No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MALIK MOSS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

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

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May 19, 2025

QUESTION PRESENTED

Was Petitioner's Fifth Amendment due process right violated when the Sentencing Court relieved the Government of its constitutionally mandated burden of proof and made findings of fact not supported by the factual record?

PARTIES TO THE PROCEEDING

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

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UNITED STATES OF AMERICA
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Malik Moss, by and through his counsel, Daniel C. Breslin, Esquire respectfully prays that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the Third Circuit filed on February 18, 2025, cited as *United States v. Malik Moss*, 129 F.4th 187 (3d Cir. 2025) and appearing at A1-4.

OPINION BELOW

The United States Court of Appeals for the Third Circuit issued an opinion on February 18, 2025 denying Mr. Moss' appeal of his conviction and sentence in the United States District Court for the District of Delaware. The Third Circuit denied Mr. Moss' appeal finding that there was no clear error in the District Court's findings related to Mr. Moss' sentencing proceedings. (A1-4). The United States Court of Appeals for the Third Circuit's February 18, 2025 opinion appears at A1-4 and is reported as *United States v. Malik Moss*, 129 F.4th 187 (3d Cir. 2025).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the United States Court of Appeals for the Third Circuit for which Petitioner seeks review was issued on February 18, 2025. This petition is filed within 90 days of the United States Court of Appeals for the Third Circuit's denial opinion in compliance with United States Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 5 provides, in pertinent part, that "No person . . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . ."[1]:

[1] U.S. Const. amend. V.

STATEMENT OF THE CASE

On March 10, 2022, the Grand Jury for the United States District Court for the District of Delaware returned a single-count indictment and notice of forfeiture against Mr. Moss and his co-defendants for conspiracy to distribute controlled substances, in violation of 21 U.S.C. §§ 841 and 846.

On May 24, 2022, Mr. Moss entered a guilty plea in the District Court to a lone count of Conspiracy to Distribute Controlled Substances, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. (A1). As Mr. Moss' plea agreement did not contain an offense level stipulation, the District Court scheduled a hearing to hear evidence regarding the applicable drug weight and purity level under the United States Sentencing Guidelines. (A1).

The evidentiary hearing was originally scheduled for December 12, 2022. (A18). However, as Mr. Moss' co-defendant, Jacob Santiago, was unable to attend the proceedings, the hearing was continued to December 21, 2022. (A18). Before the hearing was concluded, the Government made the District Court aware of a housekeeping matter. The Government advised:

> The government had mentioned that there was a corroborator in this case, Jesus Alfaro was his name. Ms. Carrie Cinquanto is representing Mr. Alfaro. Ms. Cinquanto is here. She gave the government a letter dated this weekend that Mr. Alfaro no longer wants to cooperate with the government. He has a signed cooperation agreement as the Court knows. One of those provisions of the cooperation agreement is that any proffer statements he made are on the record as of the date of his cooperation agreement.
>
> The Government plans to enforce that provision and insert his proffer statements through the testifying – through evidence of a testifying case agent, a DEA case agent who is present.
>
> So the government has discussed that with defense counsel, talked about it, I don't believe that there's an objection from defense counsel. But I wanted to let you know since Ms. Cinquanto is here, that that was the government's plan in case the Court wants to inquire of Ms. Cinquanto or anything since she is present.

(A18). In response, the District Court heard from Mr. Alfaro's attorney:

> MS. CINQUANTO: Yes, Sir. Good morning Caroline Goldner Cinquanto on behalf of Jesus Alfaro.
>
> Your Honor, I have spoken with Mr. Alfaro at length about this issue, and he has just maintained that he does not wish to go forward with his cooperation. I have prepared a statement that I had Mr. Alfaro sign stating that he understood the ramifications of this decision, that he was doing it voluntarily, and that he was not under threat or pressure not to testify.
>
> THE COURT: All right. Okay.
>
> Anything else that I should ask in follow-up?
>
> MR. IBRAHIM: I don't think so, Your Honor. You could – you know, we'll obviously have a plan to deal with Mr. Alfaro later, but in terms of, you know, how that affects these proceedings, I think I've outlined the government's plan to the Court. I've outlined it to the defense. I think we are all on the same page.
>
> Granted, however, that we can't proceed with the hearing today, I am not sure it is of very much moment how we decide to handle the issue.
>
> THE COURT: All right. Okay. All right. Well, thank you very much.
>
> MS. CINQUANTO: Your Honor, just so Your Honor is aware, I did advise him that he would not be receiving any of the benefits listed in Attachment A to the Memorandum of the Plea Agreement, including that the government – for the government moving for departure from the Sentencing Guidelines pursuant to 5K1.1 and 3553(e).
>
> He also understands that, as a result of his decision not to testify, the government may invoke the penalties set forth in Paragraph 2 of Attachment A of the Memorandum of Plea Agreement.
>
> And in summary, I advised Mr. Alfaro that those penalties include prosecution for any federal crime the government learned of during the course of his cooperation. The government's decision to decline to the file 5K1 and 3553 motion for departure, as well as the fact that the government could be relieved of any obligations under the Plea Agreement regarding recommendations as to sentence or stipulations including drug weight.

(A19).

