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.	:	

OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

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NATURE AND STAGE OF PROCEEDINGS

On May 26, 2015, Mr. Adrin Smack was indicted on one count of Giving a Firearm to a Person Prohibited, five counts of Drug Dealing in violation of 16 *Del. C.* § 4752(1), sixty six counts of Drug Dealing in violation of 16 *Del. C.* § 4754(1), one count of Possession of Marijuana, two counts of Conspiracy Second Degree, two counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448(a)(9), and three counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448.[1] On March 31, 2016, Mr. Smack pleaded guilty to two counts of Drug Dealing in a Tier 4 Quantity (Counts 36, 37),[2] two counts of Drug Dealing (Counts 40, 122),[3] one count of Possession of a Firearm by a Person Prohibited (Count 39),[4] and one count of Conspiracy Second Degree (Count 238).[5] As a condition of the plea agreement, the State agreed to not recommend a sentence greater than 15 years of incarceration and Mr. Smack agreed to not request a sentence less than 8 years of incarceration.[6]

On June 22, 2016, Mr. Smack was scheduled to be sentenced, however, the hearing was continued to allow the parties the opportunity to brief the issue of what the applicable burden of proof was for contested facts presented during the sentencing hearing.[7] On August 15, 2016, Mr. Smack filed his Pre-Sentence Motion in Response to the Court's June 22, 2016 Order Regarding the Scope of Consideration at Mr. Smack's Sentencing Hearing.[8] The State filed their response on

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[1] SR1-4, DE# 3, SR16-102.
[2] SR30.
[3] SR31, SR56.
[4] SR31.
[5] SR10, DE# 35, SR93, SR103, SR106-11.
[6] SR103, SR106.
[7] SR11, DE#38-39, SR113, SR119-20.
[8] SR12, DE# 43, SR121-26.

October 3, 2016.[9] On October 11, 2016, Mr. Smack filed a letter requesting oral argument[10] which was subsequently held on November 9, 2016.[11]

On November 17, 2016, the Superior Court issued an order finding that Mr. Smack was not entitled to an evidentiary hearing and that the Court may consider any information meeting a minimal indicia of reliability.[12]

On November 23, 2016, Mr. Smack was sentenced to an aggregate prison sentence of 14 years followed by 12 years of descending levels of probation.[13]

On December 23, 2016, Mr. Smack timely appealed his sentencing to the Delaware Supreme Court.[14] The Delaware Supreme Court affirmed the judgment of the Superior Court on October 11, 2017.[15] Thereafter, Mr. Smack timely filed a cert petition to the United States Supreme Court on January 9, 2018.[16] On April 16, 2018, the United States Supreme Court denied cert.[17]

On April 16, 2019, Mr. Smack filed his Writ of Habeas Corpus in this Court. This is his Opening Memorandum in support of that petition.

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[9] SR12, DE# 44, SR128-86.
[10] SR12, DE# 45, SR187-89.
[11] SR12, DE# 46, SR190-215.
[12] SR12-13, DE# 48, SR217-19.
[13] SR13, DE# 50, SR231-35.
[14] SR14-15, DE# 53, 60, 62, SR243.
[15] SR240, SR586-91.
[16] SR240.
[17] *Id.*

TIMELINESS

Pursuant to 28 U.S.C. § 2244(d)(1), "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."[18] This one year period of limitation begins to run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.[19]

In the present matter, Mr. Smack pleaded guilty on March 31, 2016 but was not sentenced until November 23, 2016.[20] In order to appeal his conviction, Mr. Smack had 30 days from November 23, 2016 to file a notice of appeal with the Delaware Supreme Court, pursuant to Delaware Supreme Court Rule 6(a)(iii).[21] Mr. Smack timely filed his notice of appeal with the Delaware Supreme Court on December 23, 2016.[22] On October 11, 2017, the Delaware Supreme Court affirmed Mr. Smack's conviction.[23] Thereafter, pursuant to United States Supreme Court Rule 13(1), Mr. Smack had 90 days from October 11, 2017 to file a cert petition to the United States

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[18] 28 U.S.C. § 2244(d)(1).

[19] *Id.*; *McAleese v. Brennan*, 483 F.3d 206, 212 (3d Cir. 2007) (quoting 28 U.S.C. § 2244(d)(1)).

[20] SR10, DE# 35, SR13, DE# 50.

[21] Del. Supr. Ct. R. 6(a)(iii) ("A notice of appeal shall be filed in the office of the Clerk of this Court . . . [w]ithin 30 days after a sentence is imposed in direct appeal of a criminal conviction. . . .").

[22] SR243.

[23] SR240.

Supreme Court.[24]

Mr. Smack timely filed a cert petition to the United States Supreme Court on January 9, 2018.[25] On April 16, 2018, the United State Supreme Court denied Mr. Smack's cert petition[26] and therefore Mr. Smack's conviction became final on April 16, 2018.[27] Thus, the one year period of limitation began to run on April 16, 2018 with 365 days remaining. As Mr. Smack filed his 2254 habeas petition on April 16, 2019, these proceedings are timely.

[24] Sup. Ct. R. 13(1) ("Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.").

[25] SR240.

[26] *Id*.

[27] 28 U.S.C. § 2244(d)(1)(A).

SUMMARY OF ARGUMENT

1. The Delaware State Courts erroneously concluded that Mr. Smack received a constitutionally fair sentencing hearing. In making its rulings, the Delaware State Courts failed to consider controlling United States Supreme Court precedent interpreting the Due Process Clause of the Fourteenth Amendment as requiring that disputed facts presented during a sentencing hearing and considered by the sentencing judge be proven by a preponderance of the evidence. As such, the Delaware Superior Court applied and the Delaware Supreme Court affirmed the application of an erroneous burden of proof for the resolution of disputed facts presented by the State during Mr. Smack's sentencing hearing. Thus, Mr. Smack's sentence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and therefore, Mr. Smack is entitled to habeas relief.

2. The Due Process Clause of the Fourteenth Amendment requires the Delaware State Courts to hold an evidentiary hearing in this case regarding disputed facts that the sentencing court would consider when issuing a sentence. An evidentiary hearing would have provided appropriate due process to prevent Mr. Smack from being sentenced based upon information that fails to meet a preponderance of the evidence burden of proof. However, the Delaware State Courts denied Mr. Smack's request for an evidentiary hearing. Without the evidentiary hearing, Mr. Smack was precluded from challenging the State's presentation of disputed sentencing facts and/or to make certain that the State met the requisite burden of proof for disputed facts. Thus, Mr. Smack is entitled to habeas relief.

STATEMENT OF FACTS

On or around August of 2014, an FBI Task Force began investigating a drug trafficking organization known as the Sparrow Run Crew.[28] "Evidence obtained during the investigation indicate[d] that this organization [was] responsible for distributing heroin and cocaine base to a wide network of distributors and sub-distributors. The heroin [was] distributed by [Mr. Smack] in quantities ranging from multiple bundles to multiple logs per transaction."[29] Law enforcement further alleged that Mr. Smack and his co-defendant Miktrell Spriggs were "co-leaders of the organization and that they pool[ed] money to buy heroin and cocaine from source[s] of supply."[30] This investigation also included the use of confidential informants and the monitoring of Mr. Smack's phone calls.[31]

On April 10, 2015, the Delaware Superior Court signed an order authorizing law enforcement to intercept the wireless communications to and from Mr. Smack's cell phone.[32] On April 18, 2015, law enforcement intercepted a phone call between Mr. Smack and Mr. Price during which Mr. Smack and Mr. Price discussed an item being hidden behind a radiator in Mr. Price's residence.[33] During a subsequent search of Mr. Price's residence, law enforcement located a military style tactical vest, $16,108, a loaded black Taurus .9-millimeter handgun, and 803 bundles of heroin.[34]

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[28] This background information is taken from the affidavit of probable cause used to obtain a wiretap on Mr. Smack's cell phone (SR143-79) as well as the affidavit of probable cause to obtain a search warrant for Co-Defendant Al-Ghaniyy Price's residence. (SR181-86). Both of these affidavits were attached as exhibits to the State's Response to Mr. Smack's pre-sentence motion.

[29] SR168.

[30] *Id.*

[31] SR168-76.

