

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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JASON DARNELL MCKINNEY  
PETITIONER,

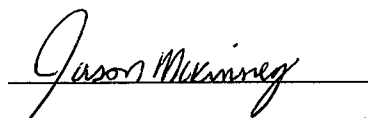
vs.

UNITED STATES OF AMERICA  
RESPONDANT.

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ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI



Jason D. McKinney (Pro Se)

REG No. 55169-060

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## QUESTIONS PRESENTED

The petition is an opportunity for this court to clear up issues related with the ALL WRITS ACT pursuant to UNITED STATES v. MORGAN, 346 U.S. 502 (1954). Thus, the two questions presented are:

[1] Whether the Tenth Circuit's holding in Petitioners case herein,--that was filed under the ALL WRITS ACT [28 U.S.C. § 1651] contradict this Honorable Court's holding in UNITED STATES v. MORGAN, 346 U.S. 502 (1954)?

[2] Whether UNITED STATES v. MORGAN, 346 U.S. 502 (1954) still stand as the law of the land, holding that the enactment of 28 U.S.C. § 2255 [does not] bar defendants from filing Common- Law Writs?

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS

|                                         |    |
|-----------------------------------------|----|
| OPINION BELOW . . . . .                 | 2  |
| JURISDICTION                            | 2  |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 3  |
| STATEMENT OF THE CASE                   | 3  |
| REASONS FOR GRANTING THE WRIT           | 8  |
| CONCLUSIONS                             | 16 |

## INDEX OF APPENDICES

APPENDIX A: The decision of the Tenth Circuit of Appeals

APPENDIX B: The decision of the District Court

## TABLE OF AUTHORITIES CITED

| Cases                                                                                  | Page Number |
|----------------------------------------------------------------------------------------|-------------|
| McKinney v United States Appeal No.09-3069,2/24/10                                     | 3           |
| McKinney v United States (COA) No.11-3281                                              | 4           |
| United States v Morgan 346 US 502,98 LEd 2d 248 (1954)                                 | passim      |
| United States v Torres 282 F3d 1241 (10th cirr2002)                                    | 5,7,9       |
| McKinney v United States US Dist Lexis 75491 2017                                      | 5           |
| United States v Kissick 69 F3d 1048,1052 (10th cir 1995)                               | 6,12,16     |
| United States v Capers 61 F3d 1100 (4th cir 1995)                                      | 6,12,16     |
| United States v Smaw 22 F3d 330 (DC cir 1994)                                          | 6           |
| United States v Spring 614 Fed Appx 386 (10th cir 2015)                                | 7           |
| United States v Tinajero-Porras 697,F Appx 609,611 (10th cir 2017)                     | 8           |
| United States v Loppedge 369 US 438 446-47 82 S Ct 917 8 LEd 2d 21 (1962)              | 9           |
| Dark Cherokee Basin Operating Co v Owen 547 US 135 S Ct 547 190 L Ed 2d 495,499 (2014) | 9           |
| Kelly v United States 300 US 50,81 L Ed 507 (1937)                                     | 9           |
| Cahill v New York NH & HR Co. 351 US 183-76 S Ct 758,1001,1075 (1956)                  | 9           |
| Atchison T and S.F.R. Co. v United States 284 US 248 260-76 LEd 273 (1932)             | 10          |
| United States v Watts 519,US 148 (1997)                                                | 13          |
| Nelson v Colorado 137 S Ct 1249 (2017)                                                 | 14,15       |
| Johnson v Mississippi 486 US 578,585 (1988)                                            | 14          |

## STATUTES AND RULES

21U.S.C./841  
 28U.S.C./2255  
 28U.S.C./2255 (H) & (E)  
 18U.S.C./3582  
 28U.S.C./1651  
 18U.S.C./924(c)

TABLE OF AUTHORITIES CITED

Other Authority:

.Clarifying Amendment 790 of the U.S.S.G..... passim

.Relevant Conduct 1B1.3(a)(1)(B) of the U.S.S.G..... passim

.U.S.S.G. 1B1.10(d)..... passim

IN THE SUPREME COURT OF THE UNITED STATES

No. \_\_\_\_\_

JASON DARNELL MCKINNEY,

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE TENTH CIRCUIT

---

The Petitioner, Jason Darnell McKinney, respectfully  
petitions for a certiorari to review the Judgment of the  
United States Court of Appeals For the Tenth Circuit's that  
was entered on 3-16-18.