On December 21, 2022, the District Court heard evidence from the parties as to the applicable drug weight and purity for purposes of determining the base offense level under the United States Sentencing Guidelines. (A22). The Government began the hearing by noting that its evidentiary presentation and argument was that the Court could calculate a base offense level of 36

in one of two ways: (1) the District Court could find that Mr. Moss and Mr. Santiago purchased "10 pounds of at least 60 percent pure methamphetamine from Reading", Pennsylvania; and (2) "find that the 3.4 pounds of methamphetamine that's 86 percent pure, seized from Tyrell Pankins, was part of this drug conspiracy." (A22).

Thereafter, the Government called Officer Trevor Riccoban to the stand. (A23). In relation to the methamphetamine purchased from Reading, Pennsylvania, Officer Riccoban testified in relation to various communications between Mr. Moss and Mr. Santiago during which they discussed purchasing multiple pounds of methamphetamine. (A37-39). Officer Riccoban also testified that through surveillance techniques and by tracking Mr. Moss' and Mr. Santiago's cell phone location data, law enforcement was able to determine that Mr. Moss and Mr. Santiago traveled to Reading, Pennsylvania on October 27, 2021 and October 28, 2021. (A39-40).

As there was no surveillance of Mr. Moss and Mr. Santiago in Reading, Pennsylvania on those dates, the Government, in an attempt to prove that Mr. Moss and Mr. Santiago purchased 10 pounds of methamphetamine, had Officer Riccoban testify in relation to cellular communications sent by Mr. Moss that he had methamphetamine for sale. (A40). Officer Riccoban also testified about a recorded phone conversation between Mr. Moss and co-conspirator, Gerardo Rodriguez during which Mr. Moss told Mr. Rodriguez that he had bought 10 pounds of "ice" from Reading, Pennsylvania. (A41).

Officer Riccoban also testified in relation to an alleged 5 pound methamphetamine purchase from Reading, Pennsylvania on November 11, 2021. Again, through surveillance techniques and tracking the location data of Mr. Moss and Mr. Santiago, Officer Riccoban testified that Mr. Moss and Mr. Santiago traveled to Reading, Pennsylvania on November 11, 2021. (A42-43). To prove

that Mr. Moss and Mr. Santiago purchased methamphetamine on this date, Officer Riccoban testified regarding a phone call between Mr. Moss and Mr. Santiago the following day during which Mr. Santiago described that they had 5 1-pound drug sales lined up. (A43).

In relation to the methamphetamine recovered from co-conspirator Pankins' residence, the Government sought to prove that this methamphetamine was attributable to Mr. Moss by showing that Mr. Moss and Mr. Pankins were collaborating. Officer Riccoban testified that Mr. Pankins traveled to Reading, Pennsylvania with Mr. Moss and Mr. Santiago on November 11, 2021 and then the group traveled to Mr. Pankins' residence. (A42-43). Additionally, Officer Riccoban testified that prior to a sale of methamphetamine to a confidential source, Mr. Moss and Mr. Pankins met up and drove from the area of Mr. Pankins' apartment to the location where the sale was to take place. Officer Riccoban stated that Mr. Pankins was in the car while Mr. Moss was conducting the controlled purchase. (A44-45). Furthermore, Officer Riccoban testified regarding Mr. Moss allegedly moving methamphetamine stored at Christina Chamberlain's apartment to Mr. Pankins' residence. (A45-47).

During cross examination, Officer Riccoban was questioned about what law enforcement did to confirm their suspicion that Mr. Moss and Mr. Santiago were traveling to Reading, Pennsylvania to purchase multiple pounds of methamphetamine. During this line of questions, Officer Riccoban conceded that Mr. Moss and Mr. Santiago were never physically observed in Reading, Pennsylvania, they were never stopped upon returning to Delaware, and therefore, no controlled substances purchased on October 27-28 or November 11th were ever seized, weighed, or chemically analyzed. (A48-50).

Also during cross examination, Officer Riccoban conceded that: (1) Mr. Pankins admitted that the methamphetamine recovered from his residence belonged to someone other than Mr. Moss; (2) that Mr. Moss traveled to the vicinity of another stash house before and after responding to the area of Mr. Pankins' residence on November 11, 2021; and (3) that Mr. Moss met with another individual in the vicinity of a stash house prior to allegedly moving methamphetamine to Mr. Pankins' residence . (A50, A51, A52-53). Furthermore, Officer Riccoban testified in relation to a recorded phone conversation between Mr. Moss and Mr. Santiago on the morning of October 27, 2021 during which they discussed only purchasing 5 pounds of methamphetamine. (A52).

After hearing arguments from the Parties, the District Court ordered simultaneous post-hearing briefing. (A88-89). In his post-hearing briefing, Mr. Moss asserted that the Government failed to meet its burden of proof that the applicable base offense level was 36. (A92-01; A125-36). The Government asserted that the evidence supported a base offense level of at least 36, but could be as high as 38. (A102-21).

Following the post-hearing briefing, the District Court issued a memorandum regarding the applicable drug weight and purity level. (A5-9). The District Court held that Mr. Moss and Mr. Santiago purchased a total of 15 pounds of methamphetamine from a source in Reading Pennsylvania, on October 27-28, 2021 and November 11, 2021, and that the applicable purity level for the methamphetamine was 62%. (A7-9). The District Court did not address the Government's argument regarding the methamphetamine recovered from Mr. Pankins' residence. (A7).

