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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

ROLLIE MONTEZ MITCHELL,

V.

UNITED STATES OF AMERICA.

ORIGINAL

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

PETITION FOR A WRIT OF CERTIORARI

Rollie Montez Mitchell

x Rollie Mitchell

Pro Se Petitioner

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QUESTION PRESENTED

1) Is Petitioner's Fifth, Sixth and Fourteenth Amendment rights violated when he is tried and convicted for one offense (distribution of a controlled substance) but sentenced for a completely different uncharged offense (first-degree murder), based exclusively on facts that were neither included in his indictment or inherent in the jury's verdict, and were judge (not jury) determined — using the preponderance of the evidence standard, rather than beyond reasonable doubt?

2) Does U.S.S.G. Manual 2024 Appendix C - Amendment 830 Part D Enhanced Penalties for Drug Offenders Apply to A Defendant That Was Sentenced For Relevant Conduct Under 201.1 Where The Elements Of The Courts Preponderance Finding Were Not Established Beyond A Reasonable Doubt To Jury?

## PARTIES TO THE PROCEEDING

Petitioner Rollie Montez Mitchell, who was the Defendant-Appellant in the court below, the United States of America, was the Plaintiff-Appelle in the court below.

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Is Petitioner's Fifth, Sixth and Fourteenth Amendment rights violated when he is tried and convicted for one offense (distribution of a controlled substance) but sentenced for a completely different uncharged offense (First-degree murder), based exclusively on facts that were neither included in his indictment or inherent in the jury's verdict, and were judge (not jury) determined — using the preponderance of the evidence standard, rather than beyond reasonable doubt?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Rollie Montez Mitchell seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

### OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at United States v. Mitchell, 2024 U.S. App. LEXIS 18350 (7th Cir. 2024). It is also reprinted in Appendix A to this Petition. The district court's judgement and amended sentence is attached as Appendix B.

### JURISDICTION

The opinion and judgement of the Seventh Circuit were entered on July 25, 2024. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

### STATUTORY AND RULES PROVISIONS

Amendment V. - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, Section 1. - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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.

USSG § 2D1.1(d)(1) - If a victim was killed under circumstances that would constitute murder under 18 U.S.C. 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply 2A1.1 (First Degree Murder) or 2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under the guideline.

## STATEMENT OF THE CASE

In June 2006, Tony Hurd--a police informant--contacted Mitchell and made a single purchase of approximately 144 grams of cocaine base (street value of \$3,000). Hurd also contacted and purchased cocaine base from a Billy Hicks and Tree Smith, two men allegedly associated with Mitchell. All three men were subsequently charged in state court with controlled substances offense - which were eventually dismissed. Following the state charge, Hurd's identity became public, and in August 2007, Hurd was murdered while sitting in an automobile at a gas station parking lot.

Mitchell was never questioned or charged with having any involvement in Hurd's murder. -1- However, seven-months after the murder and after the state charge was dismissed, Mitchell was indicted on a single count (single defendant) federal drug offense. Following a jury trial, he was convicted of knowingly distributing 50 Grams or more of cocaine base (stemming from Mitchell's single transaction with Hurd -2- ), in violation of 21 U.S.C. 841(a)(1). No fact, evidence or testimony regarding Hurd's murder was ever produced in Mitchell's charging documents or presented to the jury during his trial. Yet, at his sentencing hearing, the prosecution presented testimonial evidence suggesting that Mitchell had participated in the planning and funding of Hurd's murder - although there was no suggestion that he was the actual triggerman. Three cooperating defendant's were the sole evidence used to support the prosecution's theory:

First, was the hearsay testimony from Special Agent Noel Gaertner of the Drug Enforcement Agency about an interview he had with Edward Bradley (a jailhouse informant/informal jailhouse lawyer facing pending charges).