[32] SR137-42.

[33] SR185.

[34] SR113.

On May 26, 2015, Mr. Smack was indicted on one count of Giving a Firearm to a Person Prohibited in violation of 11 *Del. C.* § 1454, five counts of Drug Dealing in violation of 16 *Del. C.* § 4752(1), sixty-six counts of Drug Dealing in violation of 16 *Del. C.* § 4754(1), two counts of Conspiracy Second Degree in violation of 11 *Del. C.* § 512, two counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448(a)(9), three counts of Possession of a Firearm by a Person Prohibited in violation of 11 *Del. C.* § 1448; and a single count of Possession of Marijuana in violation of 16 *Del. C.* § 4764(b).[35]

On March 31, 2016, Mr. Smack agreed to enter a guilty plea to two counts of Drug Dealing Heroin in a Tier 4 Quantity (Counts 36, 37),[36] two counts of Drug Dealing Heroin no tier weight (Counts 40, 122),[37] one count of Possession of a Firearm by a Person Prohibited (Count 39),[38] and one count of Conspiracy Second Degree (Count 238).[39] As a condition of the plea agreement, the State agreed to not recommend a sentence greater than 15 years of incarceration, while Mr. Smack agreed to not request a sentence less than 8 years of incarceration.[40] Following the court's colloquy, the Delaware Superior Court accepted Mr. Smack's plea as knowing, intelligent and voluntary.[41]

At the June 22, 2016, sentencing hearing, the State characterized Mr. Smack as a drug kingpin and a criminal mastermind in an attempt to have Mr. Smack sentenced to at least 15 years of incarceration.[42] In particular, the State asserted:

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[35] SR4, DE# 3, R16-102.
[36] SR30.
[37] SR31, SR56.
[38] SR31.
[39] SR10, DE# 35, SR93-94, SR103, SR106-111.
[40] SR103, SR106.
[41] SR106-10.
[42] SR113-16.

> Your Honor, by way of background in this case, during the period of time in which the FBI Task Force was intercepting Mr. Smack's phone calls, on April 18th police intercepted a phone call between defendant and a young man named Al-Ghaniyy Price. Price was just barely 18 years old at the time of this call.
>
> During the call, Price told Smack that he was hiding something behind a radiator in his house. He told Smack that it would be in his opening behind the radiator. Mr. Smack then counseled Price to make sure that no one watched him hide the item.
>
> Just a few minutes later, like a good soldier, Mr. Price then texted Mr. Smack back and said, "Yo, Bro, it's there."
>
> How would Mr. Smack, who lives on 4th Street in the City of Wilmington, who lived there throughout this investigation, despite his assertions now to this court that he was homeless – he lived there with Akia Harley (ph) and her mother and the children – how would he transport his drugs from 4th Street to Sparrow Run and avoid detection?
>
> As Your Honor knows, because the Court took a plea from his sister, Tiffany Smack, he would have somebody else drive him, somebody with no criminal history, who had no reason to be stopped by the police.
>
> Then, he would, because he's undeniably smart, have someone else within the community of Sparrow Run, hold on to his drugs and guns, and so, the police search the home of Al-Ghaniyy Price, which was on Kemper Drive. Many of the allegations of the drug dealing in this case took place on Heron Court, Raven Turn, Kemper Drive, a few blocks from there.
>
> When the police searched this house, this is what they found: a military style tactical vest in a trashbag outside the back door of the residence, $11,853 inside a shoe box. In a different shoe box, police found $4,255. They also found a black Taurus .9-millimeter handgun, loaded with one round in the chamber.[43]

The State further described that law enforcement also found a total of 803 bundles of heroin inside the Kemper Drive address.[44]

In response, Mr. Smack asserted that the factual record undermined the State's characterization of Mr. Smack as a drug kingpin. Specifically, Mr. Smack asserted:

> The totality of the record supports the conclusion that Mr. Smack is absolutely not a king pin.
>
> Why, Your Honor? His phone calls clearly demonstrate, overwhelmingly demonstrate, he is a small-time retail Heroin salesman. That's it. That's the reason

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[43] SR113.
[44] *Id.*

> why the evidence of the individuals who were going to – would have testified, if there was a trial, and we certainly didn't put the State to the test on that, would have been about smaller portions of Heroin that were sold by Mr. Smack.
>
> Now, we all have some experience with the drug culture, and it's not because we purchase Heroin, Your Honor. It's because we deal in these types of cases. So, when you have an individual whose exposure that the evidence demonstrates, rather than just conjecture, is a retail salesman, there'd be no reason to be thinking that you have someone that is a wholesale salesman of the type of an individual that would have such a large amount of Heroin being stored at this residence.
>
> Mr. – what Mr. Smack's responsibility for, in relation to what was found in the residence, is the Taurus handgun, essentially, the firearm count that he pled guilty to, even though it's not specified. It's a generic handgun if you have an individual who is a wholesale Heroin salesman, the last thing in the universe they're doing, especially if they're weary of law enforcement, is doing retail sales.
>
> Retail sales is the way that most of these individuals end up getting caught, and it would be the thing that a wise person would be – would never be doing, especially because the profit margin is low.
>
> If Mr. Smack was a wholesale salesman of Heroin, wouldn't it have been picked up on the series of telephone calls that there were? The fact that there's nothing indicative of a wholesale sale of Heroin, there's no evidence to support that, all we have is this conjecture just thrown out today, and that's why I ask Your Honor to sentence Mr. Smack for what he did.[45]

Mr. Smack further articulated that, under a preponderance of the evidence standard, the State failed to prove that Mr. Smack was responsible for any of the contraband found inside the Kemper Drive address.[46] Thereafter, the sentencing hearing was continued to allow the parties to brief the issue of the burden of proof in relation to contested facts presented to a judge at a sentencing hearing.[47]

Through a series of filings, Mr. Smack asserted that the State bore the burden of proof for proving any contested factual allegation presented during the sentencing hearing by a preponderance of the evidence and that due process required that Mr. Smack have the opportunity to cross-examine live witnesses in relation to those contested allegations.[48] In response to Mr. Smack's assertions, the

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[45] SR117.
[46] *Id.*
[47] SR119-20.
[48] SR121-26, SR187-89.

State contended that the applicable burden proof for contested facts presented at a sentencing hearing was a minimal indicia of reliability and that the Delaware Superior Court's Rules of Criminal Procedure did not provide a procedure for live witness testimony at a sentencing hearing.[49]

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.[50] During the oral argument, Mr. Smack asserted, consistent with his prior filings, that the applicable burden of proof for contested facts presented during a sentencing hearing was a preponderance of the evidence.[51] The Superior Court dismissed this assertion finding that the applicable burden of proof was a minimum indicia of reliability.[52] The Superior Court also sought clarification as to which specific facts Mr. Smack sought to contest.[53] In response, 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."[54] Mr. Smack further specified that it was "the conduct beyond conviction that was being disputed.[55]

On November 17, 2016, the Delaware Superior Court issued a letter/order in which the court ruled that Mr. Smack was not entitled to an evidentiary hearing and that the applicable burden of proof for contested facts presented during a sentencing hearing was a minimum indicia of reliability.[56] The letter/order further noted "that the State may rely upon (in addition to the

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[49] SR129-32.
[50] SR190-92.
[51] SR195-98.
[52] SR198.
[53] SR208-10.
[54] SR213.
[55] *Id.*
[56] SR217-19.

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 or reliability. . . ."[57] It was also clear from the language of the letter/order that the Superior Court was free to consider all of the indicted counts when deciding Mr. Smack's sentence.[58]

As the Superior Court's letter/order decided that the applicable burden of proof for contested factual allegations presented at a sentencing hearing was a minimum indicia of reliability, and not a preponderance of the evidence, the remaining issue which was raised on November 9, 2016 by the sentencing judge was whether Mr. Smack disputed any of the indicted conduct beyond the counts of conviction under the minimum indicia of reliability evidentiary standard.[59] In response, Mr. Smack filed a letter on November 18, 2016 asserting that "Mr. Smack [would] not be contest[ing] the Court's consideration at sentencing, under the minimum indicium of reliability burden of proof, any of the indicted counts that Mr. Smack was not convicted of, with exception to" seven of the seventy four indicted counts beyond the six counts for which Mr. Smack was convicted.[60] The seven counts that Mr. Smack indicated were so lacking in evidence that they did not meet the incredibly low minimal indica of reliability standard were three counts of Possession of a Firearm by a Person Prohibited (Counts 248, 249, 250), three counts of Drug Dealing (Counts 251, 252, 258), and one count of Possession of Marijuana (Count 253).[61] The Delaware Superior Court ultimately considered

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[57] SR219.

