

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ADRIN SMACK,	:	
Petitioner,	:	No. 1:19-cv-00691-LPS
	:	
v.	:	
	:	
THERESA DELBALSO, Superintendent,	:	
SCI Mahanoy	:	
Respondent,	:	
	:	
ATTORNEY GENERAL OF THE STATE	:	
OF DELAWARE,	:	
Respondent.	:	

**BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF DELAWARE IN SUPPORT OF PETITIONER’S  
WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY  
PURSUANT TO 28 U.S.C. § 2254**

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Date: February 28, 2020

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## FACTUAL BACKGROUND

There are two elementary categories of evidentiary questions: admissibility and standard of proof. The first concept, admissibility, concerns what evidence is reliable enough to warrant being weighed at all by the factfinder.<sup>1</sup> In many contexts, for example, hearsay is inadmissible because it is too unreliable. *See, e.g.*, Fed. R. Evid. 801. The second concept, the standard of proof, concerns whether the weight of the evidence is sufficient to establish a given fact.<sup>2</sup>

This case involves the conflation of these two distinct evidentiary questions in the context of Delaware criminal sentencing law generally, and at one particular criminal sentencing in particular.

Adrin Smack was charged with, among other things, sixty-six counts of drug dealing. SR 248. He pleaded guilty to two counts of Drug Dealing Heroin in a Tier 4 Quantity, two counts of Drug Dealing Heroin no tier weight, one count of Possession of a Firearm by a Person Prohibited, and one count of Conspiracy Second Degree. SR 248. The State agreed, as a condition of the plea, not to seek a sentence exceeding 15 years. SR 254.

At Mr. Smack's originally scheduled sentencing, the prosecutor began to introduce allegations from the indictment that police had recovered large sums of cash and drugs from Mr. Smack's co-conspirator's home, in order to argue that Mr. Smack was a "drug kingpin" and

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<sup>1</sup> ADMISSIBILITY, Black's Law Dictionary (11th ed. 2019) ("The quality, state, or condition of being allowed to be entered into evidence in a hearing").

<sup>2</sup> The burden of proof is a legal concept that denotes both the burden of production and burden of persuasion. *See* BURDEN OF PROOF, Black's Law Dictionary (11th ed. 2019). The latter concept, burden of persuasion, is the party's duty to prove facts to a particular standard of proof, such as preponderance of the evidence. *See* BURDEN OF PERSUASION, Black's Law Dictionary (11th ed. 2019). For clarity, this brief uses the term "standard of proof" when referring to the concept of the standard for assessing the weight of the evidence.

should be sentenced accordingly. SR 114. Acknowledging the admissibility of the information contained in the indictment, but disputing it and the inferences to be drawn from it about Mr. Smack's role in the drug trade, defense counsel asked for and received an opportunity to submit written materials. SR 118. The Court stated that "what I want you to do is give me authorities for what the State has the burden of proving." SR 119.

As he did at the initial sentencing hearing, Mr. Smack's counsel's written submission to the Court conceded that the bar for admissibility of evidence at sentencing is extremely low and not the subject of his dispute, stating "Mr. Smack does not contest the scope of what the court may consider at his sentencing." SR 123. Instead, he explains, his disagreement with the State concerns the "burden of proof." SR 123. The burden of proof that he asks the State to bear is for any factual assertions made by the State—i.e., that Mr. Smack is a drug kingpin—to "be proven by the preponderance of the evidence" if they are used to determine Mr. Smack's sentence. SR 123.<sup>3</sup>

The State's response to Mr. Smack's submission characterized the disputed issue variously as the "standard of review at sentencing" and "the scope of consideration at sentencing." SR 130. It concludes that the appropriate standard is the minimal indicia of reliability standard. SR 131.

The sentencing judge's letter order resolving the dispute frames the evidentiary question as concerning the "admissibility of matters the court can consider," SR 217, but also as "the standard which applies to information presented at sentencing." SR 219. He concludes that the

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<sup>3</sup> Mr. Smack also asked for other relief, including an evidentiary hearing with witnesses, that is not the subject of this amicus brief.

indictment, among other things, may be relied upon at sentencing because it meets the requisite indicia of reliability. SR 219.

In his subsequent submission, Mr. Smack's counsel summarized the judge's ruling as "that the burden of proof, for purposes of considering aggravating facts/factors at sentencing, is a minimum indicia of reliability, not a preponderance of the evidence as asserted by Mr. Smack." The sentencing hearing proceeded on that basis.

