurisdiction over any conduct without formal and sufficient accusations brought by the prosecution even if Petitioners voluntarily submitted to the jurisdiction of the court. *Albrecht v. United States*, 273 U.S. 1, 8 (1927). This Court MUST address the issue: whether this Court has jurisdiction to adjudicate “relevant conduct,” baseless allegations, in violation of the limited jurisdiction conveyed to it by the Framers in Article III. “On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this Court, and then of the court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.” *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900). The requirement that jurisdiction be established as a threshold matter “spring[s] from the nature and limits of the judicial power of

the United States” and is “inflexible and without exception.” *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884). The factual allegations pertaining to “relevant conduct” are not embraced by the grand jury in the indictment. “Relevant conduct” is not part of the “case” and “controversy.”

9. Federal courts only have jurisdiction over cognizable offenses against the United States pursuant to the Judiciary Act of 1789. “Relevant conduct” by its very nature involves non-cognizable offenses. In implementing this limited grant of power, this Court has refused to issue advisory opinions or to resolve disputes that are not justiciable. See, *e.g.*, *Flast v. Cohen*, 392 U.S. 83 (1968). “These doctrines help to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches, and prevent the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes “traditionally thought to be capable of resolution through the judicial process.” *Id.* at 97. “Relevant conduct” is not justiciable; the USSG is merely advisory. The court’s adjudication as to “relevant conduct” is advisory as its only relevance is to assist the district court in ascertaining a sentence within a sentencing range provided by congress, obliterating the impartiality of the federal judiciary.
10. This Court’s continuous application of the unconstitutional Act, including the USSG’s advisory rules, has undermined the integrity of the Court. Under the guise of fairer sentences, the prison population has increased 500% since the inception

of the USSG. Abraham Lincoln said, “the best way to get a bad law repealed is to enforce it strictly.” The district court should not have discretion to enforce this unconstitutional act. “Relevant conduct” is alleged in the Judicial Branch’s presentence reports in which the court rendered Petitioners’ findings of fact and judgments of conviction, and not on the facts specified in the grand jury indictment and jury conviction, exceeding the court’s jurisdiction in violation of Article III and denying Petitioners’ rights guaranteed by the presumption of innocence, the Fifth Amendment, and the separation of powers. “An act of the legislature, repugnant to the constitution, is void.” *Marbury v. Madison*, 5 U.S. 137 (1803). Petitioners’ judgments of conviction pursuant to the unconstitutional Act are void, *coram non judice*.



CONCLUSION

This Court must lead by example. The time has come to restore integrity to this Court and to limit this Court’s jurisdiction to the powers provided by the Framers in Article III. Undoubtedly, Petitioners have the right to a grand jury indictment as to all allegations concerning infamous crimes pursuant to the Fifth Amendment, and they cannot be held to answer to baseless allegations at sentencing. “In a government of laws,” said Mr. Justice Brandeis, “existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the

government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.” *Olmstead v. United States*, 277 U.S. 438 at 485 (1928). (Dissenting opinion.) Thus, this Court should grant Petitioners’ writ of habeas corpus.

Respectfully submitted,

MARGARET M. CROWLEY

Counsel of Record

41 Sutton Crest

Manhasset, New York 11030

(917) 282-8487

mcrowleylaw@aol.com

CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

MARGARET M. CROWLEY