[58] *Id.*

[59] During the November 9th, 2016 oral argument, Judge Parkins asked Defense Counsel what was being disputed to which Counsel replied "criminal conduct beyond the offense of conviction." SR211. Counsel also indicated that he would " respond in writing" with more detail in writing in relation to what indicted counts were at dispute. SR213.

[60] SR220.

[61] SR220-21.

all of the indicted counts when deciding Mr. Smack's ultimate sentence including the above noted seven disputed counts.[62]

At the November 23, 2016 sentencing hearing, the State renewed its request for a fifteen year sentence.[63] Mr. Smack responded by asserting 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.[64] The State contested Mr. Smack's sentencing presentation by asserting that seventy-seven counts of drug dealing within a two month span suggested that Mr. Smack's illegal activities were 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 higher sentence.[65] In response, Mr. Smack asserted 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."[66]

Mr. Smack ultimately was sentenced to fourteen years of incarceration followed by descending levels of probation.[67] In support of its 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."[68] The Superior Court also largely adopted the State's

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[62] SR230 (noting that "we have had this discussion and I have written in the opinion to you guys that there is sufficient indicia of reliability to an indictment for me to, at least, consider the indicted counts.").

[63] SR222.

[64] SR223-26.

[65] SR226-27.

[66] SR228-29.

[67] SR231-35.

[68] SR230.

sentencing arguments, stating:

> [I] think of all of the victims of his crime. And not only the people who purchases the drugs which he sells, but also their loved ones and families.
>
> I think about all of the lives that he has destroyed.
>
> I think about the fact that he has willingly destroyed them because it provides him with money.
>
> And I believe that, in addition to the value of punishment, there is also here a need to try to deter others from doing this. And, also frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.[69]

Mr. Smack timely appealed his sentence and the Delaware Superior Court's ruling on the applicable burden of proof for contested factual allegations presented during a sentencing hearing to the Supreme Court of Delaware.[70] In his filings, Mr. Smack asserted that the Superior Court abused its discretion in resolving contested aggravating sentencing facts when it applied the minimum indicia of reliability standard, rather than the preponderance of the evidence standard.[71] Mr. Smack also asserted that the Due Process Clause required both the application of the preponderance of the evidence standard at sentencing as well as an opportunity to rebut the State's presentation of contested aggravating facts through an evidentiary hearing.[72]

On October 11, 2017, the Delaware Supreme Court affirmed the judgment of the Delaware Superior Court, finding that it established the proper evidentiary standard as a minimal indicia of reliability in *Mayes v. State*, 604 A.2d 839 (Del. 1992).[73] The Delaware Supreme Court also noted that the federal case law cited by Mr. Smack was inapposite as those cases involved sentencing under

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[69] SR230-31.
[70] SR243.
[71] SR262-77, SR565-74.
[72] SR278-88, SR565-74.
[73] SR589-90.

the federal sentencing guidelines.[74] Furthermore, the court held that due process did not require an evidentiary hearing as Mr. Smack was provided an opportunity to rebut the State's evidence, which was all that was constitutionally required.[75]

[74] SR590.
[75] SR590-91.

I. THE DELAWARE STATE COURTS DEPRIVED MR. SMACK OF A CONSTITUTIONALLY FAIR SENTENCING HEARING.

Between 1986 and 1997, in a series of evolving cases, the United States Supreme Court found that the Due Process Clause of the Fourteenth Amendment requires disputed facts presented during a sentencing hearing be proven by a preponderance of the evidence if they are to be considered by the sentencing judge when determining a defendant's sentence.[76] This has been the state of the law since 1997 when the United States Supreme Court issued its decision in *United States v. Watts*. Nevertheless, the Delaware Supreme Court has, since the 1980's to present day, somehow misinterpreted controlling United States constitutional case law in relation to the Due Process Clause of the Fourteenth Amendment, that is applicable to the states, by finding that the burden of proof for disputed facts presented at a Delaware sentencing hearing is only a minimum indicia of reliability. In particular in this matter, both the Delaware Superior Court and Delaware Supreme Court applied the erroneous "minimal indica of reliability" burden of proof to resolve disputed facts presented by the State during Mr. Smack's sentencing hearing. Thus, Mr. Smack's sentence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution[77] and this Court must: (1) reverse and remand this matter back to the Delaware Superior Court for a new sentencing hearing; and (2) order the Delaware Superior Court to comply with the Due Process Clause of the Fourteenth Amendment by applying the preponderance of the evidence

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[76] *United States v. Watts*, 519 U.S. 148, 156-57 (1997); *Nichols v. United States*, 511 U.S. 738, 747-49 (1994); *McMillan v. Pennsylvania*, 477 U.S. 79, 84-87, 91-93 (1986).

[77] *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. at 84-87; *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Agyemang*, 876 F.2d 1264, 1270 (7th Cir. 1989) (" A convicted defendant has a right to be sentenced on the basis of accurate and reliable information."); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970) (citing *Townsend*, 334 U.S. at 740-41) (holding that misinformation regarding a convicted defendant's history or untrue factual assumption at sentencing deprive the defendant of due process).

burden of proof for the resolution of disputed facts presented to the Superior Court during the sentencing hearing.

A. This claim is ripe for consideration by this Court.

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court."[78] This means that a petitioner "must give the state courts an opportunity to act on his claims before he[/she can] present[] those claims to a federal court in a habeas petition."[79] This exhaustion doctrine was codified in 28 U.S.C. § 2254(b)(1) which provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . ."[80]

Subsection (c) further provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the questions presented."[81] Although this language could be read to effectively foreclose habeas review by requiring a state prisoner to invoke any possible avenue of state court review, [the United States Supreme Court] has never interpreted the exhaustion requirement in such a restrictive fashion" nor has the United States Supreme Court interpreted the exhaustion doctrine as requiring a defendant to file repetitive petitions.[82] As such, 28 U.S.C. § 2254(c) and the exhaustion doctrine only requires that the state

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[78] *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999).
[79] *Id.*
[80] 28 U.S.C. § 2254(b)(1).
[81] 28 U.S.C. § 2254(c).
[82] *O'Sullivan*, 526 U.S. at 844 (citing *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (*per curiam*); *Brown v. Allen*, 344 U.S. 443, 447 (1953) (holding that a defendant does not need "to ask the state for collateral relief, based on the same evidence and issues already decided by

court "have the first opportunity to review this claim and provide any necessary relief."[83]

In the present matter, Mr. Smack's claim for relief, fully described below,[84] was properly exhausted in the Delaware State Courts. After litigating this issue before the Delaware Superior Court,[85] Mr. Smack appealed the denial of this claim to the Delaware Supreme Court asserting that the Delaware Superior Court abused its discretion by resolving contested aggravating sentencing facts under the minimum indicia of reliability burden of proof.[86] Mr. Smack further asserted that the Due Process Clause of the Fourteenth Amendment required the application of the preponderance of the evidence burden of proof for contested facts presented at a state sentencing hearing.[87] As such, the Delaware State Courts had "the first opportunity to review [Mr. Smack's] claim [for relief] and provide any necessary relief."[88] Thus, this claim for relief is fully exhausted and ripe for consideration by this Court.

B. The Due Process Clause of the Fourteenth Amendment requires disputed facts presented during a sentencing hearing to be proven by a preponderance of the evidence.

In 1986, the United States Supreme Court, in *McMillan v. Pennsylvania*, considered the constitutionality of Pennsylvania's sentencing scheme which only required sentencing considerations to be proven by a preponderance of the evidence.[89] The focus of the challenge to Pennsylvania's Mandatory Minimum Sentencing Act was whether due process required a burden of proof *greater*

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direct review.").