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JURISDICTION

The Court of Appeals entered its judgment on March 16,  
2018. The Jurisdiction of this Court is invoked under 28 U.S.  
C. § 1254 (1).

## PETITION FOR WRIT OF CERTIORARI

Petitioner Jason Darnell McKinney respectfully requests that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit that was entered on March 16, 2018 in case No. 17-3125.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to the petition and is unpublished disposition.

The opinion of the United States District Court for the District of Kansas appears at Appendix B to the petition and is published under United States v. McKinney 16, 2017 U.S. Dist. LEXIS 75491

## JURISDICTION

The date on which the United States Court of Appeals for the Tenth Circuit decided the case below was February 16, 2018. Petitioner filed a pro se petition for Rehearing and Rehearing en banc review of the Tenth Circuit's decision. The Tenth Circuit denied Petitioners Petition on March 16, 2018. The Jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1). The solicitor General of the United States has been served with a notice of this petition in accordance with Supreme Court Rule 29.4(a).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ALL WRITS ACT (Audita Querela) Provision of 28 U.S.C. § 1651

[OTHER]: CLARIFYING AMENDMENTS OF THE U.S. SENTENCING  
GUIDELINES

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## STATEMENT OF THE CASE

On or around June 2007, Mr. McKinney plead guilty to one count of possession with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. § 841(b)(1)(A)(iii) and one count of use of firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c). Mr. McKinney was sentenced to 360 months on count 1 and 60 months on count 2. The court found Mr. McKinney responsible for 2,791.25 grams of crack cocaine and 2,755.75 grams of powder cocaine. The district court converted those quantities to their marijuana equivalent, for a total of 56,375.15 Kilograms of marijuana under 1B1.3(a)(1)(B) RELEVANT CONDUCT.

Mr. McKinney filed a direct appeal. The United States Court of Appeals for the Tenth Circuit affirmed the conviction. UNITED STATES v. MCKINNEY Appeal No. 09-3069 Judgment entered on February 24, 2010.

On January 27, 2011, Mr. McKinney filed a motion under

28 U.S.C. 2255 alleging that he received ineffective assistance of counsel and that the government had engaged in misconduct. The district court denied motion under 28 U.S.C. § 2255 on September 2, 2011. McKinney sought a Certificate of Appealability, which the Tenth Circuit denied on April 18, 2012. UNITED STATES v. MCKINNEY, No. 11-3281.

On or around January 2017, Mr. McKinney filed a motion for Nunc Pro Tunc Judgment. McKinney's reason for filing this motion was so that the Honorable District Court could [verify] whether the court had properly applied the "Three-step analysis of 1B1.3(a)(1)(B) [RELEVANT CONDUCT].

Nevertheless, on January 23, 2017 the Honorable District Court construed Mr. McKinney's motion into a motion under 18 U.S.C. § 3582(c)(2) ruling that the sentencing commission had not listed Amendment 790 under § 1B1.10(d).

Thereafter Mr. McKinney filed a motion for reconsideration of the court order entered on January 23, 2017. Mr. McKinney explained to the court that he never submitted a § 3582(c)(2) motion but a simple motion for Nunc Pro Tunc Judgment. However the court again construed Mr. McKinney's motion into a "Rule 36 motion" to correct a clerical error, and dismissed Mr. McKinney's motion for lack of Jurisdiction.

On March 20, 2017, Mr. McKinney filed an All Writs Act Petition under "Writ of Error Audita Querela pursuant to 18

U.S.C. § 1651 raising an objection to his sentence based on an UNANTICIPATED CIRCUMSTANCE that made the continuing enforcement of his Judgment unfair. Mr. McKinney argued in his All Writs Act petition (Audita Querela) pursuant to 28 U.S.C. § 1651, that under the All Writs Act he was entitled to raise a [CLARIFYING AMENDMENT] from the U.S. Sentencing proceeding , the district court had erroneously misinterpreted the application of RELEVANT CONDUCT Guideline pursuant to current CLARIFYING AMENDMENT 790 of the U.S.S.G. (§ 1B1.3(a)(1)(B)).

