IN THE
SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

GERALD RAYNARD FULLER
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Question Presented

The federal circuit courts have uniformly held that a sentencing judge may consider conduct for which the defendant has been acquitted, and this Court has held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence," and that "application of the preponderance standard at sentencing generally satisfies due process." The Michigan Supreme Court has said nonetheless that it was somehow writing on a "clean slate," and that due process does bar sentencing courts from considering conduct for which the defendant was acquitted when sentencing on the offense of conviction, a holding the Michigan Court of Appeals was obligated to follow in this case.

The question presented is: Should this Court grant certiorari to settle the conflict of authority between state courts and the federal circuits, and among state courts themselves, as to whether due process bars sentencing courts from considering conduct for which the defendant was acquitted when sentencing on the offense of conviction?

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OCTOBER TERM, 2019

THE PEOPLE OF THE STATE OF MICHIGAN,
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PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, by KYM L WORTHY, Prosecuting Attorney for the County of Wayne, JASON W. WILLIAMS, Chief of Research, Training, and Appeals, and TIMOTHY A. BAUGHMAN, Special Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on January 21, 2020, discretionary review denied by the Michigan Supreme Court on June 17, 2020.

Opinions below

The opinion of the Michigan Court of Appeals is unreported, may be found at 2020 WL 359646, and appears as Appendix A. The order of the Michigan Supreme Court denying leave to appeal is as yet unreported, and appears as Appendix B.

Statement of Jurisdiction

The order of the Michigan Supreme Court denying discretionary review was rendered June 17, 2020. This Court's jurisdiction is invoked under 28 USC §1257(a).

Constitutional Provisions Involved

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Respondent was convicted by a jury of two counts of assault, and one count of resisting or obstructing a police officer. He was acquitted of assault with intent to commit criminal sexual conduct involving sexual penetration and assault with intent to commit second-degree criminal sexual conduct.

At sentencing, the sentencing judge said:

> The Court recognizes that the Defendant was acquitted of the more serious assault, criminal sexual conduct assault charges, but the Court does find that beyond such proof as a preponderance of the evidence that he had committed the more serious charges of assault with intent to commit criminal sexual conduct involving criminal sexual penetration and assault with intent to commit criminal sexual conduct in the second degree based on the evidence that he — there was no other reason for the contact, that it was in the middle of the day, that he threw her down and called her a bitch, that his pants were down with his butt exposed when he ran away and that he had a condom in the case.
>
> The Court notes that in reaching this conclusion that it isn't just the two sisters that made the observation, but it was a male, a man, a witness who had no

> connection with the two sisters who made that observation as well.[1]

The Michigan Court of Appeals remanded for resentencing because in People v. Beck, 504 Mich. 605, 939 N.W.2d 213 (2019) the Michigan Supreme Court held that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted."[2] The Michigan Court of Appeals thus held that "[b]ecause the trial court relied at least in part on acquitted conduct when sentencing defendant, this Court is required under Beck to vacate defendant's sentences and to remand the case to the trial court for resentencing."[3]

The Michigan Supreme Court denied discretionary review; the state now seeks certiorari.

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[1] Sentencing transcript, 46.

[2] People v. Fuller, 2020 WL 359646, at 2 (Mich. Ct. App. Jan. 21, 2020).

[3] Id.

Reasons for Granting the Writ

I. This Court should grant certiorari to settle the conflict of authority between state courts and the federal circuits, and among state courts themselves, as to whether due process bars sentencing courts from considering conduct for which the defendant was acquitted when sentencing on the offense of conviction.

The Michigan Court of Appeals vacated the sentence here because of the decision of the Michigan Supreme Court that due process prevents a sentencing court from considering as a factor conduct for which the defendant has been acquitted. That Court found that due process bars consideration of acquitted conduct because it "shows up at sentencing in the company of the due-process protection of the presumption of innocence," while conduct for which the defendant has never been charged "does not," and so uncharged conduct may be considered at sentencing.[4] In opposing the petition for certiorari by the defendant-petitioner in Asaro v. United States the United States Solicitor General aptly said:

> Under the Beck majority's reasoning . . . a sentencing court could not rely on any conduct not directly underlying the elements of the offense on which the defendant is being sentenced. Yet Beck itself

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[4] People v. Beck, 504 Mich. 605, 621, 939 N.W.2d 213, 222 (2020).