Once again, a central factual dispute at the new sentencing hearing was whether Mr. Smack was a "drug kingpin" or merely a street-level dealer, not significantly upstream in the chain of distribution from other street-level dealers. SR 224-228. Various pieces of evidence were put forward as relevant to that question, including the number of drug charges prosecutors chose to include in the indictment, SR 226-227; the amount of heroin found in an apartment belonging to Mr. Smack's co-conspirator, SR 227, and what inferences might be appropriately drawn from that evidence; and Mr. Smack's financial assets such as the fact that he did not even own a car, SR 224.

Toward the end of the hearing, after defense counsel questioned the evidentiary weight of the indicted counts on the drug kingpin question in light of the other contentions at the hearing, and the Court replied: "Well, 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. I am not going to punish him for that, I can't do that, but I can consider it." SR 230. He then proceeds to sentence Mr. Smack to fourteen years, a sentence near the top of the negotiated range.

The sentencing court's imposition of the sentence elided the question of the admissibility of the information in the indictment and the separate questions of the evidentiary weight to be

given to that evidence and whether the evidence as a whole sufficiently supported the conclusion the prosecution asked him to draw—i.e., that Mr. Smack should be sentenced at the upper end of the range because he was a kingpin. The fact that the sentencing court could admit evidence on the kingpin question so long as it met a minimal indicia of reliability was never in dispute. What was in dispute was the weight of that evidence and whether it met the appropriate standard of proof.

Unfortunately, on appeal, the Delaware Supreme Court made the same error. The Supreme Court’s Order states: “According to Smack, the State was required to prove by a preponderance of the evidence that Smack was a drug kingpin. Because this Court has previously upheld the use of a minimal indicia of reliability standard to consider evidence offered at a sentencing hearing, and due process does not require an evidentiary hearing, we affirm the Superior Court’s decision.” *Smack v. State*, 172 A.3d 390 (Del. 2017).

The second sentence of that paragraph from the Delaware Supreme Court’s opinion is a non-sequitur to the first sentence. The standard of proof necessary for the Court to find that Smack was a drug kingpin, and thereby increase his sentence in reliance on that fact, is separate from what evidence is admissible when considering that question. As explained below, this elided question of the standard of proof has a clear answer: the sentencing judge must at least believe the fact is more likely than not. By instead adopting the test for admissibility as the only test for whether a fact may be relied upon in issuing a sentence, the trial court violated Mr. Smack’s right to due process, and therefore this Court must reverse and remand this matter to the Delaware Superior Court for new sentencing hearing with instructions that the applicable burden of proof for disputed facts presented during a sentencing hearing, including the 74 non-convicted counts, is a preponderance of the evidence.

## ARGUMENT

As the Delaware Supreme Court has long acknowledged, and controlling federal precedent makes clear, a sentence based on materially false facts violates due process. *Mayes v. State*, 604 A.2d 839, 843 (Del. 1992) (quoting *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976)). A sentencing judge is not permitted to merely find that a fact relied upon to increase a sentence is supported by admissible evidence. Instead, the judge must determine that the evidence supporting the fact relied upon, when considered with the evidence opposing the fact (if any), makes the relied upon fact more likely than not true.

### **A. The question of admissibility is separate from the question of the standard of proof, even in sentencing**

Although these legal categories are elementary, their application in the context of a sentencing proceeding can be confusing. Often the fact being advanced as relevant to sentencing is the direct import of a single piece of evidence, and that evidence is not meaningfully contested—for example, when the fact relied upon is the defendant’s prior conviction history. Sometimes, the evidence and the fact it supports are so closely connected, and undisputed, that the distinction is immaterial. *See United States v. Matthews*, 773 F.2d 48, 52 (3d Cir. 1985) (holding that it was proper for sentencing court to rely on fact of anticipation of profits when court considered defendant’s statements about anticipated profits). In that scenario, questions of admissibility and standard of proof largely collapse into each other. If the evidence is admissible, then absent other evidence, it proves the relevant fact at issue by a preponderance of the evidence. When the evidence is very close to the fact being inferred from it, or the evidence is not meaningfully controverted, the space between admissibility and standard of proof becomes thin or nonexistent.