According to Gaertner, Bradley claimed that Mitchell had related to him the plan for Hurd's murder; wherein, Billy Hicks was to recruit a woman to bring Hurd to a gas station to be killed. Allegedly, Mitchell was to supply the financial compensation to the shooter. -3- Next, Mitchell's ex-girlfriend, Heather Clark (who was herself facing pending state charges), testified that shortly after Hurd's murder, she overheard a conversation between Mitchell and someone Mitchell identified as "Billy". Ms. Clark could not hear the entire

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1. Another man was eventually charged with Hurd's murder. See *State v. Croom*, 2013-Ohio-3377, Case Number 2010-CR-2215 (Anthony Croom sentenced to life without parole for the murder of Tony Hurd).
  2. See *United States v. Mitchell*, 2009 U.S. Dist. LEXIS 100101 (S.D. Ind. - 2009).
  3. Bradley, himself, never testified, but still received a plea deal for his cooperation. Mitchell was never informed of the cooperation agreement.

conversation, but did hear Billy say something about hiring a girl to have "something happen to [her boyfriend]" and that Mitchell expressed surprise that Billy would pay someone to do something like that. (During her testimony, Clark assumed "Billy" was Billy Hicks, but did not know Hicks and could not identify him). -4- Finally, David Jones (another jailhouse informant/informal jailhouse lawyer facing pending charges) testified that Mitchell had discussed his involvement in Hurd's murder while seeking help formulating a defense strategy. -5-

Based on the above testimony, the district court found, by a preponderance of the evidence, that Mitchell had participated in Hurd's murder, and applied the first-degree murder cross-reference under USSG 2D1.1(d)(1). The resulting guideline range skyrocketed Mitchell's sentencing guideline range to a life sentence for the premeditated murder of Hurd. The court then considered other sentencing factors, but ultimately sentenced Mitchell to the recommended life imprisonment for Hurd's murder.

Mitchell timely appealed, arguing that the district court erred enhancing his sentence to life based solely on a finding by the preponderance of the evidence that he participated in premeditated first-degree murder. The court rejected his argument based on standing Supreme Court and Seventh Circuit precedent. -6- Mitchell then filed a Motion for Relief, pursuant to 28 U.S.C. 2255, which was also denied pursuant to standing precedent. -7- Afterwards, Mitchell filed a Motion for Sentence Reduction pursuant to Section 404 of the First Step Act of 2018, which the district court partially granted. -8- Although the district court acknowledged that his non-murder guideline called for a 121-151 month sentence, the court only reduced Mitchell's old top end "life" sentence to the new top end sentence of "40 years" imprisonment -9- (based solely on the applied murder cross-reference). Mitchell timely appealed the district court's decision, still arguing the application of the murder since, but was -10- subsequently denied on July 25, 2024. This petition for certiorari timely follows.

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4. Clark had also received a deal for her cooperation; whereupon completion of her testimony, the prosecutors dismissed her pending state charges. Mitchell was never notified of the dismissal.
  5. Jones was also provided a plea agreement for his testimony, which Mitchell was again not ever notified.
  6. See *United States v. Mitchell*, 655 F.3d 990 (7th Cir. 2017).
  7. See *United States v. Mitchell*, No. 1:12-CV-1002-SEB-TAB (S.D. Ind. - 2014) (arguing that applying a murder sentence by a preponderance of the evidence standards violates his constitutional rights).
  8. See *United States v. Mitchell*, No. 1:08-CR-00016-SEB-TAB (S.D. Ind. - 2013) (arguing that applying a murder sentence by a preponderance of the evidence violates his constitutional rights).
  9. Section 841(a)(1) statutory range 10-life was reduced to 5-40 years. See 841(b)(1)(A)(iii)(1996-2010)(current)
  10. In *Denial* The Court said There has been No Change of Law Regarding Use of Uncharged Relevant Conduct To Increase A Defendant's Offense Level. On November 1st 2024 U.S.S.C. Manual Appendix C, Amendment 830, Part D-Enhanced Penalties For Drug Offenders Became Law. Clarifying Alternative Enhanced Base Offense Levels Apply To Offense Of Conviction And Not Relevant Conduct. (2D1.1) Mitchell Was Enhanced Under 2D1.1 For An Element That Was Not Established By The Jury On A Preponderance Determination That Wasn't Part Of Offense Of Conviction.