On March 21, 2017, the Honorable District Court ordered the government to respond to Mr. McKinney's All Writs Act Petition. On April 19, 2017, the government responded CIRCUMVENTING McKinney's argument under UNITED STATES v. MORGAN, 346 U.S. 502, 98 L. Ed. 2d 248 (1954) and FOOTNOTE[6] in UNITED STATES v. TORRES, 282 F.3d 1241 (10th Cir.2002).

The Honorable District Court erred and entered a Judgment on May 16, 2017, denying Mr. McKinney's Petition under writ of error (Audita Querela 28 U.S.C. § 1651) Because it held that Mr. McKinney had other remedies available to him, 28 U.S.C. § 2255 and 18 U.S.C. § 3582(c). See UNITED STATES v. McKinney U.S. Dist LEXIS 75491 2017.

Mr. McKinney had no other vehicle, motion and/or petition to raise the CLARIFYING AMENDMENT to the Honorable District Court. Mr. McKinney's claim in his All Writs Act petition was [not] based on a "NEW RULE" OF CONSTITUTIONAL

LAW, made retroactive to cases on collateral review; [NOR] was it based on a NEW RETROACTIVE AMENDMENT that was listed in 1B1.10(d). Thus , a § 2255 and/or 3582(c) was "INADEQUATE" to raise this claim to the Honorable District Court.

Mr. Mckinney's challenge was based on the U.S. Sentencing Commissions [CLARIFYING AMENDMENT 790] that clarified the procedures that a district court must make [before] applying "RELEVANT CONDUCT" (1B1.3(1)(B)). A procedure that has long been MISUNDERSTOOD by many Federal Courts.

In his petition, Mr. McKinney argued that although CLARIFYING AMENDMENT 790 was not listed in § 1B1.10(d) of the U.S.S.G., he could still raise a claim to the district court" and/or the "REVIEWING COURT of APPEALS" can still give RETROACTIVE EFFECT to amendments that are CLARIFYING (as opposed to substantive). See, UNITED STATES v. KISSICK, 69 F3.d 1048, 1052 (10th Cir.1995) (quoting UNITED STATES v. CAPERS, 61 F.3d 1100 (4th Cir.1995)).

Mr. McKinney argued that this above mentioned rule, applied when a sentencing court was faced with a presenting CLARIFYING AMENDMENT that postdated the particular edition of the guidelines Manuel used at sentencing. "Such an AMENDMENT CHANGES NOTHING concerning the legal effect of the guidelines, but MERELY CLARIFIES what the Commission deems the guidelines TO HAVE ALREADY MEANT." See, UNITED STATES v. SMAW, 22 F.3d 330 (D.C. Cir 1994).

Nevertheless, the District Court denied Mr. McKinney's All Writs Act Petition (Audita Querela pursuant to 28 U.S.C. § 1651, Stating the Following: "even assuming that the 'ancient common law writ Audita Querela' remains available as a form of relief, see UNITED STATES v. SPRING, 614 Fed. Appx. 386 (10th Cir. 2015), Mr. McKinney is clearly not entitled to it. It has long been settled that a writ of audita querela is not available to the petitioner when other remedies exist.' Citing UNITED STATES V. TORRES, 282 F.3d 1241,1245 (10th Cir. 2002)). "Other remedies clearly exist for McKinney to challenge his sentence."

Mr. McKinney argues that a writ of audita querela is available because 18 U.S.C. § 3582 and 28 U.S.C. § 2255 are inadequate or ineffective. Mr. McKinney indicates that his challenge is [not] based on a NEW RULE of CONSTITUTIONAL LAW made retroactive to cases on collateral review, nor is it based on a NEW RETROACTIVE AMENDMENT that is listed in § 1B1.10(d), [T]hus a § 2255 and/or § 3582(c)(2) is INADEQUATE or INEFFECTIVE to challenge his sentence and/or to request a reduction.

Thereafter, the district court denied Mr. McKinney's Writ of Audita Querela. He then appealed to the 10th Circuit of Appeals asking did the district court contradict the decision in the UNITED STATES v. MORGAN, Supra, that the enactment of 28 U.S.C. § 2255, [DID NOT BAR] Federal courts from considering common law writs? Mr. McKinney's second

inquiry was, "Did the district Court Error in Barring Mr. Mckinney's All Writs Act Petition (Audita Querela), Because it held that other remedies clearly exist for him to challenge his sentence.