[83] *Id.* (citing *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982); *Darr v. Burford*, 339 U.S. 200, 204 (1950)).

[84] *See infra* pp. 17-21.

[85] SR122-126, SR187-89, SR195-214.

[86] SR243, SR262-77, SR565-74.

[87] SR278-88, SR565-74.

[88] *O'Sullivan*, 526 U.S. at 844 (citing *Rose*, 455 U.S. at 515-16; *Darr*, 339 U.S. at 204).

[89] 477 U.S. at 81.

than a preponderance of the evidence.[90] The United States Supreme Court concluded that due process did not require sentencing facts to be proven beyond a reasonable doubt, and that Pennsylvania's sentencing scheme was constitutional.[91]

In support of the Supreme Court's holding, the Court noted that the sentencing facts in question were not elements of a crime and did not "come[] into play" until after the defendant had already been found guilty of a crime beyond a reasonable doubt, and therefore, due process was not offended by using this factor to justify the imposition of a harsher sentence, despite the factor not having been proven beyond a reasonable doubt.[92] Accordingly, the United States Supreme Court concluded that the preponderance of the evidence evidentiary standard "satisfie[d] due process."[93]

The United States Supreme Court further acknowledged that while due process constrains a state's ability to reallocate or reduce the burden of proof in criminal cases, the constitutional limitation need not be addressed at the time, as it was clear that Pennsylvania's sentencing scheme did not exceed those limits.[94] In other words, despite not clearly defining the outer limits of due process at sentencing, it was clear to the United States Supreme Court that relying on contested sentencing facts proven by a preponderance of the evidence to impose a harsher sentence did not fall below the lower limit,[95] suggesting that a lower burden of proof very well may.

Eight years after its decision in *McMillan*, the United States Supreme Court accepted jurisdiction of the issue presented in *United States v. Watts*, which was whether acquitted conduct,

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[90] *Id*. at 84.
[91] *Id*.
[92] *Id*. at 85-86.
[93] *Id*.
[94] *McMillan*, 477 U.S. at 85-86.
[95] *Id*. at 84-87, 89-93.

proven by a preponderance of the evidence, could be used to enhance a sentence under the United States Sentencing Guidelines.[96] The Supreme Court rejected the contention that acquitted conduct could never, under any burden of proof, serve as a basis for a sentence enhancement,[97] and found that the application of the preponderance of the evidence standard to be sufficient.[98] While the Supreme Court did not explicitly state that the preponderance of the evidence standard was the minimum burden of proof for use of acquitted conduct as a sentence enhancement, the express language used by the Court–"[w]e therefore hold that a jury verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted conduct, so long as that conduct has been proved by a preponderance of the evidence"[99]–established just that.

The United States Supreme Court decision in *Watts* is significant not only for what it says, but also for what it does not say. While the Court acknowledged that a standard of proof less stringent than the beyond a reasonable doubt standard was permissible,[100] the Court left open the possibility that in some circumstances, a burden of proof *stronger* than a preponderance of the evidence, such as the clear and convincing evidentiary standard may be required.[101] Although the Supreme Court left open the possibility that a more stringent evidentiary standard may be required in some instances, the Court never suggested that an evidentiary standard *less* stringent than a preponderance of the evidence would be sufficient.[102] Accordingly, it is clear from *Watts*, that a sentencing court's consideration of acquitted conduct when imposing a harsher sentence, akin to the

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[96] 519 U.S. at 149.
[97] *Id*. at 149, 154, 156-57.
[98] *Id*.
[99] *Id*. at 157.
[100] *Watts*, 519, U.S. at 155-56.
[101] *Id*. at 156-57.
[102] *Id*.

non-convicted conduct used to impose a harsher sentence on Mr. Smack, is constitutional in most instances, provided that the conduct has been proven by at least a preponderance of the evidence.[103] Thus, the United States Supreme Court's decision in *McMillan* and *Watts* clearly supports Mr. Smack's argument that the Due Process Clause of the Fourteenth Amendment requires disputed sentencing facts to be proven, at a minimum, by a preponderance of the evidence.

In further support of this assertion is the United States Supreme Court's holding in *Nichols v. United States*. In *Nichols*, the Supreme Court ruled on the constitutionality of using a defendant's prior uncounseled misdemeanor conviction at sentencing.[104] In reaching its holding, the Supreme Court analyzed its prior decisions, such as *McMillan*, in which the Court was tasked with deciding the constitutionality of a particular sentencing factor or the manner in which the factor was determined under the Due Process Clause.[105] And just as with *McMillan* and *Watts*,[106] the United States Supreme Court found that the use of a defendant's prior uncounseled misdemeanor at sentencing was constitutional as it had been proven by a preponderance of the evidence, holding that to comply with due process, "the state need prove such conduct only by a preponderance of the evidence."[107] In doing so, the United States Supreme Court clearly indicated its support for the assertion that due process requires disputed aggravating sentencing facts be minimally proven by a preponderance of the evidence.

Following the holdings and logic of *McMillan*, *Watts*, and *Nichols*, the Third Circuit Court

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[103] *Id*. at 157 ("We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering the conduct underlying the acquitted conduct, so long as that conduct has been proved by a preponderance of the evidence.").

[104] *Nichols*, 511 U.S. at 740.

[105] *Id*. at 747-48.

[106] *Watts*, 519 U.S. at 157; *McMillan*, 477 U.S. at 85-86.

[107] *Nichols*, 511 U.S. at 747-48.

of Appeals, when deciding the burden of proof necessary to support a factual finding leading to an upward or downward sentencing adjustment under the United States Sentencing Guidelines, found that due process guarantees "a convicted defendant the right not to have his sentence based upon 'materially false' information" and that a "defendant's rights in sentencing are met by a preponderance of the evidence."[108] The Third Circuit further noted that this conclusion was in accord with the decisions of the Second, Fourth, and Eleventh Circuit Courts of Appeal.[109] In specific reliance on *McMillan* and, notably, on the fact that *McMillan* was decided under the Due Process Clause of the Fourteenth Amendment, the Third Circuit also stated "[t]hat the preponderance of evidence standard can withstand constitutional muster is without much doubt."[110]

C. The Delaware State Courts have misinterpreted controlling United States constitutional case law requiring disputed facts presented during a sentencing hearing to be proven by a preponderance of the evidence.

Despite the express language of the United States Supreme Court and the Third Circuit Court of Appeals in above described decisions,[111] the Delaware Supreme Court refuted the applicability of this controlling United States constitutional case law because those cases involved situations "where the court applied a preponderance of the evidence standard to establish facts warranting a sentencing enhancement under the federal sentencing guidelines."[112] In doing so, the Delaware State Courts clearly misinterpreted the holdings in those cases,[113] failing to appreciate that despite the involvement of the United States Sentencing Guidelines, the ultimate holding–that contested

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[108] *United States v. McDowell*, 888 F.2d 285, 290-91 (3d Cir. 1989).
[109] *Id.* at 291.
[110] *Id.*
[111] *See supra* pp. 17-21.
[112] SR589 (citing *McMillan*, 477 U.S. 79; *Watts*, 519 U.S. 148; *Nichols*, 511 U.S. 738; *McDowell*, 888 F.2d 285).
[113] SR589-90.

aggravating sentencing facts must be proven by a preponderance of the evidence–was premised on the requirement that sentencing hearings comply with the Due Process Clause of the Fourteenth Amendment.[114] To hold otherwise would be an incorrect interpretation of the requirements of the Due Process Clause of the Fourteenth Amendment as well as the United States Supreme Court's holdings in *McMillan*, *Watts*, and *Nichols*, and the Third Circuit's holding in *McDowell*.[115]

The unmistakable problem with the Delaware Supreme Court's holding is that it erroneously creates two separate burdens of proof for contested sentencing facts–a higher burden in federal court and a lower burden in state court–when the burden of proof must satisfy the same Due Process Clause of the Fourteenth Amendment. If aggravating facts presented at a federal sentencing hearing must be proven by a preponderance of the evidence, as held by the United States Supreme Court, then it is incompatible with the Due Process Clause of the Fourteenth Amendment for Delaware

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[114] *McMillan*, 477 U.S. at 84-87, 91-93; *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49.