## REASONS FOR GRANTING THIS PETITION

At the time of Mitchell's sentencing, Supreme Court precedent and the US Sentencing Guidelines allowed sentencing judge's authority to factor—by the preponderance of the evidence—uncharged or acquitted conduct when determining sentencing. -1- See *United States v. Watts*, 519 U.S. 148 (1997); see also USSG 6A1.3, cmt. Recently though, the Sentencing Commission has unanimously voted to exclude conduct for which a person was acquitted in federal court from being used in calculating a sentence range under the federal guidelines. -2- See [https://www.ussc.gov/guidelines/amendments/proposed\\_2024\\_amendments\\_federal\\_sentencing\\_guidelines](https://www.ussc.gov/guidelines/amendments/proposed_2024_amendments_federal_sentencing_guidelines) (amendment barring use of acquitted conduct for purposes of determining sentence). Since *Witte v. United States*, 515 U.S. 389 (1995), the Court has continued to uphold the use of uncharged conduct at sentencing, -3- as long as "the defendant is no[t] being punished for uncharged relevant conduct as though it were a distinct criminal offense". *Id.* at 402 (emphasis added); see also *Watts*, 519 U.S. 148. The Court in *Watts* had additionally acknowledged that in "extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence". *Id.* at 156, n.2. 4 a

The US Sentencing Guidelines first degree murder cross reference—as applied to Mitchell—is such an 'extreme' example that punishes uncharged conduct as though it were a 'distinct criminal offense'. Pursuant to the Sentencing Guidelines applied at Mitchell's sentencing and sentencing reduction:

If a victim was killed under circumstances that would constitute murder under 18 U.S.C. 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply 2A1.1 (First Degree Murder) or 2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

USSG 2D1.1(d)(1). The tragic murder of Tony Hurd was never charged in Mitchell's indictment or found by a jury beyond reasonable doubt. -4- In applying 2D1.1(d)(1) to Mitchell's minor drug offense, the district court essentially imposed a dramatically higher murder sentence of life/480 month, by the lower preponderance of -5

1. For the purposes of this argument, "there is no relevant difference...between acquitted conduct and uncharged conduct". *McClinton v. United States*, 143 S. Ct. 2400, 2404, n.\* (2023).
2. However, the Commission delayed voting on the retroactivity of the amendment, under USSG 1B1.10(b), pending an undisclosed date.
3. In fact, the Court in *Witte* made its determination against a double-jeopardy challenge, not a Fifth, Sixth, or Fourteenth Amendment challenge. See *Witte*, 515 U.S. 389.
4. Notably, not a single fact surrounding the murder offense was ever mentioned until Mitchell's sentencing of a single transaction of selling cocaine base, a 121-151 month imprisonment offense (see argument below). See also *United States v. Felton*, 166 Fed. Appx. 64 (4th Cir. 2006) (2D1.1(d)(1) invalid if not indicted).
5. The Mandatory Minimum Sentence Triggered By Facts Found By The Court Based On A Preponderance of Relevant Conduct At Sentencing Converged With The Statutory Maximum Imposed For Facts Mitchell Went To Trial For As An Element Of The Crime. The Judges Find On Entitled Her To A Particular Outcome Because It Was A Life-Death Penalty Base Offense Level 43. Once A Judge Makes A Finding they Must Impose It. This Effectively Increased The Mandatory Minimum To 40 years. 5

the evidence standard of proof. In allowing a judge made determination on the facts surrounding a murder, including the defendant's level of intent (premeditation), components that are as close to the essential "elements" of an offense as one can get, -5- "is repugnant to [judicial] jurisprudence". -6- Therefore, section 2D1.1(d)(1) violates the fundamental components of Mitchell's Fifth, Sixth, and Fourteenth Amendment rights.

