No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ADRIN SMACK
Petitioner

v.

SUPERINTENDENT MAHANOY SCI
Respondent,

and

ATTORNEY GENERAL OF DELAWARE
Respondent.

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

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February 18, 2025

QUESTION PRESENTED

Was Petitioner's Fourteenth Amendment due process right violated when a Delaware State Sentencing Court applied a minimal indicia of reliability burden of proof to resolve disputed facts at Petitioner's sentencing hearing, rather than the preponderance of the evidence standard which Petitioner asserted was required to comply with due process?

PARTIES TO THE PROCEEDING

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

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Petitioner, Adrin Smack, by and through his counsel, Christopher S. Koyste, Esquire respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed on November 20, 2024, cited as *Smack v. Superintendent Mahanoy, SCI*, No. 23-1600 (3d Cir. Nov. 20, 2024) and appearing at A1-11.

OPINION BELOW

The United States Court of Appeals for the Third Circuit issued an opinion on November 20, 2024 denying Mr. Smack's appeal of the United States District Court for the District of Delaware's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Third Circuit held that Mr. Smack was not entitled to relief as he failed to identify clearly established federal law governing the burden of proof for all disputed facts presented at a state sentencing hearing. (A2). The United States Court of Appeals for the Third Circuit's November 20, 2024 opinion appears at A1-11 and is reported as *Smack v. Superintendent Mahanoy, SCI*, No 23-1600 (3d Cir. Nov. 20, 2024).

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 November 20, 2024. 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 14 provides, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. amend. XVI).

STATEMENT OF THE CASE

In 2014 and 2015, Mr. Smack was involved in possessing with an intent to distribute heroin in the State of Delaware. (A203-12; A220-22). As a result of his actions, Mr. Smack was charged by indictment with one count of giving a firearm to a person prohibited, seventy one counts of drug dealing, one count of possession of marijuana, two counts of conspiracy second degree, and five counts of possession of a firearm by a person prohibited. (A65-74; A76-77; A79-80; A82-86; A92-93; A95-98; A102-04; A107-08; A110-11; A113; A116-18; A129-30; A133-35; A137).

On March 31, 2016, Mr. Smack entered a guilty plea to two counts of drug dealing heroin in a tier 4 quantity (counts 36 and 37 of the indictment), two counts of drug dealing no tier weight) (counts 40 and 122 of the indictment), and singular counts of possession of a firearm by a person prohibited (count 39 of the indictment) and conspiracy second degree (count 238 of the indictment). (A139; A144-46). As a condition of the plea agreement, the State agreed to not recommend a prison sentence greater than 15 years and Mr. Smack agreed to not request a prison sentence of less than 8 years. (A139; A142).

On June 22, 2016, Mr. Smack was scheduled to be sentenced, however, the hearing was continued to allow Mr. Smack and the State to brief the issue of what the applicable burden of proof was for disputed facts presented during the sentencing hearing. (A149; A155-56). The continuance was needed because the State argued to the Sentencing Judge that facts involving conduct beyond the admitted/pled counts of the indictment should have been considered by the Sentencing Court when determining Mr. Smack's sentence. (A149-52). Mr. Smack argued that contested facts presented by the State to be relied upon when sentencing Mr. Smack needed to be proven by a

preponderance of the evidence while the State advanced that the applicable burden of proof was only a minimal indicia of reliability. (A153; A155-56).

In a series of filings,[1] Mr. Smack asserted that the State bore the burden of proof for any disputed factual allegations presented during a sentencing hearing and that the applicable burden of proof was a preponderance of the evidence. (A159-60). The State responded by arguing that the applicable burden of proof for disputed facts presented at a sentencing hearing was a minimal indicia of reliability. (A165-67).

On November 9, 2016, the Delaware Superior Court held oral argument on the applicable burden of proof for contested facts presented at a sentencing hearing. (A226-28). Consistent with his filing, Mr. Smack asserted that the applicable burden of proof was a preponderance of the evidence. (A231-34). However, the Superior Court rejected Mr. Smack's assertion and held that the applicable burden of proof was only a minimal indicia of reliability. (A235). The Superior Court also sought clarification as to which specific facts Mr. Smack would contest in light of the court's ruling. (A236-44; A247). Mr. Smack indicated that it was "the assertion of the other uncharged aspects, such as Mr. Price's residence and what [was] found in Mr. Price's residence that we dispute." (A249). Mr. Smack further specified that it was "the conduct beyond conviction that was being disputed." (A249). Counsel for Mr. Smack also indicated that he would "respond in writing" with more detail in relation to what indicted counts were at dispute. (A249).