But the collapsing of the questions of admissibility and standard of proof is not always appropriate. When there is competing evidence or competing inferences that might be drawn from the evidence, or when the evidence is merely relevant to some ultimate factual conclusion but too removed to be sufficient to establish the conclusion on its own, then the separate questions of admissibility and standard of proof become important. *Cf. Huddleston v. United States*, 485 U.S. 681, 691, (1988) (observing that an individual piece of evidence may be insufficient in itself to meet a standard of proof for some factual conclusion).

Delaware's lead case on the question of admissibility at sentencing acknowledges this distinction between admissibility and standard of proof. *See Mayes v. State*, 604 A.2d 839, 844 (Del. 1992). After explaining the admissibility of evidence provided in the presentence report, the Court's opinion notes that the sentencing court had to "make its own determinations of credibility from the information provided in the presentence report" and that under the circumstances of claims of private crimes without witnesses or physical evidence, it is appropriate to make that determination about the weight of the evidence based on corroboration from other witnesses alleging similar facts. *Mayes v. State*, 604 A.2d 839, 844 (Del. 1992). This further review of whether to believe the admitted evidence is required. Indeed, part of the rationale for the precedent holding that information alleged in the indictment is admissible at sentencing is precisely because the sentencing judge is equipped to evaluate it and give it the evidentiary weight it deserves—in some circumstances, presumably, believing it, and in other circumstances not, and with a level of weight depending on the context. *See United States v. Watts*, 519 U.S. 148, 160 (1997) (noting otherwise inadmissible evidence can be used at sentencing but that the judge is "to give appropriate weight to uncorroborated hearsay or to evidence of criminal conduct that had not resulted in a conviction").

If, at sentencing, a judge were permitted to rely on evidence merely because it was admissible, it would follow, for example, that a judge could increase a sentence based on testimony that the judge does not find credible. After all, lots of non-credible testimony is nevertheless admissible.

For all these reasons, it is necessary for the sentencing court to distinguish questions of admissibility and standard of proof.

**B. The minimum possible standard of proof for facts relied upon to increase a sentence is preponderance of the evidence**

Because admissibility and standard of proof are two separate questions, the only remaining issue is whether the standard for admissibility can be used as a standard of proof.

The notion of “minimal indicia of reliability” as a standard of proof is logically incoherent. To understand why the minimum indicia test cannot be the test for standard of proof, one need only consider what it would mean to apply it in the context of countervailing pieces of admissible evidence. If a court faces, for example, competing testimony, it simply provides no guidance at all to say the standard of proof is whether the testimony bears the minimal indicia of reliability—if it did not, it would not have been admitted for consideration, and that test has been met by both sides of the evidence.

When a standard of proof is being applied to fact-finding—as opposed to justifying further investigation or narrowing the scope of appellate review—the minimum requirement is that the judge believes the fact to be inferred from the evidence is, more likely than not, true; a preponderance of the evidence standard is the lowest possible standard of proof. *United States v. Sparkman*, 500 F.3d 678, 685 (8th Cir. 2007) (noting that preponderance of evidence is the lowest possible standard of proof); *Jeremiah v. State*, 73 S.W.3d 857, 858 (Mo. Ct. App. 2002)

(same); *Ashcraft v. State*, 716 N.E.2d 1278, 1280 (Ind. 1999) (same); *United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996) (same); *MaGuire v. Merrimack Mut. Ins. Co.*, 573 A.2d 451, 453 (N.H. 1990) (same).<sup>4</sup> Any standard of proof less than a preponderance, by definition, would involve relying on facts for a final sentence that the sentencing court believes are more likely than not false. Such a lower standard cannot satisfy due process.

In sum, the minimum possible standard of proof for a fact that is to be relied on to increase a sentence is that the sentencing court believes the fact is, more likely than not, true. The sentencing court errs if it relies on a fact that is merely determined is supported by some admissible evidence, without weighing competing evidence or assessing the weight of the evidence.

The petitioner's writ should be granted.

Respectfully submitted,

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<sup>4</sup> Of course, appellate courts sometimes adopt more deferential standards, requiring, for example, only substantial evidence. But that is a standard allowing for reasonable disagreement about the weight of the evidence between a court sitting on appeal and a court receiving the evidence in the first instance, and not a standard of proof as such. *See, e.g., Rutherford v. Barnhart*, 399 F.3d 546, 552 (3d Cir.2005) (explaining that review for substantial evidence is to avoid weighing evidence or substituting the appellate court's own conclusions for those of the fact-finder).