I. Fifth, Sixth, And Fourteenth Amendment Jurisprudence—As Applied Here.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court reaffirmed the principle that it is permissible for sentencing judges "to exercise discretion...in imposing judgement within the range prescribed by statute", *Id.* at 481, but also held that the Constitution limited this discretion, because the Sixth Amendment requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt". *Id.* at 490; see also *United States v. Alleyne*, 570 U.S. 99, 104 (2013)(any fact that increases the mandatory minimum is also an "element of a crime [that] must be proved to the jury beyond a reasonable doubt"). In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court elaborated on *Apprendi*, stating that the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant". *Id.* at 303; see also *Cunningham v. California*, 549 U.S. 270, 275 (2007)(same). In *United States v. Booker*, 543 U.S. 200 (2005), the Court further expanded its earlier holdings to apply to sentencing enhancements that exceeded maximum sentences under the Sentencing Guidelines. See *Booker* at 239 ("Regardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable").

The majority opinions in *Apprendi v. New Jersey*, *United States v. Alleyne*, *Blackley v. Washington*, and the constitutional majority in *United States v. Booker*, reflect the Court's concern that sentencing enhancements based on uncharged, dismissed and acquitted crimes may undermine—if not directly contravene—many of the fundamental components of the adversary system that the Framers intended, specifically—notice, jury trial,

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5. *Apprendi v. New Jersey*, 530 U.S. 466, (2003)(a "defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element'").

6. *Watts*, 519 U.S. at 170 (Justice Stevens, dissent)("The notion that a charge that cannot be sustained by proof beyond reasonable doubt may give rise to the same punishment as if it had been so provided is repugnant to that jurisprudence")

7. The Aggravating Fact Produced A Higher Penalty Range Of Minimum Life. Which In Turn, Conclusively Indicates That The Fact Is An "Element" Of A Distinct And Aggravated Crime. The Sentencing Scheme Effectively Increased Mitchell's Mandatory Minimum Of Five Years (121-151 months). To A Mandatory Minimum Guideline Range Of 480 Months Due To The Increased Base Offense Level Of 43. The Judge Acknowledged Without The Relevant Conduct Finding Mitchell Is At 121-151 Months Or Immediate Release.

due process, and proof beyond a reasonable doubt. The application of the murder sentencing enhancement, 2D1.1(d)(1), does exactly that—it allows the government to sentence a defendant for committing murder, even though the jury convicted him only of simple possession with intent to distribute a controlled substance. This violates a defendant's Fifth, Sixth and Fourteenth Amendment rights.

A. Circumventing the Fifth Amendment right to due process.

"[T]he drafters of the Declaration of Independence" were particularly concerned about the abuse of old English vice-admiral courts and went through "great lengths" to protect colonists from such practices, which is now safeguarded through "the Bill of Rights". SEC v. Jarkes, 114 S. Ct. 2117, 2143-44 (2024); Erlinger v. United States, 144 S. Ct. 219 (slip Op. at 6)(2023). Of these rights, the Fifth Amendment Due Process Clause, addresses this very concern by providing that the government may not deprive anyone of "life, liberty, or property, without due process of law". SEC at 214. In other words, "due process of law" generally implies and includes...[a judge], regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings". Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856). US Guideline Section 2D1.1(d)(1) completely circumvents this process.

First, the statutory elements of first degree murder under 18 U.S.C. 1111—the offense for which Section 2D1.1(d)(1) sentences—requires that the defendant unlawfully "kill[s another] human being, with malice aforethought, done with premeditation or committed in the perpetration of certain enumerated felonies". See United States v. Thomas, 280 F.3d 1149, 1156 (7th Cir. 2002). Regular due process would require, at minimum, that Mitchell be notified of the murder offense and charged with its essential elements and any "facts and circumstances which constitute the offense". Erlinger at 462; quoting Apprendi, 530 U.S. at 478. Because, "an indictment or accusation [that] lack any particular fact which the laws made essential to the punishment, [is] treated as no accusation at all". Erlinger, 462 (internal citations and edits omitted). Here, Mitchell's indictment was completely devoid of any facts or circumstances surrounding Herd's murder, let alone the essential elements section 1111's premeditated murder offense.