On February 16, 2018 the Tenth Circuit Court of Appeals rejected Mckinney's arguments, barring his all writs act petition Audita Querela with the procedures of 28 U.S.C. § 2255 Citing Tinajero-Porras 697 F. Appx 609, 611 (10th Cir. 2017) an unpublished disposition, reasoning it was persuasive value. In reaching this erroneous conclusion the Tenth Circuit is in direct conflict with this Honorable Courts holding in MORGAN. Mr. McKinney then filed a timely rehearing and rehearing en banc which both were denied on March 16, 2018. Thus Mr. Mckinney's All Writs Act Petition under "Writ of Error Audita Querela" SHOULD have been heard and a determination should have been made under the ALL WRITS ACT Provision of 28 U.S.C. § 1651 because the court ERRED, barring Mr. Mckinney's writ with 28 U.S.C. § 2255(e) procedures.

#### REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari is concerned with whether the Tenth Circuit Court of Appeals has entered erroneous decisions that contradict the holdings of this Court and whether the Tenth Circuit in this case departed from accepted usual course of judicial proceedings such as to call for the exercise of this courts supervisory powers.

The Tenth Circuit of Appeals abused its discretion with omissive acts, circumventing the Supreme Court Ruling in UNITED STATES v. MORGAN, 346 U.S. 502, 98 L.Ed 2d. 248 74 S. Ct. 247 (1954) and FOOTNOTE[6] in UNITED STATES v. TORRES 282 F.3d 1241 (10th Cir. 2002).

Rather than awarding Mr. McKinney the relief that well settled precedent would require, the court of appeals conveniently overlooked the issues.

It is the duty of the UNITED STATES SUPREME COURT to assure the greatest degree possible, within the statutory framework for appeals created by congress, equal treatment for every litigant before the bar. "LOPPEDGE v. UNITED STATES, 369 U.S. 438, 446-47, 82 S. Ct. 917, 8 L.Ed 2d 21 (1962).

While appellate review of a position for rehearing is "discretionary, exercise of that discretion is not rudderless...and a court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," DARK CHEROKEE BASIN OPERATING CO., v. OWEN, 547 U.S.\_\_\_\_, 135 S. ct. 547, 190 L. Ed. 2d 495, 499 (2014). See KELLY v. UNITED STATES, 300 U.S. 50, 81 L.Ed. 507 (1937). When an original order [is] erroneous, "it should be corrected" in the interest of fairness. " CAHILL v. NEW YORK, N.H. & H.R. CO., 351 U.S. 183, 76 S. Ct. 758, 100 L. 1075, 1077 (1956).

"Ordinarily a petition for rehearing is for the purpose of directing attention to matter said to have been overlooked or mistakingly conceived in the original decision

and thus invites a reconsideration upon the record which the decision rested. "ATCHISON, T. and S.F.R. CO, . V. UNITED STATES, 284 U.S. 248, 260 76 L.Ed. 273 (1932). When a party would suffer an injustice oversight in an original decision is not corrected, the denial of a rehearing amounts to an "abuse of administrative discretion", and further constitutes "a denial of due process in violation of the 5th Amendment of the Constitution of The United States." Id at 258. 262.

Hence, this petition for writ of certiorari follows:

[1] The first question whether the Tenth Circuit's holding in Petitioner's case herein,--that was filed under the All Writs Act [28 U.S.C. § 1651] contradict this Honorable Court's holding in UNITED STATES v. MORGAN, 346 U.S. 502 (1954)?

[2] The second question is whether UNITED STATES v. MORGAN, 346 U.S. 502 (1954), still stand as law of the land, holding that the enactment of 28 U.S.C. § 2255 [does not] bar defendants from filings common law writs?