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[1] Mr. Smack filed a Pre-Sentence Motion in Response to the Court's June 22, 2016 Order Regarding the Scope of Consideration at Mr. Smack's Sentencing Hearing on August 15, 2016. (A157-62). The State filed their Memorandum Regarding Sentencing on October 3, 2016. (A163-22). Mr. Smack filed a letter replying to the State's memorandum on October 11, 2016. (A223-25).

On November 17, 2016, the Superior Court issued an order finding that the applicable burden of proof for disputed facts presented at a sentencing hearing was a minimal indicia of reliability. (A49-51). The order further stated "that the State may rely upon (in addition to the Presentence Investigation) the indictment and the affidavit submitted by the State in support of its application to obtain a warrant" as "the[y] bear the requisite indicia of reliability. . . ." (A51). It was also clear from the language of the order that the Superior Court was free to consider all of the indicted counts when determining Mr. Smack's sentence. (A51).

On November 18, 2016, Mr. Smack filed a letter asserting that "Mr. Smack [would] not be contest[ing] the Court's consideration at sentencing, under the minimal indicia of reliability burden of proof standard ruled to be applicable by the Superior Court, of seventy four non-convicted indicted counts. (A253). However, Mr. Smack also identified seven non-convicted indicted counts that he asserted did not satisfy the minimal indicia of reliability standard. (A253-54).

During the November 23, 2016 sentencing hearing, the State renewed its request for a fifteen year sentence. (A255). In response, Mr. Smack asserted that an eight year sentence was sufficient as Mr. Smack was not a drug kingpin and was only involved in drug dealing to support his family. (A256-59). The State countered by asserting that seventy-seven drug dealing counts within a two month time span suggested that Mr. Smack's illegal activity was a full-time job, that Mr. Smack was a significant drug dealer, and that retail drug sales were a greater evil than distributing large amounts of drugs, all of which justified a harsher sentence. (A259-60). Mr. Smack responded that seventy-seven drug deals within a two month time period was indicative of a retail seller, not a supplier, and that it was illogical for the State to argue that "the drug dealer is considered a greater evil than the wholesale individuals that are supplying them." (A261-62).

The Superior Court sentenced Mr. Smack to an aggregate prison sentence of 14 years followed by 12 years of descending levels of probation. (A264-68). In support of the sentence, the Superior Court rejected Mr. Smack's arguments and considered all of the indicted counts, noting "we have had this discussion and I have written in the opinion to you guys that there is a sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts." (A263). The Sentencing Court's statement made it clear that it considered all of the indicted not-pled to counts when issuing its sentence,[2] finding that the non-pled-to-yet-indicted conduct met the minimal indicia of reliability standard.

On December 23, 2016, Mr. Smack timely appealed his sentencing and the Delaware Superior Court's ruling on the applicable burden of proof for disputed facts presented at a sentencing hearing to the Delaware Supreme Court. In his appellate filings, Mr. Smack asserted that the Superior Court abused its discretion by resolving disputed aggravating sentencing facts by applying the minimal indicia of reliability standard, rather than the preponderance of the evidence standard. (A291-06; A343-53). Mr. Smack also asserted that the Due Process Clause required the application of the preponderance of the evidence standard to resolve disputed facts raised at sentencing hearings. (A291-06; A343-53).

The Delaware Supreme Court affirmed the judgment of the Superior Court on October 11, 2017, finding that the Delaware Superior Court used the proper evidentiary standard for fact finding at sentencing which was a minimal indicia of reliability as noted in *Mayes v. State*, 604 A.2d 839

[2] The non-convicted counts included 67 counts of drug dealing, 4 counts of possession of a firearm by a person prohibited, and singular counts of giving a firearm to a person prohibited, possession of marijuana, and conspiracy second degree. *Compare* A65-74; A76-77; A79-80; A82-86; A92-93; A95-98; A102-04; A107-08; A110-11; A113; A116-18; A129-30; A133-35; A137 with A139; A144-46.

(Del. 1992). (A46-47). The Delaware Supreme Court also noted that the federal case law cited by Smack was inapposite as those cases involved sentencing under the federal sentencing guidelines. (A47).