Next, regular due process would then require "the ancient rule" that the government must prove to a jury every one of its charges beyond a reasonable doubt". Erlinger, 461. This rule seeks to "mitigate the risk of

prosecutorial overreach and misconduct", *Id.*, including the pursuit of "pretended offenses" and "arbitrary convictions". The Federalist No. 83, p.499 (C. Rossiter ed. 1961). Instead, Mitchell was tried and convicted with a simple possession with intent to distribute 50 grams or more of a controlled substance, and then sentenced to premeditated murder, based on the preponderance of the evidence determined by a single judge. This, along with the insufficient indictment, violated Mitchell's Fifth Amendment right to due process. -7-

**B. Circumventing the Sixth Amendment right to trial by jury.**

The Sixth Amendment promises that "[i]n all criminal prosecutions the accused" has "the right to a speedy and public trial, by an impartial jury". Inhering in that guarantee is an assurance that a guilty verdict will issue only from a unanimous jury. *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020). The Sixth Amendment, along with the Due Process Clause of the Fifth Amendment, work together to "limit how the government may go about depriving an individual of the life, liberty, or property", thus, vindicating the Constitutional promise of a "fair trial in a fair tribunal". *SEC*, 144 S. Ct. at 2140. Because, "the Framers would not have thought it too much to demand that, before depriving a man of...his liberty [for the rest of his life], the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors', rather than a lone employee of the State". *Booker*, 543 U.S. at 238 quoting *Blakely*, 542 U.S. at 313.

Allowing a judge to determine, by the preponderance of the evidence, the essential facts of a murder offense (disguised as a simple sentencing enhancement), violates the "fundamental reservation of power" to the American people. *Blakely*, 305-06. Justice Scalia in *Blakely v. Washington*, specifically recognized that the threshold for sentencing factors cannot be elevated to become "the tail which wags the dog of the substantive offense". *Id.* at 307; quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986). Justice Scalia further explained that this threshold is crossed whenever legislators—or the Sentencing Guidelines—enact sentencing mechanisms that exceed "the judicial estimation of the proper role of the judge". *Blakely*, 307. As an example, the *Blakely* court specifically recognized that it would be an "absurd result" of the Guidelines if "a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing [a] firearm used to commit it, or of making an illegal lane change while fleeing the death scene". *Id.* This is exactly what has

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7. *United States v. Allen*, 644 F. Supp. 2d 422, 435 (2nd Cir. 2009) ("It may violate due process for a defendant

to be charged with one crime and then sentenced based on other crimes carrying a higher Guideline range") The Original Meaning Of The Sixth Amendment Is Any Fact That By Law, Increases The Penalty For A Crime Is An Element That Must Be Submitted To Jury And Proved Beyond A Reasonable Doubt. It Follows, Then, That Any Fact That Increases The Mandatory Minimum Is An Element That Must Be Submitted To Jury And Found Beyond A Reasonable Doubt. *Alleyne v. U.S.* 570 U.S. 99 (2013) Which Was Not Available In Mitchell's First Appeal In 2011, Which Is Applicable Under *Concepcion* And A Intervening Change Of Law Under *Concepcion* (2022) But Was Not Applied In Mitchell's Sentencing Reduction Hearing On 11-30-23.

occurred in Mitchell's case. As feared in Blakely, the "tail" of Mitchell's murder sentence wagged the "dog" of his possession with intent to distribute conviction. He was sentenced to life (now 40-years) for allegedly participating in a murder, yet only convicted of distributing a controlled substance one time—which is a constitutionally 'absurd result'.