On August 29, 2023, the United States Probation Office issued its draft of Mr. Moss' presentence report. In response, Mr. Moss raised a series of objections which included objections

to enhancements for obstruction of justice, possession of a deadly weapon, and role in the offense. Thereafter, the Government and US Probation filed their responses to the objections.

Mr. Moss' sentencing hearing was held on November 2, 2023. The District Court began the hearing by ruling on Mr. Moss' objections to the presentence report. The District Court overruled Mr. Moss' objections. (A138-39; A142; A160).

The District Court also heard testimony and argument regarding the Government's request for a 2 point offense level enhancement for obstruction of justice relating to Mr. Moss' attempt to have an individual record the evidentiary hearing. (A143). In support of the enhancement, the Government called Jesus Alfaro to testify in relation to letters he allegedly received through the prison facility's toilet system. (A144-46). Although there was no proof that Mr. Alfaro actually received the letters and there was no way for Mr. Moss to physically send these letters due to where his cell was located inside the prison, the Government argued that it was Mr. Moss who sent these letters to Mr. Alfaro in an attempt to persuade him to not testify against Mr. Moss. (A146-; A148; A149). The Government also presented a series of communications between Mr. Moss and other individuals which detailed Mr. Moss' attempt to recruit someone to record the evidentiary hearing. (A150-55).

To rebut the Government's argument, Mr. Moss presented a series of communications as evidence of his intent to prove that he was not a cooperator, not to intimidate. (A156-59). Ultimately, the District Court rejected Mr. Moss' argument and overruled his objection to the obstruction of justice enhancement. (A159-60).

After hearing arguments from the Parties regarding the appropriate sentence and considering the 3553(a) factors, the District Court sentenced Mr. Moss to 384 months of incarceration, followed by 60 months of supervised release, and a $100.00 special assessment. (A161-69).

Mr. Moss timely filed his notice of appeal on November 16, 2023. Following briefing, the United States Court of Appeals for the Third Circuit issued an opinion denying Mr. Moss' appeal. (A1-4).

REASONS FOR GRANTING THE WRIT

I. It is clearly established federal law of this Court that disputed facts raised in a sentencing hearing and relied upon by a judge when issuing a sentence, must be proven by a preponderance of the evidence to satisfy due process.

Supreme Court Rule 10(c) provides that a writ of certiorari may be granted where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."[2] Petitioner Moss advances that the Due Process Clause of the 5th Amendment required the Government to prove by a preponderance of the evidence that Mr. Moss purchased 15 pounds of methamphetamine and that said methamphetamine had a purity level of 62%. However, the United States Court of Appeals for the Third Circuit endorsed the Delaware District Court's findings and erroneously permitted the Delaware District Court "to estimate purity of unseized drugs based on the purity of drugs seized from the defendant", thereby relieving the Government of its burden of proof of proving purity level in violation of the Due Process Clause. (A4).

As Mr. Moss did not stipulate to the base offense level as part of his plea agreement, due process mandated the Government to prove by a preponderance of the evidence both the weight and purity of the methamphetamine that Mr. Moss conspired to distribute.[3] Although the Government

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[2] Sup. Ct. R. 10(c).

[3] *United States v. Watts*, 519 U.S. 148, 156, 157 (1997) (citing *Nichols v. United States*, 511 U.S. 738, 747-48 (1994); *Dowling v. United States*, 493 U.S. 342, 349 (1990); *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986)) (holding that acquitted conduct may be considered at sentencing "so long as that conduct has been prove[n] by a preponderance of the evidence" as "the application of the preponderance of the evidence at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (noting that the "petitioner . . . could have been sentenced more severely . . . simply on evidence of the underlying conduct . . . And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 86 (holding that

presented a significant amount of evidence during an sentencing evidentiary hearing, the Government ultimately failed to present sufficient evidence to establish by a preponderance of the evidence that Mr. Moss purchased a total of 15 pounds of methamphetamine from a supplier in Reading, Pennsylvania as well as the requisite purity level. Nevertheless, the District Court concluded that Mr. Moss conspired to purchase 15 pounds and assigned that methamphetamine an artificial purity level of 62%. (A7-9). A finding that the Third Circuit upheld. (A3).

The described error runs afoul of the Due Process Clause of the Fifth Amendment as the Third Circuit has endorsed a finding that would essentially relieve the Government of its mandated burden of proof for the purity level of the methamphetamine. The United States Supreme Court further erred by affirming the Delaware District Court's finding regarding the calculated 15 pound weight of methamphetamine and an obstruction of justice enhancement when said findings were not supported by the factual record Thus, this Supreme Court should exercise its discretion under Rule 10(c) and grant the petition to remedy this error for Mr. Moss.

A. Applicable Law.

For almost 77 years, this Court has said that the Due Process Clause guarantees a convicted criminal defendant the right to not have his or her sentence based on materially false information.[4] In order to ensure that a defendant's sentence is not based on materially false information, this Court, through a series of cases, has clearly established that the preponderance of the evidence burden of

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the use of "the preponderance standard satisfi[ed] due process.").