In UNITED STATES v. MORGAN, 346 U.S. 502, 98 L. Ed. 2d 248, 74 S. Ct. 247 (1954), this Honorable Court held that courts still have authority to issue writs of CORAM NOBIS or AUDITA QUERELAS in collateral [CRIMINAL PROCEEDINGS]. Id. at 506-510. It further held that the enactment of 28 U.S.C. § 2255 [DOES NOT BAR] Federal Courts from considering common law writs, to wit:

"The contention is made that § 2255 of Title 28



U.S.C., providing that a prisoner 'in custody' may at any time move the court which imposed the sentence to vacate it, if, in violation of the Constitution [o]r laws of the United States', should be construed to cover the entire field of remedies in the nature of coram nobis Federal Courts. "WE SEE NO COMPELLING REASON TO REACH THAT CONCLUSION." Id. "We know nothing in the legislative history that indicates a different conclusion. WE DO NOT THINK THAT THE ENACTMENT OF A § 2255 IS A BAR TO THIS MOTION..."Id. at 511. The Court emphasized that the [C]ontinuation of litigation AFTER final judgment and exhaustion or waiver of any statutory right of review [SHOULD BE ALLOWED] through this extraordinary remedy under circumstances compelling such action to ACHIEVE JUSTICE." Id. Where there are sound reasons existing for failure to seek appropriate earlier relief, this motion in nature of the extraordinary writ of coram nobis [MUST] be heard by Federal Trial Court." Id. at 512. "OTHERWISE A WRONG MAY STAND UNCORRECTED WHICH THE AVAILABLE REMEDY WOULD RIGHT."

In the case at bar, Mr. McKinney [could not] use a § 2255 because a CLARIFYING AMENDMENT issued by the U.S. Sentencing Commission was not a "NEW RULE OF CONSTITUTIONAL LAW under the 28 U.S.C. § 2255(h)(2)'s proceedings. Moreover, the Tenth Circuit Court of Appeals used the 28 U.S.C. § 2255(e) procedures to bar Mr. McKinney's All Writs Act Petition Audita Querela.

As properly held in MORGAN, the ENACTMENT of 28 U.S.C. § 2255 (this includes its procedures, DOES NOT BAR Federal

Courts from considering common law writs. Id. at 511. Section 2255(e)'s procedures state, to wit:

"(e) An Application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is INADEQUATE OR INEFFECTIVE to test the legality of his detention." Id.

THUS, using § 2255(e)'s procedures to BAR McKinney's ALL WRITS ACT MOTION under 28 U.S.C. § 1651 (Audita Querela), [CLEARLY CONTRADICTS] this Courts holding in MORGAN. In this case at bar, McKinney's challenge is based on a U.S. Sentencing Commission [CLARIFICATION AMENDMENT] that is not listed in 1B1.10(d) of the U.S.S.G. This Amendment [790] was issued with the sole intention of CLARIFYING the procedures that the district court MUST make [BEFORE] applying "RELEVANT CONDUCT" (1B1.3(a)(1)(B)). A procedure that has been [MISUNDERSTOOD] by many Federal Courts.

Nevertheless, if an Amendment is NOT listed in U.S.S.G. § 1B1.10, case law states that a "SENTENCING COURT" and/or "REVIEWING COURT" may still give RETROACTIVE EFFECT to amendments that are "CLARIFYING" (as opposed to substantive)." See, UNITED STATES v. KISSICK, 69 F.3d 1048, 1052 (10th Cir. 1995), (quoting UNITED STATES v. CAPERS, 61 F.3d 1100 (4th Cir. 1995)). Amendment 790 did not effect any policy change

but, only "restructure[d] the guideline and its commentary to set out more clearly the three-step analysis the court applies in determining whether a defendant is accountable for the conduct of others in a jointly undertaken criminal activity under [U.S.S.G.] § 1B1.3 (a)(1)(B)." THIS WAS NOT A CHANGE IN THE LAW; IT WAS A CLARIFICATION OF EXISTING LAW that applies Retroactive.

HENCE, this Honorable Court should Grant Certiorari and resolve the issue on whether MORGAN stands as good law, and on whether the district court should have corrected the misapplied and misinterpreted application of RELEVANT CONDUCT under U.S.S.G § 1B1.3(a)(1)(B), as no other vehicle existed in order to bring this matter to the sentencing Court. RELEVANT CONDUCT unfortunately misapplied to 90% of Federal Inmates. Not only has been misapplied by not properly applying it under § 1B1.3(a)(1)(B) as clarified by the Sentencing Commission, but it has received the most critical attention. However, a recent ruling by this Honorable Court, may indicate that such a controversial practice may finally be coming to an end.

At sentencing, Federal Judges consider "RELEVANT CONDUCT" for purposes of calculating the Guidelines, which may include UNCHARGED CONDUCT, otherwise inadmissible-at-trial evidence, even acquitted conduct. Twenty years ago, in UNITED STATES v. WATTS, 519 U.S. 148 (1997) (per curiam), this Honorable Court Controversially ruled "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 PREPONDERANCE OF THE EVIDENCE."