This is not inconsistent with the Court's previous holding in *United States v. Watts*, because it "simply was not presented" in *Watts*. *Watts* only addressed "a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause" in "permit[ing] a court to consider acquitted conduct in sentencing a defendant under the Guidelines" and limited its holding by noting; "neither *Witte* [*v. United States*] nor [*United States v.*] *Watts* was there any contention that the sentencing enhancement [like Mitchell's] had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment". *Booker*, 543 U.S. at 240, n.4. The Guideline's 2D1.1(d)(1) murder enhancement does just that; wherein, a jury convicts a defendant of a minor offense (like "possessing [a] firearm" or, here, possession with intent to distribute), but exceeds its judicial authority by imposing a sentence almost entirely upon a separate uncharged offense (murder). See e.g. *Blakely*, 307. Multiple Circuit judge's, including the Court, argue this fundamentally unfair issue warrants certiorari:

*Jones v. United States*, 574 U.S. 948 (2014)(Scalia, J. dissenting from denial of cert.)(“we should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment”) (Thomas and Ginsburg., J.J.)(same); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (“Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to jury trial”); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006)(“sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment”); *United States v. Olsen*, 519 F.3d 1096, 1105 (10th Cir. 2008)(notes “several cases...hold that sentencing facts must be supported by [at least] clear and convincing evidence if they have an 'extremely disproportionate effect on the sentence relative to the offense of conviction'”); *United States v. Staten*, 466 F.3d 708, 717-20 (9th Cir. 2006)(requiring findings by clear and convincing evidence when the defendant's sentence was increased by four offense levels); *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008)(“the consideration of 'acquitted conduct' to enhance a defendant's sentencing is unconstitutional”); *United States v. Cox*, 2023 U.S. App. LEXIS 14784 (6th Cir), cert denied, 2023 U.S. LEXIS 3970 (2023)(pressing argument that “relying on acquitted conduct in sentencing violates the Fifth and Sixth Amendment”); *United States v. Medley*, 34 F.4th 326, n.3 (4th Cir. 2022)(noting the “growing number of critics” who believe uncharged or acquitted conduct in sentencing violates the Sixth Amendment); *United States v. Martinez*, 769 Fed. App'x 12 (2nd Cir. 2019)(court's use of acquitted conduct of murder is “fundamentally unfair” and runs afoul of the Sixth Amendment).

"The jury c[an]not function as circuit breaker in the States machinery of justice if it were regulated to making a determination that the defendant at some point did something wrong [(possession with intent to distribute)], a mere preliminary to a judicial inquisition into the facts of the crime [(murder)] the State actually seeks to punish". Blakely, 306-07.

Here, the Government actually seeks to punish a murder offense (18 U.S.C. 1111) and then circumvent Mitchell's right to jury trial by instead applying the murder offense as a mere sentencing enhancement to his possession with intent to distribute conviction. -8- "When a sentencing judge finds facts that could, in themselves, constitute entirely free-standing offenses under the applicable law—that is, when an enhancement factor could have been named in the indictment as a complete criminal charge—the Due Process Clause of the Fifth Amendment requires that those facts be proven beyond a reasonable doubt", by a unanimous jury of his peers under the Sixth Amendment. *United States v. Faust*, 456 F.3d 1342, 1352 (11th Cir. 2006). -9- Both the crime of 'murder' (whether under Section 1111, 1958, or 1959) and the crime of 'possession with intent to distribute' (under Section 841) provide for a top end imprisonment term of "life". -10- But a possession with intent to distribute also provides for a sentence as low as ten years imprisonment. -11- With such a wide range of punishment in the possession with intent offense Mitchell was convicted, it seems fundamentally unfair to sentence him on its top end (life/480-months) based solely on the murder enhancement. -12- The Seventh Circuit precedent used to affirm the murder cross-reference enhancement, notes this very concern:

No one can deny that the guidelines, coupled with recent increases in the maximum terms for many offenses, have increased the importance of sentencing vis-a-vis trial. We have indicated some