[4] *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (holding that "on this record we conclude that, while disadvantaged by lack of counsel, this prisoner 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.").

proof standard for disputed facts presented during a sentencing hearing "generally satisfies due process."[5]

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), this Court held that the preponderance of the evidence standard of proof is the constitutionally required burden of proof to resolve relevant facts presented during a sentencing hearing. The petitioners in *McMillan* were each convicted of an enumerated felony that would subject them to an enhanced punishment under Pennsylvania's Mandatory Minimum Sentencing Act.[6] However, the sentencing judge found the act unconstitutional and imposed a lesser sentence than was required by the act.[7] The Commonwealth of Pennsylvania appealed and the Supreme Court of Pennsylvania concluded that the act was consistent with due process.[8] The petitioners then sought certiorari review arguing that due process required a sentencing factor to be proven by a burden of proof greater than a preponderance of the evidence.[9]

This Court found otherwise. In particular, this Court concluded that this Court "ha[s] never attempted to define precisely . . . the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases . . . we are persuaded by several factors that Pennsylvania's

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[5] *Watts*, 519 U.S. at 156, 157 (citing *Nichols*, 511 U.S. at 747-48; *Dowling*, 493 U.S. at 349; *McMillan*, 477 U.S. at 91-92) (holding that acquitted conduct may be considered at sentencing "so long as that conduct has been prove[n] by a preponderance of the evidence" as "the application of the preponderance of the evidence at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (noting that the "petitioner . . . could have been sentenced more severely . . . simply on evidence of the underlying conduct . . . And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 86 (holding that the use of "the preponderance standard satisfi[ed] due process.").

[6] *McMillan*, 477 U.S. at 82.

[7] *Id.*

[8] *Id.* at 83.

[9] *Id.* at 84.

Mandatory Minimum Sentencing Act does not exceed those limits.[10] Furthermore, this Court concluded that the Act's use of "the preponderance standard satisfie[d] due process. Indeed, it would be extraordinary if the Due Process Clause . . . plainly sanctioned Pennsylvania's scheme, while the same Clause . . . in some other line of . . . cases imposed more stringent requirements. There is, after all, only one Due Process Clause. . . ."[11]

This Court's 1994 decision in *Nichols v. United States* further established that for a fact to be considered as proven for purposes of sentencing, that fact must be proven by a preponderance of the evidence. During the federal sentencing proceedings in *Nichols*, the petitioner's criminal history category was assessed one category higher due to the petitioner's prior uncounseled state DUI misdemeanor conviction.[12] Although the petitioner objected to the assessment, the United States District Court for the Eastern District of Tennessee rejected the objection and issued a sentence 25 months longer than would have been permitted had the DUI conviction not been considered.[13] On direct appeal, the United States Court of Appeals for the Sixth Circuit affirmed.[14] Thereafter, the petition sought certiorari review.[15]

This Court concluded that "consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction is . . . valid when used to enhance punishment at a subsequent conviction."[16] In support of this conclusion, this Court noted that the "petitioner . . . could have been sentenced more severely . . . simply on evidence of the underlying

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[10] *Id.* at 86.
[11] *Id.* at 86.
[12] *Nichols*, 511 U.S. at 740.
[13] *Id.* at 741.
[14] *Id.* at 742.
[15] *Id.*
[16] *Id.* at 748.

conduct . . . And the state need prove such conduct only by a preponderance of the evidence. Surely then, it must be constitutional[] . . . to consider a prior uncounseled misdemeanor conviction. . . where th[e] [underlying] conduct [was] prove[n] beyond a reasonable doubt."[17]

Lastly, in *United States v. Watts*, this Court found that acquitted conduct may be considered during a criminal defendant's sentencing proceeding so long as the conduct is proven by a preponderance of the evidence. Watts was convicted, after a federal jury trial, of possessing cocaine with intent to distribute, but was acquitted of having used a firearm in relation to a drug offense.[18] Despite the jury acquitting Watts of this offense, the sentencing court found, under a preponderance of the evidence, that Watts did possess a firearm in connection with a drug offense and therefore, added two points to his base offense level.[19] On direct appeal, however, the United States Court of Appeals for the Ninth Circuit vacated the sentence, holding that a sentencing court "may not 'under any standard of proof,' rely on facts of which the defendant was acquitted."[20]

The government thereafter sought certiorari review and this Court found that the Ninth Circuit had erred. Relying on the two cases discussed above, *McMillan* and *Nichols*, this Court rejected the argument that "a jury's verdict of acquittal . . . prevent[s] the sentencing court from considering conduct underlying the acquitted charge,"[21] finding that acquitted conduct can be considered for sentencing purposes "so long as that conduct has been prove[n] by a preponderance

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[17] *Nichols*, 511 U.S. at 748.
[18] *Watts*, 519 U.S. at 149.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 157,

of the evidence"[22] as "the application of the preponderance of the evidence at sentencing generally satisfies due process."[23]

The above cases make it clear that due process requires disputed sentencing facts to be proven by a preponderance of the evidence in order to be considered by a court for sentencing purposes.[24] "It therefore logically follows that the burden of ultimate persuasion should rest upon the party attempting to adjust the sentence. Thus, when the Government attempts to upwardly adjust the sentence" or like in the present matter, attempts to establish the applicable base offense level, the Government "must bear the burden of persuasion."[25]

B. The Third Circuit erred by failing to properly apply clearly established federal law by upholding the District Court's assignment of an artificial purity level.

