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

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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.
>
> 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

[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

[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.

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Respectfully submitted,

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