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8. See e.g., *United States v. Burrell*, 177 Fed. Appx. 322 (4th Cir. 2006)(finding a defendant convicted "of conspiracy to distribute and possesses with the intent to distribute cocaine and sentenced...to life imprisonment...pursuant to the [2D1.1] murder cross-reference", "violated his Sixth Amendment rights").
  9. The Government, in seeking to punish for Hurds murder, could have (and should have) charged Mitchell under 18 U.S.C. 1111 for murder, or 18 U.S.C. 1958 for murder for hire, or 18 U.S.C. 1959(a)(1) for murder in aid of racketeering, or any other applicable federal offense with the element of murder, to be determined beyond a reasonable doubt. But why would they if the higher standard of proof can be stripped away and the murder be found by a much lower standard of proof by a judge (not jury).
  10. Murder under Section's 1111, 1958 and 1959 also allow for the death penalty.
  11. Although, 18 U.S.C. 841's punishment range of 10 years-to-life has been reduced to 5 years-to-life.
  12. Again, Mitchell's non-murder guideline range is only 121-151 months (even lower considering the disparity between cocaine base (crack) and powder cocaine guideline ranges). See *Kimrough v. United States*, 552 U.S. 85 (2007)(allowing district courts discretion under Booker to disregard the 100-to-one ratio for crack vs powder cocaine sentences)

sympathy with the conclusion that when sentencing becomes the dog and the trial the tail, judges should borrow some of the devices used at trial to protect the defendant's interest and improve accuracy (two objectives that are not always compatible).

United States v. Masters, 978 F.2d 281, 287 (7th Cir. 1992). Although the district court's sympathy is appreciated, it does not solve how the enhancement became unreasonable in relation to the convicted offense, nor did the court 'borrow' any of the devices used at trial to protect Mitchell's interest. His sentence had no meaningful connection to his charged offense but remained valid simply because it remained within the statutory maximum sentence (which happens to be the same statutory maximum for the murder offense the Government actually sought to punish).

In fact, not only did Section 2D1.1(d)(1) murder cross-reference enhancement undermine the goals and validity of the Sentencing Guidelines, -13- it also directly violates the core concern outlined in Apprendi v. New Jersey. "Apprendi's 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense'". Union Co. v. United States, 567 U.S. 343, 368 (2012) quoting Ice v. Oregon, 555 U.S. 160, 170 (2009). Because the Sixth Amendment must always "guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY". Jones v. United States, 526 U.S. 227, 248 (1999). Section 2D1.1(d)(1) pulls the penalty provision of Section 1111 into Mitchell's sentencing and "under Section 1111 of Title 18, which is the federal murder statute, the offense of murder in the first degree...carries a maximum sentence of death and a minimum sentence of life in prison". United States v. Bonilla-Romero, 984 F.3d 414, 417 (5th Cir. 2020)(emphasis added); see also United States v. Lee, 618 F. Supp. 3d 797, 802 (7th Cir. 2022)(agreeing with Bonilla-Romero that Section 1111 "sets forth both a maximum [death] and minimum [life] sentence" the court must follow). Therefore, 2D1.1(d)(1) raised Mitchell's minimum statutory penalty from 10 years-to-life (or 5 years-to-40 years) to a minimum of life (or 40 years).

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13. "[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process". Gall v. United States, 552 U.S. 38, n.6 (2007). And "[w]hile the ultimate sentencing decision is discretionary, 'the Guidelines are [still] the framework for sentencing and anchor the district court's discretion'". McClinton v. United States, 143 S. Ct. 2400, 2401 (2023). A 'life' sentence guideline range, based on an uncharged murder offense, 'anchored' the district court's sentencing and resentencing-- which undermined the validity of his sentence.

Allowing A Court To Make A Factual Determination, Such As Whether A Murder Was Caused By Crime, Seriously Implicates The <sup>due</sup> Process Clause Of The U.S. Constitution Amendment Five And The Notice And Jury Trial Guarantees Of U.S. Constitution Amendment Six.