[115] While the Fourteenth Amendment's due process rights have been selectively incorporated to the states through judicial interpretation, the United States Supreme Court has specifically held that the Fourteenth Amendment's Due Process Clause applies to sentencing in state court. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968)) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirement of the Due Process Clause . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing hearing"); *see also Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 763-65, n.13 (2010)) ("With only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States."); *McDonald*, 561 U.S. at 763-65, n.13 ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict, see n. 14, *infra*), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines."); *Watts*, 519 U.S. at 156-57; *Nichols*, 511 U.S. at 747-49; *McMillan*, 477 U.S. at 84-87, 91-93; *McDowell*, 888 F.2d at 290-91.

State Courts to allow contested facts presented at a Delaware sentencing hearing to be proven by the lower minimal indicia of reliability burden of proof. The United States Supreme Court specifically touched upon this very issue in *McMillan*, noting:

> 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.[116]

The Due Process Clause of the Fourteenth Amendment is applicable to Delaware and the rest of the states,[117] and as *McMillan*,[118] *Watts*,[119] *Nichols,*[120] and *McDowell*[121] make it clear that the Due Process Clause requires disputed facts presented at a sentencing hearing to be proven, at a minimum, by a preponderance of the evidence, the Delaware State Courts continued adherence to the minimal indicia of reliability burden of proof for disputed facts presented during a sentencing hearing[122] violates the Due Process Clause of the Fourteenth Amendment.

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[116] *McMillan*, 477 U.S. at 91.

[117] Although the Fourteenth Amendment's due process rights have been selectively incorporated to the states through judicial interpretation, the United States Supreme Court has specifically held that the Fourteenth Amendment's Due Process Clause applies to sentencing in state court. *Gardner*, 430 U.S. at 358 (citing *Witherspoon*, 391 U.S. at 521-523) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause . . . The defendant has a legitimate interest in the character of the procedures which leads to the imposition of a sentence even if he may have no right to object to a particular result of the sentencing hearing."); *see also McDonald*, 561 U.S. at 764-65; *Albright v. Oliver*, 510 U.S. 266, 272 (1994). The *McMillan* decision further confirms that the Due Process Clause is applicable to state sentencing proceedings, as the Supreme Court reviewed Pennsylvania's sentencing scheme for due process compliance under the Fourteenth Amendment. *McMillan*, 477 U.S. at 83-87, 90-93.

[118] *McMillan*, 477 U.S. 79.

[119] *Watts*, 519 U.S. 148.

[120] *Nichols*, 511 U.S. 738.

[121] *McDowell*, 888 F.2d at 290-91.

[122] SR589.

D. This Court must remand Mr. Smack's case as the Sentencing Court resolved and considered unproven and disputed aggravating sentencing facts under the erroneous minimal indicia of reliability burden of proof.

Mr. Smack is entitled to a new sentencing hearing as the Delaware Superior Court applied a burden of proof less than what is required by the Due Process Clause of the Fourteenth Amendment as well as relied on disputed aggravating sentencing facts not proven by a preponderance of the evidence to impose Mr. Smack's sentencing.

At Mr. Smack's June 22, 2016 sentencing hearing, the State alleged that Mr. Smack was a violent drug kingpin and that he was responsible for drugs and a firearm found at his co-defendant's house in an attempt to persuade the Delaware Superior Court to sentence Mr. Smack to a 15 year prison sentence, the max recommendation pursuant to Mr. Smack's plea agreement.[123] In support of their argument, the State described Mr. Smack's involvement in drug dealing:

> How would Mr. Smack, who lives on 4th Street in the City of Wilmington, who lived there throughout this investigation, despite his assertions now to this court that he was homeless–he lived there with Akia Harley (ph) and her mother and the children–how would he transport his drugs from 4th Street to Sparrow Run and avoid detection?
>
> As Your Honor knows, because the Court took a plea from his sister, Tiffany Smack, he would have somebody else drive him, somebody with no criminal history, who had no reason to be stopped by the police.
>
> Then, he would, because he's undeniably smart, have someone else within the community of Sparrow Run, hold on to his drugs and guns, and so, the police searched the home of Al-Ghaniyy Price, which was on Kemper Drive. Many of the allegations of drug dealing in this case took place on Heron Court, Raven Turn, Kemper Drive, a few block from there.[124]

The State also sought to portray Mr. Price as Mr. Smack's "good soldier."[125]

Additionally, in his November 18, 2016 letter, Mr. Smack specifically identified seven, out

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[123] SR113-15.
[124] SR113.
[125] *Id.*

of the seventy four indicted counts beyond the six counts of conviction, which Mr. Smack asserted lacked sufficient evidence to meet the incredibly low minimal indicia of reliability standard.[126] Those seven counts were three counts of Possession of a Firearm by a Person Prohibited (Counts 248, 249, 250), three counts of Drug Dealing (Counts 251, 252, 258), and one count of Possession of Marijuana (Count 253).[127]

During the November 23, 2016 sentencing hearing, the State began its sentencing presentation by reminding the Delaware Superior Court of its previous assertions during the June 22, 2016, sentencing hearing.[128] However, due to Mr. Price's statements during his own sentencing hearing and the State's concession that it would not ask the Delaware Superior Court to consider the drugs found at Mr. Price's residence, the State sought to portray Mr. Smack as a "significant drug dealer."[129] In particular, the State asserted that the amount of indicted drug dealing counts demonstrated that Mr. Smack was a "full-time" drug dealer and reminded the Delaware Superior Court of all of the people Mr. Smack hurt by his drug dealing activities, including the family members of those whom Mr. Smack supplied with heroin.[130]

To refute the State's allegations, Mr. Smack described how 77 drug deals in a two month span suggested that Mr. Smack was only involved in retail sales as Mr. Smack was engaged in "slightly more than one heroin deal per day over a two month time period."[131] Mr. Smack also asserted that the State's sentencing presentation was illogical as the State was arguing that "the retail

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[126] SR220.
[127] SR220-21.
[128] SR222.
[129] SR216, SR226-27.
[130] SR226-27.
[131] SR228.

drug dealer is considered a greater evil than the wholesale individuals that are supplying them."[132]

Despite the inherent weaknesses in the State's sentencing presentation and Mr. Smack's identification of the seven counts of the indictment that were so lacking in evidence that they did not even meet the minimal indicia of reliability standard,[133] the Delaware Superior Court, in violation of the Due Process Clause of the Fourteenth Amendment, rejected Mr. Smack's assertions and considered all of the indicted counts, including the 74 non-conviction counts[134] noting "we have had this discussion and I have written in the opinion to you guys that there is sufficient indicia of reliability to an indictment for me to, at least consider the indicted counts."[135] The Delaware Superior Court also largely adopted the State's sentencing presentation when crafting Mr. Smack's 14 year sentence as the Delaware Superior Court expressly noted that:

> . . . I think of all of the victims of his crime. And not only the people who purchased the drugs which he sells, but also their loved ones and families.
>
> I think about all of the lives that he has destroyed.
>
> I think about the fact that he has willingly destroyed them because it provides him with money.
>
> And I believe that, in addition to the value of punishment, there is also here a need to try to defer others from doing this. And, also, frankly, I need to remove individuals from society who are going to prey upon those who are weak and addicted to drugs.[136]

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[132] SR228-29.

[133] SR220-21, SR228-29.

[134] This included the counts of the indictment that Mr. Smack conceded met the erroneous minimal indicia or reliability burden of proof as well as the counts of the indictment that Mr. Smack contested did not even meet the minimal indicia of reliability burden of proof. SR220-21.

[135] SR230.

[136] Compare SR227 with SR230-31 ("And, so many of the problems that Your Honor heard about, many of the mothers who came in with their children at sentencing, many of the loved ones speaking of children who are affected by their loved one's heroin abuse are, certainly, people who maybe weren't known to Mr. Smack, but he know them as people. And so, is there a statutory difference in the way we treat people who supply large quantities of heroin and profit the most? Yes. But there is something different about the act of supplying daily heroin to a person with a family that is counting on them, as opposed to showing up at a parking lot with a

Thus, it is apparent on the record that the Delaware Superior Court relied heavily on the State's presentation of disputed aggravating facts including all of the 74 indicted counts beyond conviction, which were not proven by a preponderance of the evidence, and which Mr. Smack was, in essence, precluded from challenging once the Superior Court applied the erroneous minimal indicia of reliability burden of proof.[137] Thus, Mr. Smack was sentenced in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and this Court must reverse and remand this matter to the Delaware Superior Court for a 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.