Nevertheless, this Honorable Court's recent decision in NELSON v. COLORADO, 137 S. Ct. 1249 (2017) regarding a restitution matter has now brought [tension] between NELSON and WATTS. At issue in NELSON was whether a reversal of conviction by an appellate court on direct or collateral review entitles a defendant to reimbursement of any restitution the defendant-- in this case, defendants--may have paid pursuant to the sentence imposed for the now-vacated conviction. Under Colorado's Exoneration Act, "an innocent person who was wrongly convicted" could recover any restitution, cost, fees, or fines paid as a result of the conviction, provided the "conviction has been overturned for reasons other than insufficiency of evidence or legal error unrelated to actual innocence." NELSON at 1254. Furthermore, the defendant-claimant had to prove his actual innocence by clear and convincing evidence. See id. at 1255.

This Honorable Court held that Colorado's Exoneration Act violated DUE PROCESS. "[O]nce those convictions were erased [for any reason]. THE PRESUMPTION OF THEIR INNOCENCE WAS RESTORED." Id. (emphasis added; citing JOHNSON v. MISSISSIPPI, 486 U.S. 578, 585 (1988) (After a "conviction has been reversed, unless and until [the defendant] should be retired, he must be PRESUMED INNOCENT of that charge"))). Accordingly, as the defendant's in NELSON were no innocent SIMPLICITER, the state held no right to retain the

restitution, cost, fees, or fines paid by them.

Hence, the tension between NELSON and WATTS, therefore, is the effect of an acquittal. WATTS held that an acquittal is irrelevant for purposes of sentencing because it is not a finding of innocence. In stark contrast, NELSON held that an absolute is relevant BECAUSE of the reversion to a PRESUMPTION OF INNOCENCE -- so relevant in fact as to preclude any penalty being sustained subsequent to the acquittal.

As this Honorable Court observed in NELSON, "[t]he vulnerability of the state's argument that it can keep the amounts exacted so long as it prevailed in the court of first instance [and thus met some burden of proof] is more apparent still if we assume a case in which the sole penalty is a fine.

On Colorado's reasoning, an appeal would leave the defendant empty handed; regardless of the outcome of an appeal, the state would have no refund obligation." NELSON, 137 S. Ct. at 1256.

THUS, the same surely holds true where liberty, as opposed to property, is at stake. NELSON entails not only that a defendant may not be penalized for acquitted conduct under RELEVANT CONDUCT, but also that defendants may not be punished for dismissed or even UNCHARGED CONDUCT. This is so, as it has been emphasized in NELSON, the [presumption of innocence] is to be given weight; a state may NOT engage in an end-run around the Constitution (DUE PROCESS) by

characterizing at sentencing (acquitted, dismissed, or uncharged) facts that are actually elements of a [s]eparate offense as mere sentencing factors. To do so eviscerates the PRESUMPTION OF INNOCENCE.

HENCE, Mr. Mckinney's ALL WRITS ACT Petition under the CLARIFYING AMENDMENT 790, of the application of "RELEVANT CONDUCT" under the Guidelines, should have been Granted to properly correct the erroneous application of 1B1.3(a)(1)(B), at the very least until WATTS gets overturned by this court pursuant to NELSON.

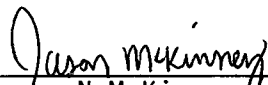
As stated above, CLARIFYING AMENDMENT 790 can only be raised under the All Writs Act, because [Sentencing Courts] and [Reviewing Courts] can still give RETROACTIVE EFFECT to amendments that are clarifying as opposed to substantive). See UNITED STATES v. KISSICK, 69 F.3d 1048, 1052 (10th Cir. 1995) (quoting UNITED STATES v. CAPERS, 61 F.3d 1100 4th Cir. 1995)). This CLARIFYING AMENDMENT was not a change in the law; it was a clarification of the EXISTING LAW.

For these reasons, this Honorable Court should GRANT Mr. Mckinney's writ of certiorari to answer the important questions above.

#### CONCLUSION

Wherefore, this petition for writ of certiorari should be granted.

Respectfully Submitted,

  
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