"[T]he language of 18 U.S.C. 1111(b)...appears on its face to provide a mandatory minimum sentence of life imprisonment for the offense". Sentencing Guideline, Appendix C. Amendments 82 (1989). This raised Mitchell's minimum penalty provision without determining the essential elements of the murder to a jury beyond reasonable doubt, -14- and created a new arbitrary method of trial for murder without providing the protections of the Fifth/Sixth Amendment.

Finally, applying this enhancement strips away Mitchell's Sixth Amendment "right to confront the witnesses against him". *Smith v. Arizona*, 144 S. Ct. 1785, 1791 (2024). The Sixth Amendment bars the admission of "testimonial statements" of an absent witness unless he is "unavailable to testify, and the defendant has had a prior opportunity" to cross-examine him. *Id.* quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The hearsay testimony of Noel Gaertner (D.E.A.) regarding informant/informal jailhouse lawyer, Edward Bradley, statements violate this principle (yet are allowed during sentencing proceedings). So to did the admission of Mitchell's ex-girlfriend, Heather Clark, and other informant/informal jailhouse lawyer, David Jones, testimony violate the Sixth Amendment because it bars out-of-court statements offered "to prove the truth of the matter asserted", *Anderson v. United States*, 417 U.S. 211, 219 (1974), and because "[i]t is fundamentally at odds with the right of confrontation to admit statements based on judicial determinations of reliability". *Smith*, 1791 quoting *Crawford*, 61. Since one witness was not provided (or given prior opportunity) to testify, and all three testimonies were not governed by the same standards as if at trial, -15- and because the truth of the statements were judge-made (not jury-made), the application of a murder enhancement—based solely on these testimonies—violates the Sixth Amendment.

C. Circumventing the Fourteenth Amendment right to due process.

"Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression". *Deshaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189 (1989). Both "ensure that officials may not displace certain rules associated with criminal liability that are so old and venerable, so rooted in the

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14. *Allyene*, 570 U.S. at 104 (any fact that increases the mandatory minimum is an "element" of the offense)

15. For example: At trial, since all three witnesses were given some benefit for their testimonies, that fact would have been required to be disclosed to Mitchell (which it was not). See; Exhibit "A", Enclosed.

traditions and conscience of our people, as to be ranked as fundamental". City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2215 (2024)(internal quotes omitted). Since "no meaningful difference exists between the Fifth and Fourteenth Amendment's" Due Process Clause, Schnier v. Qatar Islamic Bank v, 632 F. Supp 3d 1335, 1358 n.16 (11th Cir. 2022), Mitchell simply cites his Fifth Amendment argument above that the US Guideline 2D1.1(d)(1) enhancement has stripped away his due process rights. -16-

#### CONCLUSION

For the reasons stated above, Mitchell respectfully request the Court grant his petition for certiorari.

Respectfully submitted;

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16. Additionally, Mitchell argues that the exclusion of witnesses plea agreement affected the "traditional and fundamental standards of due process". Chambers v. Mississippi, 410 U.S. 284, 302 (1973)("exclusion of... critical evidence" violates the Fourteenth Amendment). Also See: Burrage V. U.S. 134 S.Ct. 881 (2014) Applies Retrospectively And Made A Substantive Change That Affects Mitchell's Sentence. The Drugs Distributed By Mitchell Is Not Independently Sufficient Cause Of Victim's Death Or Serious Bodily Injury, Therefore Mitchell Is Not Liable Under The Penalty Enhancement Provision of 21 USC 841 Unless Such Use Is A "But For Cause" Of The Death Or Injury. Burrage Referenced Its Decision To Alayon V. U.S. 133 S.Ct. 2151 (2013) That Because The Death Results Enhancement In 21 USC 841 Or Murder Enhancement In 2D1.1 "Reckless Conduct" 13 Increased The Minimum & Maximum Exposure To Punishment Base Offense Level 43 To (Life-Death). It Is An Element That Must Be Proved And Found Beyond A Reasonable Doubt.