E. State sentencing hearings must comply with the Due Process Clause of the Fourteenth Amendment.

It is well recognized that a sentence based on inaccurate and/or unreliable information violates a defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.[138] It is also well accepted that the Due Process Clause of the Fourteenth Amendment has been incorporated to the states and in particular, state sentencing proceedings.[139]

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trunk full of heroin and dropping it off as a distributor.").

[137] In his November 18, 2016 letter, Mr. Smack articulated which counts of the indictment he would and would not contest at the sentencing hearing based upon the Sentencing Court's decision that the minimum indicia of reliability was the appropriate burden of proof. SR220-21.

[138] *See Agyemang*, 876 F.2d at 1270 ("A convicted defendant has a right to be sentenced on the basis of accurate and reliable information."); *Townsend*, 334 U.S. at 741; *see also Malcolm*, 432 F.2d at 816 (citing *Townsend*, 334 U.S. at 740-41) (holding that misinformation regarding a convicted defendant's history or untrue factual assumptions at sentencing deprive the defendant of due process.).

[139] While the Fourteenth Amendment's due process rights have been selectively incorporated to the states through judicial interpretation, the United States Supreme Court has specifically held that the Fourteenth Amendment's Due Process Clause applies to sentencing in

Accordingly, the Fourteenth Amendment's due process rights guaranteed to defendants at federal sentencing are equally guaranteed to defendants at state sentencing. Thus, in determining whether a defendant in a state sentencing proceeding is entitled to a specific right held by a defendant in a federal sentencing hearing, the central question is whether the right in question is statutorily based or based on the Due Process Clause of the Fourteenth Amendment. If the right is guaranteed by the Due Process Clause, the right is equally held by both federal and state criminal defendants.

For the foregoing reasons,[140] Mr. Smack asserts that the preponderance of the evidence burden of proof for disputed sentencing facts that has been applied in federal court is clearly based on the Due Process Clause of the Fourteenth Amendment is therefore equally applicable to state sentencing proceedings. Thus, contested sentencing facts presented at a state sentencing proceeding must be proven by a preponderance of the evidence so as to comply with due process.

However, even if this Court determines that this particular due process protection has not yet been incorporated to the states, this Court has the discretion[141] to find that this protection is

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state court. *Gardner*, 430 U.S. at 358 (citing *Witherspoon*, 391 U.S. at 521-23) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing hearing."); *see also Timbs*, 139 S.Ct. at 687 (citing *McDonald*, 561 U.S. at 763-65, n. 13) ("With only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States."); *McDonald*, 561 U.S. at 763-65, n.13 ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict, see n.14, *infra*), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines."); *Albright*, 510 U.S. at 272.

[140] *See infra* pp. 28-32.

[141] *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982) (agreeing with the "district court that the Third Amendment is incorporated into the Fourteenth Amendment for application to the states.").

"'fundamental to our scheme of ordered liberty' [and/]or 'deeply rooted in this Nations' history and tradition.'"[142] In so doing, the constitutionally mandated minimal burden of proof for contested sentencing facts in a federal sentencing hearing–a preponderance of the evidence–can be deemed as being incorporated and fully applicable to the states.

The United States Supreme Court has expressly recognized that "[a] Bill of Rights protection is incorporated . . . if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition."[143] If a right has been incorporated, the "Bill of Rights guarantees are 'enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"[144] "Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."[145]

As sentencing hearings are a "critical stage of the criminal proceeding", it is well-settled "that the sentencing process, as well as the trial itself, must satisfy the requirement of the Due Process Clause."[146] As such, '[t]he defendant has a legitimate interest in the character of the procedure which

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[142] *Timbs*, 139 S.Ct. at 686-87 (citing *McDonald*, 571 U.S. at 767).

[143] *Id.*

[144] *Id.* (additionally noting that this Court has never decided whether the Third Amendment or Eighth Amendment's prohibition on excessive fines are applicable to the states through the Due Process Clause).

[145] *Id.* (quoting *McDonald*, 561 U.S. at 766, n.14) (noting that "[t]he sole exception is our holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings. *Apodaca v. Oregon*, 406 U.S. 404 (1972). As we have explained, that 'exception to th[e] general rule . . . was the result of an unusual division among the Justices,' and it 'does not undermine the well established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.'")); *McDonald*, 561 U.S. at 766 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964)) (noting that the United States Supreme Court has "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'"); *Id* (noting that the United States Supreme court recognized that "it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court'").

[146] *Gardner*, 430 U.S at 358.

leads to the imposition of a sentence even if he may have no right to object to a particular result of the sentencing process."[147]

The express language of the United States Supreme Court, as explained in detail above,[148] establishes that the minimum burden of proof for contested sentencing facts, as required by due process, is a preponderance of the evidence. The Supreme Court had the occasion to consider the constitutionality the use of the preponderance of the evidence standard at sentencing for: sentencing considerations under a state sentencing scheme; the use of acquitted conduct as a sentencing enhancement; and the use of a defendant's prior uncounseled misdemeanor conviction to enhance a defendant's sentence in *McMillan*,[149] *Watts*,[150] and *Nichols*[151] respectively and in each case, the United States Supreme Court found that the application of the preponderance of the evidence standard passed constitutional muster.[152]

The holdings in *McMillan*, *Watts*, and *Nichols*, make it clear that the application of the preponderance of the evidence burden of proof for contested facts presented during a sentencing hearing is a right guaranteed by the Due Process Clause of the Fourteenth Amendment as the United States Supreme Court's express language in those opinions make it clear that this right/protection is "'fundamental to our scheme of ordered liberty,' [and/]or 'deeply rooted in this Nation's history and tradition.'"[153] As such, this due process protection must be incorporated and be "enforced against the States under the Fourteenth Amendment according to the same standards that protect those

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[147] *Id*. (citing *Witherspoon*, 391 U.S. at 521-23.
[148] *See supra* pp. 17-21.
[149] *McMillan*, 477 U.S. 79.
[150] *Watts*, 519 U.S. 148.
[151] *Nichols*, 511 U.S. 738.
[152] *Watts*, 519 U.S. at 156; *Nichols*, 511 U.S. at 748; *McMillan*, 477 U.S. at 85-86.
[153] *Timbs*, 139 S.Ct. at 686-87 (citing *McDonald*, 571 U.S. at 767).

personal rights against federal encroachment."[154]

This conclusion is enormously buttressed by the United States Supreme Court's recent decision in *Timbs v. Indiana* in which the Supreme Court determined whether "the Eighth Amendment's Excessive Fines Clause [was] an 'incorporated' protection applicable to the States under the Fourteenth Amendment's Due Process Clause."[155] In reaching the conclusion that the Excessive Fines Clause was incorporated, the United States Supreme Court expressly noted that there was "only 'a handful'" of protections that the Supreme Court had not yet held to be incorporated.[156]

The decision in *Timbs* clearly illustrates the intent of the United States Supreme Court to narrow the number of rights that are not incorporated and held to be applicable to the States through the Due Process Clause of the Fourteenth Amendment as the Supreme Court in *Timbs* incorporated one of the few remaining non-incorporated rights.[157] This intent was further demonstrated by the comments of Justice Gorsuch and Justice Kavanaugh during oral argument in *Timbs* when both Justices satirically questioned why the incorporation of the Bill of Rights was still being litigated in

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[154] *McDonald*, 571 U.S. at 765, n.13.(noting that this Court has never decided whether the Third Amendment or Eight Amendment's prohibition on excessive fines is applicable to the states through the Due Process Clause).

[155] *Timbs*, 139 S.Ct. at 686.

[156] *Id*. at 687 (citing *McDonald*, 571 U.S. at 764-765, n. 12-13).

[157] *McDonald*, 561 U.S. at 764-65, n.13 ("In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict . . .) the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines. We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause.").