As described above, it is clearly established federal law that due process required the Government to prove the requisite purity level by a preponderance of the evidence.[26] However,

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[22] *Id.*

[23] *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; USSG § 6A1.3 cmt.)

[24] *Id.* at 156, 157 (citing *Nichols*, 511 U.S. at 747-48; *Dowling*, 493 U.S. at 349; *McMillan*, 477 U.S. at 91-92) (holding that acquitted conduct may be considered at sentencing "so long as that conduct has been prove[n] by a preponderance of the evidence" as "the application of the preponderance of the evidence at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (noting that the "petitioner . . . could have been sentenced more severely . . . simply on evidence of the underlying conduct . . . And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 86 (holding that the use of "the preponderance standard satisfi[ed] due process.").

[25] *United States v. McDowell*, 888 F.2d 285, 291 (3d Cir. 1989) (noting that under *McMillan* it "is without much doubt" that "the preponderance of evidence standard can withstand constitutional muster" and that it "logically follows that the burden of ultimate persuasion should rest on the party attempting to adjust the sentence.").

[26] *Watts*, 519 U.S. at 156, 157 (citing *Nichols*, 511 U.S. at 747-48; *Dowling*, 493 U.S. at 349; *McMillan*, 477 U.S. at 91-92) (holding that acquitted conduct may be considered at sentencing "so long as that conduct has been prove[n] by a preponderance of the evidence" as "the application of the preponderance of the evidence at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (noting that the "petitioner . . . could have been sentenced

Third Circuit erroneously affirmed the Delaware District Court's assignment of an artificial purity level of 62% as "it [was] reasonable for [the] district court to estimate the purity of unseized drugs" "based on the lowest purity sample purchased directly from Moss." (A4).

Due to law enforcement failing to seize any methamphetamine from Mr. Moss and/or Mr. Santiago upon their return from Reading, Pennsylvania, on October 27th, 2021, October 28th, 2021 or November 11th, despite having the opportunity to do so,[27] due process mandated the District Court to carefully review the Government's evidence "to ensure that [the Government's] estimate [for purity level was] proven by a preponderance of the evidence."[28] However, the Government failed

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more severely . . . simply on evidence of the underlying conduct . . . And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 86 (holding that the use of "the preponderance standard satisfi[ed] due process."); *McDowell*, 888 F.2d at 291 (noting that under *McMillan* it "is without much doubt" that "the preponderance of evidence standard can withstand constitutional muster" and that it "logically follows that the burden of ultimate persuasion should rest on the party attempting to adjust the sentence.").

[27] A48-50.

[28] *United States v. Collado*, 975 F.2d 985, 998 (3d Cir. 1992); *see also Watts*, 519 U.S. at 156, 157 (citing *Nichols*, 511 U.S. at 747-48; *Dowling*, 493 U.S. at 349; *McMillan*, 477 U.S. at 91-92) (holding that acquitted conduct may be considered at sentencing "so long as that conduct has been prove[n] by a preponderance of the evidence" as "the application of the preponderance of the evidence at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (noting that the "petitioner . . . could have been sentenced more severely . . . simply on evidence of the underlying conduct . . . And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 86 (holding that the use of "the preponderance standard satisfi[ed] due process."); *United States v. Johnson*, 94 F.4th 661, 664 (7th Cir. 2024) (citing *United States v. Carnell*, 972 F.3d 932, 939 (7th Cir. 2020)) ("[I]f the district court chooses to rely on the quantity of actual methamphetamine in a mixture . . . the court must ensure that the government has provided reliable, factual basis to compute it."); *United States v. Williams*, 19 F.4th 374, 380 (4th Cir. 2021) (noting that while the district court consider non-lab report evidence for determining drug purity, this other evidence "must be sufficiently reliable and specific that it actually supports the Government's position" in relation to drug purity.); *Id.* at 380, n.3 (noting that "[d]istrict court are better equipped than circuit courts to make these determinations in the first instance and their determinations will, of course, be based on the records presented in their entirety. But to explain out instruction that indirect evidence of 80% purity be sufficiently reliable and specific, evidence that Ice was commonly used in the geographic area of the conspiracy, for example, would not without some indirect evidence

to present any evidence linking the 62% pure methamphetamine obtained during a controlled buy with Mr. Moss and the alleged methamphetamine purchased by Mr. Moss from a supplier in Reading, Pennsylvania. Nevertheless, the Delaware District Court artificially assigned all of the methamphetamine a 62% purity level even though the District Court acknowledged that "[t]here [was] no direct or circumstantial evidence to establish by a preponderance that any of the methamphetamine seized by the government during its investigation came from the October 27-28 and November 11 purchases Moss and Santiagor made in Reading." (A9). As mere speculation is insufficient[29] and there was a lack of evidence linking the 62% pure methamphetamine and the alleged methamphetamine from Reading, Pennsylvania, it was inappropriate for the Delaware District Court to assign all of the methamphetamine the 62% purity level.[30]

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specifically connected to the defendant, be sufficient."); *United States v. Verdin-Garcia*, 516 F.3d 884, 896 (10th Cir. 2008) (citing *United States v. Dalton*, 409 F.3d 1247, 1251 (10th Cir. 2005); *United States v. Ruiz-Castro*, 92 F.3d 1519, 1543 (10th Cir. 1996)) ("When the actual drugs underlying a drug quantity determination are not seized, the trial court may rely upon an estimate to establish the defendant's guideline offense level so long as the information relief upon has some basis of support in the facts of the particular case and bears sufficient indicia of reliability.").