On January 9, 2018, Mr. Smack timely filed a certiorari petition to this Court. (A354-81). Following the State's brief in opposition, this Court denied the certiorari petition. (A382-95).

On April 16, 2019, Mr. Smack timely filed his writ of habeas corpus in the United States District Court for the District of Delaware. In his habeas filings, Mr. Smack asserted that the Delaware State Courts erred because the courts failed to consider controlling United States Supreme Court precedent interpreting the Due Process Clause of the Fourteenth Amendment as requiring disputed facts presented during sentencing and considered by the sentencing judge to be proven by a preponderance of the evidence. (A405; A415-32; A442; A491-98; A505-08; A509).

The United States District Court for the District of Delaware dismissed Mr. Smack's habeas petition on March 3, 2023. (A13-42). In support, the Delaware District Court held that Mr. Smack failed to identify clearly established federal law that was violated by the Delaware State Courts because Petitioner's case "did not involve a statutory sentencing enhancement provision, and the sentence imposed was within statutory limits." (A25). The District Court also held that Mr. Smack failed to "demonstrate that the information before the sentencing court was materially false and that the court relied on the false information when imposing the sentence." (A27).

On March 31, 2023, Mr. Smack timely filed a notice of appeal to the United States Court of Appeals for the Third Circuit. Thereafter, Mr. Smack moved for the issuance of a certificate of appealability on May 1, 2023, which the Third Circuit granted on July 26, 2023. (A12).

In his Third Circuit appellate briefs, Mr. Smack asserted that the Delaware State Court's and the Delaware District Court's holdings were erroneous as the holdings were "based upon misapplication of federal case law relating to an appellate standard of review of sentencing hearing fact findings, as well as a misapplication of a series of United States Supreme Court cases which involve how disputed facts raised in a sentencing hearing are ruled upon by a sentencing judge." (A529; A530-41; A605-09). Mr. Smack also argued that Delaware sentencing hearings must comply with the Due Process Clause of the Fourteenth Amendment and therefore, the preponderance of the evidence burden of proof for disputed sentencing facts that have been applied in federal court under the Due Process Clause was equally applicable to Delaware state sentencing hearings. (A541-48; A602-05). Furthermore, Mr. Smack asserted that the Delaware District Court incorrectly concluded that no disputed facts were presented during Mr. Smack's sentencing hearing, specifically identifying the disputed facts, not proven by a preponderance of the evidence, that were relied upon by the sentencing judge when issuing Mr. Smack's sentence. (A548-52; A613-16).

On November 20, 2024, the United States Court of Appeals for the Third Circuit issued its denial opinion. In its opinion, the Third Circuit held that Mr. Smack "fail[ed] to identify clearly established federal law governing the burden of proof for all disputed facts at his state sentencing hearing and . . . fail[ed] to identify any materially false information relied on by the sentencing court. . . ." (A2). However, Mr. Smack in his Opening Brief and Reply Brief provided accurate information that there were disputed facts raised at Mr. Smack's sentencing hearing and described why it was indisputable fact that the sentencing court made fact findings using a minimal indicia of reliability standard and that Petitioner properly preserved his objection to this finding. (A548-52; A613-16).

The constitutional question at issue was preserved in the Delaware State Courts, the United States District Court for the District of Delaware, and the United States Court of Appeals for the Third Circuit, as Mr. Smack asserted that the Due Process Clause of the Fourteenth Amendment requires disputed sentencing facts presented during a state court sentencing hearing and considered by the sentencing judge to be proven by a preponderance of the evidence. (A159-60; A231-34; A291-06; A343-53; A405; A415-32; A442; A491-98; A505-08; A509; A529; A530-41; A541-48; A602-05; A605-09).

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."[3] Petitioner Smack advances that the Due Process Clause of the 14th Amendment requires that disputed facts raised at a sentencing hearing, and considered by a sentencing judge when imposing a sentence, must be proven by a preponderance of the evidence standard; essentially, Smack asserts that disputed facts must be demonstrated to be true and accurate based on a probability, being probably true. On it's face, Smack's position does not sound controversial, as it reads as if it's a commonsensical statement of Black Letter Law. However, the Delaware Superior Court, the Delaware Supreme Court, the District Court for the District of Delaware, and the Third Circuit Court of Appeals have all upheld Delaware's state court standard

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

of proof for facts raised at a sentencing hearing and relied upon by a sentencing judge to be only a "minimal indicia of reliability". (A6-8; A24-26; A46-47; A51). Essentially, all of these courts have upheld a "minimal indicia of reliability" as being the standard of proof to be applied by a sentencing judge, although such a less than a probability standard "smacks" of being an appellate review standard of facts findings made by a sentencing judge who has applied the Constitutionally correct standard of proof.