2018.[158] Thus, in the event that this Court finds that this right/protection has yet to be incorporated, this Court, in its discretion, may still find that this protection is "'fundamental to our scheme of ordered liberty,' [and/] or 'deeply rooted in this Nation's history and tradition'"[159] and therefore incorporated and applicable to the states.

[158] ALM Media, *Gorsuch, Kavanaugh and Sotomayor Sound Skeptical of States' Civil Forfeiture*, Yahoo Finance (Nov. 28, 2018), https://finance.yahoo.com/news/gorsuch-kavanaugh-sotomayor-sound-skeptical-082359663.html (last visited April 2, 2019) (noting Justice Gorsuch's comment to Indiana Solicitor General Thomas Fisher, "[h]ere we are in 2018 still litigating incorporation of the Bill of Rights. Really?" and Justice Kavanaugh's supporting comment "[w]hy do you have to take into account all of the history, to pick up on Justice Gorsuch's question? Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated?").

[159] *Timbs*, 139 S.Ct. at 686-87 (citing *McDonald*, 571 U.S. at 767).

II. MR. SMACK WAS ENTITLED TO AN EVIDENTIARY HEARING TO CHALLENGE THE CONTESTED FACTS PRESENTED BY THE STATE DURING MR. SMACK'S SENTENCING HEARING.

A. Mr. Smack's claim is ripe for consideration by this Court.

As noted above,[160] a "prisoner must exhaust his remedies in state court" prior to a federal court granting habeas relief.[161] This means that the habeas petitioner "must give the state courts an opportunity to act on his[/her] claims before he[/she can] present[] those claims to a federal court in a habeas petition."[162] Thus, the exhaustion doctrine requires that the state courts be given "the first opportunity to review [the petitioner's claim(s)] and provide any necessary relief."[163]

Mr. Smack's claim for relief, fully described below, has been properly exhausted in the Delaware State Courts. Similar to the above claim for relief, Mr. Smack litigated this claim before the Delaware Superior Court[164] as well as appealed the denial of this claim to the Delaware Supreme Court.[165] Thus, the Delaware State Courts had "the first opportunity to review [Mr. Smack's] claim [for relief] and provide any necessary relief"[166] and therefore this claim is fully exhausted and is ripe for consideration by this Court.

B. The United States Constitution required the Delaware State Courts to hold an evidentiary hearing to resolve contested sentencing facts presented during Mr. Smack's sentencing hearing.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

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[160] *See supra* pp. 16-17.
[161] *O'Sullivan*, 526 U.S. at 842; *see also* 28 U.S.C. § 2254(b)(1).
[162] *Id.*
[163] *Id.* at 844 (citing *Rose*, 455 U.S. at 515-16; *Darr*, 339 U.S. at 204).
[164] SR124-25, SR188-89.
[165] SR278-88, SR565-74.
[166] *O'Sullivan*, 526 U.S. at 844 (citing *Rose*, 455 U.S. at 515-16; *Darr*, 339 U.S. at 204).

mandates that no person shall be "deprived of life, liberty or property, without due process of law"[167] and "[d]ue process . . . guarantee[s] a criminal defendant the right to not have his sentence based upon 'materially false' information."[168] The Federal Rules of Criminal Procedure, which were designed to protect a criminal defendant's due process rights,[169] "contain specific requirements that ensure that the defendant is made aware of the evidence to be considered and potentially used against him at sentencing."[170] Federal Rule of Criminal Procedure 32 similarly "require[s] the court to hold a hearing to determine disputed issues of fact included in the presentence report if it wishes to rely upon th[o]se facts in sentencing."[171]

Although due process "require[s] the court to hold a hearing to determine disputed issues of fact . . . if it wishes to rely upon th[o]se facts in sentencing,"[172] the Delaware Supreme Court, in this matter, concluded that due process does not require a full evidentiary hearing to determine the reliability of information presented during a sentencing hearing, "[i]t only requires the defendant to

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[167] U.S. CONST. amend. XIV

[168] *McDowell*, 888 F.2d at 290 (citing *Townsend*, 334 U.S. at 741; *United States v. Cifuentes*, 863 F.2d 1149, 1153 (3d Cir. 1988); *see also United States v. Nappi*, 243 F.3d 758, 763 (3d Cir. 2001) (citing *Townsend*, 334 U.S. at 741; *Moore v. United States*, 571 F.2d 179, 183 (3d Cir. 1978)).

[169] *Nappi*, 243 F.3d at 763 (citing *United States v. Greer*, 223 F.3d 41, 58 (2d Cir. 2000); *United States v. Curran*, 926 F.2d 59, 61 (1st Cir. 1991)) ("Federal Rule of Criminal Procedure 32, which governs sentencing procedures in the federal courts, emanates from Congress' concern for protecting a defendant's due process rights in the sentencing process.").

[170] *Id.* (citing *United States v. Blackwell*, 49 F.3d 1232, 1235 (7th Cir. 1995); *United States v. Jackson*, 32 F.3d 1101, 1105 (7th Cir. 1994) (Coffey, J., concurring); *United States v. Cervantes*, 878 F.2d 50, 56 (2d Cir. 1989); *Moore*, 571 F.2d at 182); *Blackwell*, 49 F.3d at 1235 ("It is well established that a convicted defendant has the right to be sentenced on the basis of accurate and reliable information, and that implicit in this right is the opportunity to rebut the government's evidence and the information in the presentence report.").

[171] *McDowell*, 888 F.2d at 290 (citing Fed. R. Crim. P. 32(c)(3)(D).

[172] *Id.*

be allowed to explain or rebut the evidence presented."[173] By citing to Delaware's Superior Court Rules of Criminal Procedure and not addressing the United States Constitutionally premised case law from the Third Circuit Court of Appeals cited to and described by Mr. Smack in his direct appeal,[174] the Delaware Supreme Court essentially deemed this precedent irrelevant. The Delaware Supreme Court erred by not adhering to the decisions of the Third Circuit, described below, as the Third Circuit has consistently held that the Due Process Clause of the Fourteenth Amendment requires that courts hold evidentiary hearings when the court wishes to rely upon contested sentencing facts to fashion a defendant's ultimate sentence.[175] To deny Mr. Smack an evidentiary hearing to resolve contested aggravating facts presented during his state sentencing proceedings was erroneous and is inconsistent with clearly established federal law and the Fourteenth Amendment to the United States Constitution.

In *United States v. Furst*, the defendant alleged that the district court violated Federal Rule of Criminal Procedure 32(c)(3)(D) and his due process rights when it failed to make findings in relation to alleged factual inaccuracies or, alternatively, by failing to explicitly state that it would not rely upon the disputed facts.[176] The Third Circuit Court of Appeals held that the district court had violated Rule 32 and therefore, vacated the defendant's sentence and remanded the case back to the district court for further action.[177] In support of its holding, the Third Circuit found that it was unnecessary to consider the defendant's due process claims as "the rule operates to guarantee the

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[173] SR590-91.

[174] SR279-87, SR571-74.

[175] *United States v. Zabielski*, 711 F.3d 381, 385, 391 (3d Cir. 2013); *United States v. Furst*, 918 F.2d 400, 407 (3d Cir. 1990); *Cifuentes*, 863 F.2d at 1150, 1155 *McDowell*, 888 F.2d at 290-91; *United States v. Rosa*, 891 F.2d 1063, 1079 (3d Cir. 1989).

[176] *Furst*, 918 F.2d at 407.

[177] *Id.*

very right that [the defendant] claims has been constitutionally infringed upon."[178] The Third Circuit further noted that, upon remand, the district court would be required to either make findings "based upon the evidence already before it or upon evidence adduced at a hearing"[179] should it wish to rely upon the disputed information to sentence the defendant.