[29] *Collado*, 975 F.2d at 998 ("This is not to say that calculation of drug amounts may be based on mere speculation. . . .").

[30] *Watts*, 519 U.S. at 156, 157 (citing *Nichols*, 511 U.S. at 747-48; *Dowling*, 493 U.S. at 349; *McMillan*, 477 U.S. at 91-92) (holding that acquitted conduct may be considered at sentencing "so long as that conduct has been prove[n] by a preponderance of the evidence" as "the application of the preponderance of the evidence at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (noting that the "petitioner . . . could have been sentenced more severely . . . simply on evidence of the underlying conduct . . . And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 86 (holding that the use of "the preponderance standard satisfi[ed] due process."); *Johnson*, 94 F.4th at 664 (citing *Carnell*, 972 F.3d at 939) ("[I]f the district court chooses to rely on the quantity of actual methamphetamine in a mixture . . . the court must ensure that the government has provided reliable, factual basis to compute it."); *Williams*, 19 F.4th at 380 (noting that while the district court consider non-lab report evidence for determining drug purity, this other evidence "must be sufficiently reliable and specific that it actually supports the Government's position" in relation to drug purity.); *Id.* at 380, n.3 (noting that "[d]istrict court are better equipped than circuit courts

In sum, it was the Government's burden of proof to prove by a preponderance of the evidence the requisite purity of the methamphetamine attributable to Mr. Moss for purposes of calculating Mr. Moss' base offense level under the U.S. Sentencing Guidelines. As the Government failed to present any evidence linking the 62% pure methamphetamine to the alleged methamphetamine purchased from Reading, Pennsylvania, the Delaware District Court improperly relieved the Government of its burden of proof to prove the drug purity level by a preponderance of the evidence by assigning the artificial 62% purity level. By doing so, the District Court violated Mr. Moss' due process rights and the Third Circuit erred when it upheld this artificial assignment contrary to clearly established federal law requiring disputed facts to be proven by a preponderance of the evidence.[31] Thus, this Court should exercise its discretion pursuant to Rule 10(c) and grant the petition to remedy this error.

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to make these determinations in the first instance and their determinations will, of course, be based on the records presented in their entirety. But to explain out instruction that indirect evidence of 80% purity be sufficiently reliable and specific, evidence that Ice was commonly used in the geographic area of the conspiracy, for example, would not without some indirect evidence specifically connected to the defendant, be sufficient."); *Verdin-Garcia*, 516 F.3d at 896 (citing *Dalton*, 409 F.3d at 1251; *Ruiz-Castro*, 92 F.3d at 1543) ("When the actual drugs underlying a drug quantity determination are not seized, the trial court may rely upon an estimate to establish the defendant's guideline offense level so long as the information relief upon has some basis of support in the facts of the particular case and bears sufficient indicia of reliability."); *Collado*, 975 F.2d at 998.

[31] *Watts*, 519 U.S. at 156, 157 (citing *Nichols*, 511 U.S. at 747-48; *Dowling*, 493 U.S. at 349; *McMillan*, 477 U.S. at 91-92) (holding that acquitted conduct may be considered at sentencing "so long as that conduct has been prove[n] by a preponderance of the evidence" as "the application of the preponderance of the evidence at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 748 (noting that the "petitioner . . . could have been sentenced more severely . . . simply on evidence of the underlying conduct . . . And the state need prove such conduct only by a preponderance of the evidence."); *McMillan*, 477 U.S. at 86 (holding that the use of "the preponderance standard satisfi[ed] due process.");

C. The Third Circuit similarly erred by upholding the Delaware District Court's other base offense calculations and an obstruction of justice enhancement.

In addition to upholding the artificially assigned 62% purity level, the Third Circuit also upheld the District Court's methamphetamine weight calculation for purposes of determining Mr. Moss' base offense level as well as the application of an obstruction of justice enhancement. (A3; A7-9). As described, below, Mr. Moss asserts that the Government failed to meet its burden of proof in relation to the weight calculation and obstruction of justice enhancement and therefore, the Third Circuit erred when it upheld the Delaware District Court's contrary findings.

1. The Government failed to present sufficient evidence that Mr. Moss purchased 15 pounds of methamphetamine from a supplier in Reading, Pennsylvania.

Following the evidentiary hearing and post-hearing briefing, the Delaware District Court found that Mr. Moss and his co-conspirators purchased 10 pounds of methamphetamine between October 27th and October 28th, 2021 and an additional 5 pounds of methamphetamine on November 11, 2021. (A7-9). The Delaware District Court referenced several factors in support of it holding which the Third Circuit affirmed as "a 'plausible' interpretation of the evidence. . . ." (A8-9). However, as described below, the record does not support this conclusion that the Government had proven by a preponderance of the evidence that Mr. Moss purchased 15 pounds in totality.

As Mr. Moss was not physically observed in Reading, Pennsylvania nor stopped by law enforcement at any point on October 27, 2021, October 28, 2021 or November 11, 2021 after traveling to Reading, Pennsylvania, law enforcement did not seize, field test, preliminarily weigh, or have any chemical analysis performed on the controlled substances purchased on those dates.