At his sentencing hearing, over Smack's objection that the proper burden of proof for disputed facts is a preponderance of the evidence (A159-60; A231-34), the Delaware sentencing judge applied the minimal indica of reliability standard as the fact burden of proof to establish the disputed facts, allowing the judge to consider in addition to the six counts which Smack plead guilty to, all of the not admitted, not plead to 74 counts of the indictment. (A51; A235). Considering all the alleged facts in the indictment as being true and correct, the Delaware sentencing judge issued an effective 14 year sentence of incarceration as opposed to the 8 year sentence requested by Mr. Smack. (A259; A264; A266-68). Delaware allows its sentencing judges to fashion a sentence of incarceration by considering as true and correct, facts that are only proven or established under a minimal indicia of reliability standard which means less facts than a probability.

The described error of law is a compellingly dangerous standard, which is applied in Delaware's state court system every time that a Defendant is sentenced and there is a dispute about some fact that is raised by a prosecutor, argued by a prosecutor, is a true and proven fact, even though Delaware only requires a prosecutor to prove that disputed fact and a Delaware sentencing judge to find that fact under a minimal indicia of reliability in order for a Judge to rely upon that fact when determining the sentence. This Supreme Court should exercise its discretion under Rule 10(c)

and grant the petition to remedy this error for Mr. Smack, all defendants in Delaware who face a sentencing hearing which will have disputed facts, as well as any other state that applies a minimal indicia of reliability standard of proof at sentencing hearings.

Throughout his case, from the very beginning in the Superior Court of Delaware, Smack has asserted via written submissions and arguments that the Delaware state sentencing judge must apply a standard of proof for disputed facts of a preponderance of the evidence. Facts relating to criminal conduct described in 74 indicted counts were at issue in whether the Delaware sentencing judge would consider these facts as proven true as part of the mental calculations that the judge would perform to issue a sentence of incarceration. Smack consistently argued that a trilogy of three United States Supreme Court cases provided the support for his position that the United States Constitution, through its 14th amendment, requires state sentencing courts to use the preponderance of the evidence standard as the burden of proof to resolve the disputed facts. Those three cases are *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), *Nichols v. United States*, 511 U.S. 738 (1994) and *United States v. Watts*, 519 U.S. 148 (1997).

This Court's recent decision in *Andrew v. White*, 220 L. Ed. 2d 340 (2025) is a roadmap that helps one determine if a United States Supreme Court opinion that "relies on a legal rule or principle to decide a case, [whether] that principle is a 'holding' of the Court for purposes of AEDPA."[4] The instructive guidance in *Andrew* is extremely helpful in resolving the dilemma raised by Smack as Smack's argument is a layered analysis that requires one to interpret the noted trilogy of cases consistently to reach the conclusion that the preponderance of the evidence burden of proof for

[4] *Andrew v. White*, 220 L.Ed. 2d 340, 345 (2025) (citing *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)),

disputed facts at a state court sentencing hearing is required by the 14th Amendment of the Constitution. *Andrew* explains that a legal principle can be "'clearly established' under § 2254(d)(1),' even though it arises out of a 'thicket of . . . jurisprudence' and lacks 'precise contours.'"[5] *Andrew* noted that in the 2020 opinion in *Taylor v Riojas* that this Court held that even if a specific case has not been previously relied upon to decide the question at hand, "general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question."[6]

A. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)

McMillan is the first of the trilogy that holds that a preponderance of the evidence is the standard of proof required by the Constitution to resolve a fact relevant to sentencing. 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.[7] However, the sentencing judge found the act unconstitutional and imposed a lesser sentence than was required by the act.[8] The Commonwealth appealed and the Supreme Court of Pennsylvania concluded that the act was consistent with due process.[9] The petitioner 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.[10] This Court held otherwise finding that although this Court "ha[s] never attempted

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[5] *Id*. at 347 (citing *Lockyer*, 538 U.S. at 72).