In *United States v. Cifuentes*, the Third Circuit considered whether the defendant's due process rights were violated by the district court's consideration, without an appropriate hearing, of disputed facts.[180] The Third Circuit held that "where, as here, the disputed information is important to the fashioning of an appropriate sentence, the court, if it relies on it, should grant a hearing at which the government, through testimony and other relevant evidence about its investigation, can attempt to show the disputed information is reliable and the defendant can produce evidence, including his own testimony, to refute it."[181]

Similarly, in *United States v. Zabielski*, the Third Circuit Court of Appeals found that "a sentencing court may consider '[p]rior similar adult criminal conduct not resulting in a criminal conviction,' so long as that conduct has been proven by a preponderance of the evidence."[182] In support of this finding, the Third Circuit noted that the alleged criminal conduct had been proven by a preponderance of the evidence, as the government, during the sentencing hearing, introduced live testimony of an investigating officer who was able to describe the defendant's alleged criminal conduct.[183]

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[178] *Id.*
[179] *Id.*
[180] *Cifuentes*, 863 F.2d at 1150.
[181] *Id.* at 1155.
[182] *Zabielski*, 711 F.3d at 391 (internal citations omitted).
[183] *Id.* at 385, 391.

Likewise, in *United States v. Rosa*, factual disputes arose between the government and the defendant in relation to factors relevant to the sentencing hearing.[184] In particular, the defendant requested the production of *Jencks* materials, a request that the court denied, following a government's witness testifying in support of the government's version of the events.[185] On direct appeal, the Third Circuit vacated the defendant's sentence and remanded the case, noting that "sentencing is the end of the line. The defendant has no opportunity to relitigate factual issues resolved against him . . . [W]here, after a guilty plea, the critical fact was litigated for the first time at the sentencing hearing, the defendant is irreparably disadvantaged."[186] In support of this conclusion, the Third Circuit states that "we can perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if accepted, add substantially to the defendant's sentence."[187] Like the defendant is *Rosa*, Mr. Smack pleaded guilty and therefore, Mr. Smack's sentencing hearing was "in effect, the 'bottom-line.'"[188] Thus, there was "no purpose in denying [Mr. Smack] the ability to effectively cross-examine"[189] witnesses that the State should have been required to present its version of the facts by the requisite preponderance of the evidence standard, particularly at such a "critical stage of [the] criminal proceedings."[190]

Additionally, the Delaware Superior Court Rule of Criminal Procedure 32(c)(3), like its

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[184] *Rosa*, 891 F.2d at 1075.
[185] *Id*. at 1075, 1077.
[186] *Id*. at 1078.
[187] *Id*. at 1079.
[188] *Id*. ("We believe the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the 'bottom-line' for the defendant, particularly where the defendant has pled guilty.").
[189] *Rosa*, 891 F.2d at 1079.
[190] *Id*.

federal counterpart, undoubtedly endeavors to protect the fundamental fairness principles essential to due process by affording a criminal defendant notice and an opportunity to challenge disputed sentencing issues.[191] In particular, Delaware's Rule 32 provides that "[t]he court shall afford the parties an opportunity to comment on the [presentence] report and, in the discretion of the court, to present information relating to any alleged factual inaccuracy contained in it."[192] Rule 32 further stipulates that "[i]f the comments or information presented allege any factual inaccuracy in the presentence investigation report, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing."[193] Unfortunately, Rule 32(c)(3) was not utilized in the present matter as only a shortened presentence report was prepared that related only to Mr. Smack's criminal history and not to the disputed facts at issue.

Delaware's Superior Court Rule of Criminal Procedure 32 largely tracks the language of Federal Rule of Criminal Procedure 32.[194] Pursuant to the Federal Rules of Criminal Procedure, which was designed to comply with and protect a defendant's due process rights,[195] if a court considers disputed sentencing factor(s) in the absence of an initial finding as to the disputed information, based upon either the evidence before it or additional evidence adduced at a hearing,

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[191] Del. Super. Ct. Crim. R. 32(c)(3).

[192] *Id.*

[193] *Id.*

[194] Fed. R. Crim. P. 32(i), formerly 32(c)(3)(D), provides: "[a]t sentencing the court . . . must–for any disputed portion of the presentence report or other controverted matter–rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i).

[195] *Nappi*, 243 F.3d at 763 (noting that the purpose of the Rule is to "ensure that the defendant is made aware of the evidence to be considered and potentially used against him at sentencing, and is provided an opportunity to comment on its accuracy.").

then the defendant's sentence must be vacated and remanded.[196] When, as here, it is a question of the applicability of the Due Process Clause of the Fourteenth Amendment, there is no justification for distinguishing between a state sentence and a federal sentence in deciding the merits of a claim. It would inequitable and fundamentally unfair if, under the same facts, a defendant who alleges a violation of his due process rights should be denied relief under the state rule but be granted relief under the federal rule, even though the basis for the requested relief stems not from an alleged violation of the state rule, but rather, of the protections guaranteed by the Due Process Clause of the Fourteenth Amendment.

It is also significant to note that the United States Sentencing Guideline, which were enacted in an effort to improve fairness in sentencing,[197] state that "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor."[198] The Sentencing Guidelines also provide that "[t]he court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P."[199] The commentary to the guidelines further notes that "[a]n evidentiary hearing may sometime be the only reliable way to resolve disputed issues" and that "[w]hen a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information."[200]

In *United States v. McDowell*, the Third Circuit considered for the first time under the then-

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[196] *Furst*, 918 F.2d at 408; *Rosa*, 891 F.2d at 1073; *United States v. Gomez*, 831 F.2d 453 (3d Cir. 1987).

[197] *McDowell*, 888 F.2d at 290.

[198] U.S. Sentencing Guidelines Manual § 6A1.3(a) (2016).

[199] *Id.* at § 6A1.3(b).

[200] *Id.* at § 6A1.3 cmt.

recently enacted United States Sentencing Guidelines what the relevant burden of proof was for the determination of facts relied upon in sentencing.[201] The Third Circuit noted that because "[d]ue process [] guarantee[s] a convicted criminal defendant the right not to have his sentence based upon 'materially false' information," the federal rules, in compliance with due process, "require the court to hold a hearing to determine the disputed issues of fact included in the presentence report if it wishes to rely upon these facts in sentencing."[202] The Third Circuit went on to hold that "the preponderance of evidence standard can withstand constitutional muster" and is therefore, the appropriate burden of proof to apply to disputed issues of fact.[203]

In the present matter, the Delaware State Courts violated the Due Process Clause of the Fourteenth Amendment when it denied Mr. Smack's request for an evidentiary hearing to challenge the State's sentencing presentation of unproven disputed aggravating facts.[204] The Delaware State Courts refusal to conduct an evidentiary hearing precluded Mr. Smack from cross-examining live witnesses on disputed facts presented to the Delaware Superior Court at Mr. Smack's sentencing hearing,[205] thereby depriving Mr. Smack of the opportunity to ensure that he would not receive a sentence based upon materially false information in violation of due process.[206] Additionally, without an evidentiary hearing, Mr. Smack could not challenge the State's presentation of contested aggravating sentencing facts,[207] and/or make certain that the State had met the requisite burden of

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[201] 888 F.2d at 290.

[202] *Id*. (internal citations omitted).

[203] *Id*. at 291.

[204] SR217-18, SR590-91.

[205] SR113-16, SR117, SR213, SR220-21, SR222, SR223-27, SR228-29.

[206] *McDowell*, 888 F.2d at 290 (citing *Townsend*, 334 U.S. at 741; *Cifuentes*, 863 F.2d at 1153); *See also Nappi*, 243 F.3d at 763 (citing *Townsend*, 334 U.S. at 741; *Moore*, 571 F.2d at 183).

[207] *Id*.

proof for disputed facts. Accordingly, the Delaware State Court's decision to deny Mr. Smack's request for an evidentiary hearing violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Thus, this Court must overturn Mr. Smack's conviction and remand this matter to the Delaware Superior Court for a new sentencing hearing with instructions that Mr. Smack be permitted to present testimony and other evidence to rebut the State's presentation of contested aggravating facts.

CONCLUSION

Based on the arguments made above regarding the merits of his claims for relief, Mr. Smack respectfully requests that this Court grant him a writ of habeas corpus so that he may be discharged from his unconstitutional confinement and restraint. This Court must recognize that Mr. Smack's sentence was the result of the Delaware State Courts applying the erroneous minimal indicia of reliability evidentiary standard in violation of the Due Process Clause of the Fourteenth Amendment and controlling United States Supreme Court precedent interpreting the Due Process Clause. As such, Mr. Smack's conviction must be vacated and this matter must be remanded back to the Delaware State Courts for a new sentencing hearing that fully complies with the Due Process Clause of the Fourteenth Amendment.

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