(A49). Thus, the Government had to rely heavily on Mr. Moss' cellular communications to meet its burden of proof for alleged weight of methamphetamine purchased by Mr. Moss.

In relation to the methamphetamine purchased between October 27th October 28th, 2021, the best evidence available of what was purchased was from a recorded phone call between Mr. Moss and Mr. Santiago that took place on the morning of October 27th. (AA52). During this phone call, Mr. Santiago unequivocally told Mr. Moss that they were "only gonna get 5 because I ain't trynna get the whole 10, for real." (A52). When questioned about this phone call, the Government's witness, Officer Riccoban, interpreted this call as meaning that Mr. Moss and Mr. Santiago were only going to purchase 5 pounds of methamphetamine,[32] as opposed to the 10 pounds which was found by the Delaware District Court. (A7-9). As this phone call clearly established the intent of the Parties mere hours before they departed to Reading, it is apparent that any previous phone calls discussing what the Parties planned to purchase is meaningless. (A52).

Similar reasoning applies to the Delaware District Court's citation and reference to a phone call between Mr. Moss and Mr. Rodriguez on November 3, 2011. A review of this phone call clearly shows a bit of puffery on the part of Mr. Moss as it is apparent that Mr. Moss was trying to convince Mr. Rodriguez to engage in the sale of methamphetamine.[33] Notably, Mr. Moss advised Mr. Rodriguez during this call that there was no way that he could lose, that selling methamphetamine was "where the bread [was] at", and that the sale of methamphetamine was keeping Mr. Moss "a

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[32] A52.

[33] *See* A41 ("my boys all down there hustling right now."); *Id.* ("But, one of them is like a millionaire, though, bro."); *Id.* ("I swear to you [U/I] it's like, a dope flip bro, you ain't gonna lose, I swear you not, ain't no . . . way you can lose bro. . . ."); *Id.* (" I promise you bro, that's where the bread is at."); *Id.* ("That's how I be staying a float. . . ."); *Id.* ("Times like this, the ice money be coming through bro, I am telling you, that shit save me every time.").

float." (A41). As such, it is reasonable to conclude that the information Mr. Moss reported to Mr. Rodriguez was embellished. Additionally, this phone call must also be considered in context with Mr. Moss' phone call with Mr. Santiago just mere hours before they departed for Reading during which they discussed how they were only going to purchase 5 pounds as opposed to 10 pounds. (A52). In light of the other available evidence, the phone call between Mr. Moss and Mr. Santiago, it is apparent that the phone call with Mr. Rodriguez does not lend much support to the District Court's conclusion that a 10 pound purchase occurred on October 27th and October 28, 2021. (A7-9).

Lastly, the District Court referenced, and the Third Circuit affirmed, Mr. Moss' advertisement of methamphetamine for sale on the way back from Reading as evidence of a 10 pound purchase between October 27th and October 28th, 2021. (A8). While Mr. Moss did advertise that he had methamphetamine for sale, he was not offering to sell larger amounts of methamphetamine which would have been indicative of a recent purchase of 10 pounds. Rather Mr. Moss was only offering to sell ounces. (A40; A85). Thus, as the record makes it clear that Mr. Moss and Mr. Santiago formulated a plan to only purchase 5 pounds collectively, the Government failed to prove by a preponderance of the evidence a 10 pound purchase of methamphetamine on October 27th and October 28th, 2021. Therefore, the Third Circuit erred when it upheld the District Court's finding that the Government presented sufficient evidence of a 10 pound purchase of methamphetamine on October 27th and October 28, 2021.

In relation to the alleged purchase of 5 pounds of methamphetamine on November 11, 2021, the District Court also referenced a number of factors in support of its finding that this purchase occurred all of which the Third Circuit affirmed. (A3; A8-9). However, like with the purchase of

methamphetamine between October 27th and October 28th, none of the factors established by a preponderance of the evidence that Mr. Moss purchases 5 pounds of methamphetamine on November 11, 2021.

Again, as described above, the Government was forced to rely on Mr. Moss' cellular communications to establish this purchase as Mr. Moss was not physically observed in Reading, Pennsylvania on November 11, 2021, nor was he stopped on his way back. (A49-50). As such, the Delaware District Court relied on a November 12, 2021 phone call between Mr. Moss and Mr. Santiago during which the two discussed "five one-pound drug sales" as evidence of a 5-pound purchase on November 11, 2021. (A43). However, the Delaware District Court considered this snippet in a vacuum, not giving proper consideration to the rest of the phone call. In particular the Delaware District Court, and in turn the Third Circuit, failed to give proper weight to the portions of the call where Mr. Santiago said he was trying to "go up" to Reading while also voicing concerns over the price that would need to be paid to supplier. (A43; A132-34). The Courts also failed to give weight to the portions of the call where Mr. Santiago expressed concerns about filling order that he already had lined up and where Mr. Moss and Mr. Santiago discussed how they only had a few ounces left at Ms. Chamberlain's residence. (A43; A132-34). All of which are not indicative of someone who, within the last 24 hours, purchased 5 pounds of methamphetamine.