[6] *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (internal quotations omitted) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *Andrew*, 220 L.Ed. 2d at 347 (quoting *White v. Woodall*, 572 U.S. 415, 427 (2014)) ("Although this Court has not previously relied on *Payne* to invalidate a conviction for improperly admitted prejudicial evidence, moreover, 'certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.'").

[7] *McMillan v. Pennsylvania*, 477 U.S. 79, 82 (1986).

[8] *Id.*

[9] *Id*. at 83.

[10] *Id*. at 84.

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 Mandatory Minimum Sentencing Act does not exceed those limits.[11] 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 in the Fourteenth Amendment."[12]

In *Andrew*, this Court held that when "a legal rule or principle" is relied upon "to decide a case, that principle is a 'holding' of the Court for purposes of AEDPA."[13] In *McMillan*, this Court expressly relied upon the legal principle that due process requires disputed sentencing facts to be proven by a preponderance of the evidence to reject the petitioner's "subsidiary claim that due process nonetheless requires that visible possession be proved by at least clear and convincing evidence."[14] As the principle that the preponderance of the evidence is the proper standard of proof to make a fact finding at a sentencing hearing was relied upon by this Court to resolve one of the petitioner's claims in *McMillan*, that means this principle was a holding of this Court for purposes of AEDPA.

B. *Nichols v. United States*, 511 U.S. 738 (1994)

The *Nichols* 1994 opinion of this Court provides additional support that it is clearly established federal law of the Supreme Court that for a fact to be considered to be proven for

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[11] *Id*. at 86.
[12] *Id.* at 86.
[13] *Andrew*, 220 L.Ed 2d at 345 (citing *Lockyer*, 538 U.S. at 71-72).
[14] *McMillan*, 477 U.S. at 80.

purposes of sentencing, that the burden of proof is the preponderance of the evidence standard. 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.[15] Although petitioner objected to the inclusion of his prior DUI misdemeanor conviction, 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.[16] On direct appeal, a divided panel for the United States Court of Appeals for the Sixth Circuit affirmed.[17] Thereafter, the petitioner sought certiorari review.[18]

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."[19] In support, this Court indicated that "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. 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."[20]

As recognized in *Andrew*, "[w]hen this Court relies on a legal rule or principle to decide a case, that principle is a 'holding' of the Court for purposes of AEDPA."[21] And in *Nichols*, this Court relied on the principle that due process requires disputed sentencing facts to be proven by a

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[15] *Nichols*, 511 U.S. at 740.
[16] *Id.* at 741.
[17] *Id*. at 742.
[18] *Id.*
[19] *Id.* at 748.
[20] *Nichols*, 511 U.S. at 748.
[21] *Andrew*, 220 L.Ed. 2d at 345.

preponderance of the evidence, to reach the conclusion that "consistent with the Sixth and Fourteenth Amendment of the Constitution, that an uncounseled misdemeanor conviction . . . is . . . valid when used to enhance punishment at a subsequent conviction."[22] This Court further recognized its prior holding *McMillan*, stating:

> Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence. [*McMillan*, 477 U.S. at 91]. Surely, then, it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proved beyond a reasonable doubt.[23]

C. *United States v. Watts*, 519 U.S. 148 (1997)

Watts was convicted at a federal jury trial of possessing cocaine with intent to distribute, but was acquitted of using a firearm in relation to a drug offense.[24] Despite the acquittal, the sentencing court found, under the preponderance of the evidence standard, that petitioner did possess a firearm in connection with a drug offense and therefore, added two points to his base offense level.[25] On 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."[26] The government thereafter sought certiorari review and this Court found that the Ninth Circuit had erred. Relying on its holding in *McMillan* and *Nichols*, this Court rejected the argument that "a jury's verdict of acquittal . . . prevent[s] the sentencing court from considering

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[22] *Nichols*, 511 U.S. at 748.
[23] *Id.*
[24] *Watts*, 519 U.S. at 149.
[25] *Id.*
[26] *Id.*

conduct underlying the acquitted charge,"[27] finding that acquitted conduct may be considered at sentencing "so long as that conduct has been prove[n] by a preponderance of the evidence"[28] as "the application of the preponderance of the evidence at sentencing generally satisfies due process."[29]

As this Court noted in *Andrew* that "*Payne* did not invent due process protections against unduly prejudicial evidence" as "[t]he Court had several time before held that prosecutors' prejudicial or misleading statements violate due process if they render a trial or capital sentencing fundamentally unfair", *Watts* did not invent the due process requirement that disputed sentencing facts must be proven by a preponderance of the evidence in order to satisfy due process.[30]

Mr. Smack's analysis of the Due Process Clause of the 14th Amendment and its applicability to the required burden of proof for disputed sentencing facts presented at a state sentencing hearing is supported by this Court's very recent decision in *Andrew v. White*, 220 L. Ed. 2d 340 (2025). In *Andrew*, the petitioner was convicted and sentenced to death after a jury trial in which the prosecutors "spent significant time at trial introducing evidence about Andrew's sex life and about her failings as a mother and wife. . . ."[31] On direct appeal, petitioner asserted "that the introduction of irrelevant evidence, including evidence 'that she had extramarital sexual affairs with two other men,' that she had 'come on to' another witness's sons, and that she had dressed provocatively at a restaurant . . . violated Oklahoma law as well as the Federal Due Process Clause."[32] The Oklahoma

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[27] *Id.* at 157,

[28] *Id.*

[29] *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.)

[30] *Watts*, 519 U.S. at 156 (citing *Nichols*, 511 U.S. at 747-48; *McMillan*, 477 U.S. at 91-92) ("[W]e have held that application of the preponderance standard at sentencing generally satisfies due process.").

[31] *Andrew*, 220 L. Ed. 2d at 342-43.

[32] *Id*. at 344 (internal citation omitted).

Court of Criminal Appeals disagreed and denied relief because the trial court's errors were harmless.[33]

Thereafter, petitioner sought habeas relief arguing that the "admission of this evidence rendered the guilt and penalty phases of her trial fundamentally unfair, in violation of due process."[34] However, the District Court denied relief and on appeal, "[a] divided Tenth Circuit affirmed because, it held, Andrew had failed to cite 'clearly established federal law governing her claim.'"[35] The Tenth Circuit's majority noted that:

> . . . Andrew had cited *Payne* [*v. Tennessee*, 501 U.S. 808 (1991)], in which this Court said that the Due Process Clause "provides a mechanism for relief" when the introduction of unduly prejudicial evidence "renders [a] trial fundamentally unfair." According to the majority, however, that had been a "pronouncement," not a "holding" of this Court. It therefore concluded Andrew had failed to identify "clearly established federal law governing her claim," as required under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[36]

This Court granted certiorari and vacated the judgments below.[37] This Court began its analysis by determining whether this Court's decision in *Payne* constituted clearly established federal law.[38] This Court concluded that "[t]he legal principle on which Andrews relies, that the Due Process Clause can in certain cases protect against the introduction of unduly prejudicial evidence at a criminal trial, was therefore indispensable to the decision in *Payne*. That means it was a holding of this Court for purposes of AEDPA."[39] As such, this Court faulted the Tenth Circuit for

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[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Andrew*, 220 L. Ed. 2d at 344.
[37] *Id*. at 348.
[38] *Id*. at 345-46.
[39] *Id*. at 346.

concluding that "*Payne* 'merely established that the Eighth Amendment did not erect a '*per se* bar' to the introduction of victim-impact statements in capital cases.'"[40]

This Court went on to further note that:

> To the extent that the Court of Appeals thought itself constrained by AEDPA to limit *Payne* to its facts, it was mistaken. General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court. For example, The Eighth Amendment principle that a sentence may not be grossly disproportionate to the offense is "'clearly established' under § 2254(d)(1)," even though it arises out of a "thicket of Eighth Amendment jurisprudence" and lacks "'precise contours.'" Although this Court has not previously relied on *Payne* to invalidate a conviction for improperly admitted prejudicial evidence, moreover, "certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt."[41]

Procedurally, Mr. Smack's case is nearly identical to the procedural posture in *Andrew*. Like the petitioner in *Andrew*, Mr. Smack asserted throughout his state court proceedings that disputed sentencing facts must be proven by a preponderance of the evidence in order to satisfy due process.[42] Also similar to *Andrew*, during his habeas proceedings, Mr. Smack asserted that *McMillan*, *Nichols,* and *Watts* constituted clearly established federal law setting forth that due process required disputed sentencing facts to be proven by a preponderance of the evidence.[43] And at each step of the way the then presiding court erroneously rationalize that *McMillan*, *Nichols*, and *Watts* did not apply to Mr. Smack's case.[44]

Additionally, like the majority in the Tenth Circuit in *Andrew*, the Third Circuit has incorrectly constrained itself and the applicability of this Court's decisions in *McMillan*, *Nichols*,

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[40] *Id*.