This conclusion is further buttressed by another call later that morning between Mr. Moss and Mr. Santiago during which Mr. Moss and Mr. Santiago discussed only having 70 grams left. (A123-24). Thus, as the above noted phone calls demonstrate a low supply of methamphetamine, the District Court's findings that Mr. Moss purchased 5 pounds of methamphetamine on November 11, 2021 were not supported by the factual record. Therefore, the Third Circuit erred when it upheld the District Court's finding that Mr. Moss purchased 5 pounds of methamphetamine on November

11, 2021 and this Court should exercise its discretion pursuant to Rule 10(c) and grant the petition to remedy this error.

2. There was insufficient evidence to sustain the District Court's application of an obstruction of justice enhancement.

The Third Circuit affirmed the District Court's application of 2 point offense level enhancement for obstruction of justice. (A4). In support, the Third Circuit concluded that there was "significant evidence supporting the enhancement and thus, the decision to apply it was not clearly erroneous." (A4). The Third Circuit noted in support that the District Court considered "testimony from the cooperating co-conspirator about threatening notes he received as well as communications between Moss and his girlfriend confirming that he intended to expose the co-conspirator by recording the proceedings." (A4). Contrary to the Third Circuit findings, the evidence did not support the conclusion that Mr. Moss sent threatening notes to the cooperating co-conspirator.

Noticeably absent from the Third Circuit's opinion is any analysis of how Mr. Moss was physically unable to send these notes to his cooperating co-conspirator. While the cooperating co-conspirator alleged to have received these notes through the plumbing system at FDC Philadelphia, the Government failed to present any evidence that Mr. Moss was the responsible party. In fact, the Parties, prior to the cooperating co-conspirator's testimony, stipulated that there was no direct connection between Mr. Moss' cell and the co-conspirator's cell which would enable Mr. Moss to send these notes through the plumbing system. (A143; A146; A148; A149).

Also absent from the Third Circuit's opinion is any analysis of the suspicious circumstances surrounding how the co-conspirator came into possession of these notes and how he made the Government aware of his receipt. As drawn out during cross examination, the co-conspirator was originally scheduled to testify during the evidentiary hearing as a condition of his plea agreement.

(A147). However, he breach the agreement last minute, thereby placing into jeopardy all of the benefits who stood to gain by testifying against Mr. Moss. (A147-48).

Conveniently after the co-conspirator was advised that he would be losing all of the benefits he would have received, the co-conspirator then made the Government aware of the alleged threatening notes. (A148). However, the co-conspirator did not report the notes to any prison staff nor was he able to produce the notes because the co-conspirator, on his own initiative, destroyed the notes before anyone could see them. (A148). Toward the end of cross examination, the co-conspirator conceded that he was testifying against Mr. Moss in hopes that the Government would file a 5K motion on his behalf. (A148-49). In light of the above, the circumstances in which the co-conspirator allegedly received the threatening messages is suspect at best and in turn, the credibility of their testimony is questionable. Thus, contrary to the Third Circuit's findings, the co-conspirator's testimony did not constitute ample evidence to support the obstruction of justice enhancement.

In relation to Mr. Moss' intent to expose the co-conspirator, the Third Circuit's opinion also did not address the evidence presented by Mr. Moss that his intent was not to intimidate, but rather to unwisely attempt to clear his own name of being labeled as a cooperator or snitch by his peers. As argued during the sentencing hearing, Mr. Moss highlighted multiple emails illustrating that he was being accused of being a cooperator and his efforts to prove otherwise. (A157-59). In particular, Mr. Moss argued to the District Court that his January 5, 2023 email in which he wrote "Yo, what's up with Chunk telling people I'm police" was evidence that the cooperating co-conspirator was accusing Mr. Moss of being a cooperator. (A157). Mr. Moss similarly argued that his December 14, 2022 email was further evidence of Mr. Moss being labeled as a cooperator. (A158). Furthermore, Mr. Moss argued that his December 15, 2022 email which read "[n]ot his

peoples, it just the one who had the wire and camera on, but the 'N word' Hove talking – shit talking about I'm paranoid and that his folks solid over there" as evidence of "this beef . . . that it's Mr. Moss that's cooperating, and not" the cooperating co-conspirator. (A158-59). Furthermore, Mr. Moss noted to the Delaaware District Court a recorded phone call between Mr. Moss and another young woman during which Mr. Moss told this woman that he was not cooperating and that anyone could learn who was cooperating by going to Pacer.com. (A159).

As argued during the sentencing hearing, these emails and the phone call were evidence of how Mr. Moss was being labeled as a cooperator and were indicative of Mr. Moss' true intent that he only unwisely sought to expose the co-conspirator to prove that he was not cooperating. (A157-59). Thus, the record did not support the application of the obstruction of justice enhancement based upon his efforts to expose the cooperating co-conspirator because the evidence demonstrated a non-nefarious intent.

Lastly, as described above, neither the co-conspirator's alleged receipt of threatening messages nor Mr. Moss' attempt to expose the co-conspirator was a sufficient independent basis to sustain the obstruction of justice enhancement. As such, cumulatively, they were also not a sufficient basis for the enhancement. In light of the above, the record did not support the Third Circuit finding that there was "significant evidence supporting the enhancement" and this Court should exercise its discretion pursuant to Rule 10(c) and grant the petition to remedy this error.

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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