[41] *Id*. at 347 (quoting *White*, 572 U.S. at 427; *Lockyer*, 538 U.S. at 72).

[42] *Compare* A159-60; A223-24; A292-96; A344-49 with *Andrew*, 220 L.Ed.2d at 343-44.

[43] *Compare* A415-23; A427-32; A491-98; A529-48; A602-09 with *Andrew*, 220 L.Ed 2d at 344.

[44] A6-8; A23-26; A46-47; A50.

and *Watts* when it found that those cases do not apply to cases like Mr. Smack's where the ultimate sentence was "within the range established only by his conviction." (A6-8). As Mr. Smack argued,[45] when these cases are read together, the general legal principle that the Due Process Clause of the Fourteenth Amendment requires disputed facts presented during a sentencing hearing and considered by the sentencing judge be proven by a preponderance of the evidence becomes clear.[46] This is because the legal principle which Mr. Smack has relied upon "was . . . indispensable to the decision" in *McMillan*, *Nichols*, and *Watts*.[47] Thus, the general legal principle that disputed facts presented during a sentencing hearing must be proven by a preponderance of the evidence "constitute[s] clearly established law for purposes of AEDPA . . . even though it arises out of a 'thicket of [Due Process] jurisprudence' and lack 'precise contours'".[48] Therefore, this Court's decision in *Andrew* requires this Court to resolve this important issue which affects all state sentencing hearing where disputed facts are presented and having a bearing on the sentence issued, like Mr. Smack's case.

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[45] A159-60; A223-24; A292-96; A344-49; A415-23; A427-32; A491-98; A529-48; A602-09.

[46] *Watts*, 519 U.S. at 156-57 (citing *McMillan*, 477 U.S. at 91-92) ("we have held that application of the preponderance standard at sentencing generally satisfies due process."); *Nichols*, 511 U.S. at 747-49 ("Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence."); *McMullan*, 477 U.S. at 84-87, 91-93 ("Like the court below, we have little difficulty concluding that, in this case, the preponderance standard satisfies due process. Indeed, it would be extraordinary if the Due Process Clause, as understood in *Patterson*, plainly sanctioned Pennsylvania's scheme, while the same Clause explained in some other line of less clearly relevant cases imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment.").

[47] *Id.*

[48] *Andrew*, 220 L. Ed. 2d at 347.

D. The Third Circuit erred by failing to properly apply clearly established federal law.

The United States Court of Appeals for the Third Circuit, however, held that Mr. Smack failed "to identify clearly established federal law governing the burden of proof for all disputed facts at his state sentencing hearing. . . ." (A2). In support, the Third Circuit concluded that, contrary to Mr. Smack's argument, this Court's decisions in *McMillan*, *Nichols*, and *Watts* do not "'clearly establish[]' that all disputed facts raised at a sentencing hearing must be proven by a preponderance of the evidence. . . ." (A6). The Third Circuit also erroneously limited the applicability of each of those cases finding that none of those cases addressed "the burden of proof governing sentencing enhancement facts" when the "sentence . . . is within the range established only by his conviction." (A7).

The Third Circuit erred when it did not apply the clearly established federal law set forth in *McMillan*, *Nichols*, and *Watts* as outlined in *Andrews* when it improperly limited the applicability of those cases to the case at hand. (A6-8). As recognized in *Andrew*, "[w]hen this Court relies on a legal rule or principle to decide a case, that principle is a 'holding' of the Court for purposes of AEDPA."[49] And in *McMillan*, this Court expressly relied upon the legal principle that due process requires disputed sentencing facts to be proven by a preponderance of the evidence to reject the petitioner's "subsidiary claim that due process nonetheless require[d] that visible possession be proved by at least clear and convincing evidence."[50] As this principle was specifically relied upon by this Court to resolve one of the petitioner's claims in *McMillan*, "[t]hat means it was a holding

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[49] *Andrew*, 220 L.Ed. 2d at 345 (citing *Lockyer*, 538 U.S. at 71-72).
[50] *McMillan*, 477 U.S. at 80.

of this Court for purposes of AEDPA" and the Third Circuit erred when it held that Mr. Smack failed to properly identify the clearly established federal law.[51]

Similarly, this Court in *Nichols*, also relied on the principle that due process requires disputed sentencing facts to be proven by a preponderance of the evidence to reach the conclusion that "consistent with the Sixth and Fourteenth Amendment of the Constitution, that an uncounseled misdemeanor conviction . . . is . . . valid when used to enhance punishment at a subsequent conviction."[52] In support, this Court, recognizing its prior holding in *McMillan*, stated:

> Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence. [*McMillan*, 477 U.S. at 91]. Surely, then, it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proved beyond a reasonable doubt.

Id. Thus, like it did with *McMillan*, the Third Circuit erred by improperly limited the applicability of *Nichols* to Mr. Smack's case. (A6-8).

The Third Circuit further erred when it concluded that *Watts* did not apply to Mr. Smack's case. (A6-8). However, just like in *Andrew* where this Court noted that "*Payne* did not invent due process protections against unduly prejudicial evidence" as "[t]he Court had several times before held that a prosecutor's prejudicial or misleading statements violate due process if they render a trial or capital sentencing fundamentally unfair", so did *Watts* when this Court reiterated that "[W]e have held that application of the preponderance standard at sentencing generally satisfies due process."[53]

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[51] *Andrew*, 220 L.Ed. 2d at 346; A6-8.

[52] *Nichols*, 511 U.S. at 748.

[53] *Watts*, 519 U.S. at 156 (citing *Nichols*, 511 U.S. at 747-48; *McMillan*, 477 U.S. at 91-92) ("[W]e have held that application of the preponderance standard at sentencing generally satisfies due process.").

This Court's decision in *Andrew* provides guidance for complex and layered legal issues such as those raised by Smack, as *Andrew* points the way through the brush by noting that clearly established federal law satisfies the definition of clearly established "even though it arises out of a 'thicket of . . . jurisprudence' and lacks 'precise contours'"[54] and even if a specific case has not been previously relied upon to decide the question at hand as "general constitutional rule already identified in the decisional law may apply with the obvious clarity to the specific conduct in question."[55] Additionally, the Third Circuit erred when it failed to recognize the clearly established federal law set forth in the *McMillan*, *Nichols*, and *Watts* jurisprudence as argued by Smack as the preponderence of the evidence argument that Smack has raised is a fundamental principal that must be utilized to regulate judicial fact findings made at a state sentencing hearing when those facts are relied upon by a state sentencing judge when fashioning and issuing a sentence . (A6-8).

E. "Minimal indicia of reliability" as the burden of proof for the resolution of disputed facts at a state court sentencing hearing is a dangerous standard that is out of compliance with fundamental Constitutional principles.

If this Court does not grant certiorari, it will let stand the concept that state court sentencing judges can make factual findings of disputed facts, using a minimal indicia of reliability burden of proof, which means that state court judges can issues sentences by relying on fact findings that are not even premised upon being probably true. This minimal indicia of reliability standard for disputed facts would mean, as occurred in Smack (A49-51), that all indicted counts even those in which a defendant was not convicted or plead guilty to, would be recognized as being true and

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[54] *Andrew*, 220 L.Ed. 2d at 347 (citing *Lockyer*, 538 U.S. at 82).

[55] *Taylor*, 592 U.S. 7, 9 (2020) (internal quotations omitted) (quoting *Hope*, 536 U.S. at 741); *Andrew*, 220 L.Ed. 2d at 347 (quoting *White*, 572 U.S. at 427) ("Although this Court has not previously relied on *Payne* to invalidate a conviction for improperly admitted prejudicial evidence, moreover, 'certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.'").

correct and could be factored into a state court sentencing judge's analysis and issued sentence. Thus, this Court must take action, grant certiorari, and reverse the finding of the Third Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: February 18, 2025

Respectfully submitted,

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SUPREME COURT
OF THE UNITED STATES

Adrin Smack,
Petitioner,
v.
Superintendent Mahanoy SCI
Respondent,
and
Attorney General of Delaware
Respondent.

PROOF OF SERVICE

I, Christopher S. Koyste, Esquire, Counsel for Adrin Smack, do swear or declare that on this date, February 18, 2025, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS with EXHIBIT A and PETITION FOR A WRIT OF CERTIORARI with APPENDIX on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Clerk, Supreme Court of the United States, One First Street, NE, Washington DC 20543

Andrew Vella, Esquire, Chief of Appeals, State of Delaware Department of Justice, 820 North French Street, Wilmington, DE 19801

I Declare under penalty of perjury that the foregoing is true and correct. Executed on February 18, 2025.

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