> acknowledged that "[w]hen a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance -of-the-evidence standard ". . . . The majority did not attempt to explain that logical inconsistency in its reasoning.[5]

The Michigan Supreme Court decision avoided controlling decisions of this Court, stating instead that it was writing on a "clean slate."[6] But this Court has held "that application of the preponderance standard at sentencing generally satisfies due process," and flatly held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[7]

Every federal circuit court that has considered the question has held that a sentencing court may consider acquitted conduct so long as the conduct is proved by a preponderance of the evidence, as one

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[5] Brief for the United States in Opposition to the Petition for Certiorari in Asaro v. United States, No. 19-107, p. 14, certiorari denied, 140 S.Ct. 1104 (2020).

[6] People v. Beck, 939 N.W.2d at 225.

[7] United States v. Watts, 519 U.S. 148, 156–57 (1997). And see Witte v. United States, 515 U.S. 389 (1995); McMillan v. Pennsylvania, 477 U.S. 79 (1986).

would expect given the decisions of this Court.[8] These courts have relied on Watts to reject claims under both the Sixth Amendment right to jury trial and the Due Process clause of the Fifth Amendment.[9]

State courts, however, are somewhat divided, revealing the conflict between states, as well as some states and the federal circuits (as well as this Court). Several states have relied on due process to find, as did the Michigan Supreme Court, that acquitted conduct may not be considered at sentencing even if found by a preponderance of the evidence.[10] But other state courts have held that

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[8] See, e.g., United States v. Gobbi, 471 F.3d 302, 314 (CA 1, 2006), abrogated in part on other grounds as stated in United States v. Nagell, 911 F.3d 23, 31 n. 8 (CA 1, 2018); United States v. Vaughn, 430 F.3d 518, 525-27 (CA 2, 2005); United States v. Hayward, 177 F. App'x 214, 215 (CA 3, 2006); United States v. Ashworth, 139 F. App'x 525, 527 (CA 4, 2005); United States v. Farias, 469 F.3d 393, 399-400 (CA 5, 2006); United States v. White, 551 F.3d 381, 383-84 (CA 6, 2008); United States v. Price, 418 F.3d 771, 787-88 (CA 7, 2005); United States v. High Elk, 442 F.3d 622, 626 (CA 8, 2006); United States v. Mercado, 474 F.3d 654, 655-56 (CA 9, 2007); United States v. Magallanez, 408 F.3d 672, 684-85 (CA 10, 2005); United States v. Duncan, 400 F.3d 1297, 1304-05 (CA 11, 2005); United States v. Dorcely, 454 F.3d 366, 371 (CA DC, 2006).

[9] See Dorcely, 454 F.3d at 372. In a state case such as the present one, the due process claim arises under the Fourteen Amendment.

[10] See State v. Marley, 364 S.E.2d 133, 138-39 (N.C. 1988); State v. Cote, 530 A.2d 775, 783-85 (N.H. 1987);

consideration of acquitted conduct at sentencing under a preponderance of the evidence standard is constitutionally permissible under Watts.[11]

The Michigan Supreme Court's opinion, followed necessarily by the Michigan Court of Appeals here, presents a clear conflict between a state court of last resort and the federal courts of appeals; further, state courts that have considered the question are themselves in conflict. This Court should grant certiorari to resolve the conflict.

Bishop v. State, 486 S.E.2d 887, 897 (Ga. 1997). See also State v. Paden-Battle, —A.3d— , 2020 WL 3240959, at 9 (N.J. Super. Ct. App. Div. June 16, 2020).

[11] See, e.g., State v. Clark, 197 S.W.3d 598, 600-02 (Mo. 2006); People v. Towne, 186 P.3d 10, 24-25 (Cal. 2008); State v. Witmer, 10 A.3d 728, 733-34 (Me. 2011); State v. Hampton, 195 So.3d 548, 561 (La. Ct. App. 2016); Nusspickel v. State, 966 So.2d 441, 445-47 (Fla. Dist. Ct. App. 2007); People v. Pagan, 165 P.3d 724, 730-31 (Colo. App. 2006); State v. Ballard, No. 08 CO 13, 2009 WL 3305747 (Ohio Ct. App. Sept. 30, 2009); State v. Thames, No. 2008AP1127-CR, 2008 WL 5146778 (Wis. App. Dec. 9, 2008).

Conclusion

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

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PETITION APPENDIX

Appendix A: Opinion of the Michigan Court of Appeals

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

GERALD RAYNARD FULLER,
Defendant-Appellant.

No. 345500
LC No. 18-002067-01-FH

Before: RIORDAN, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault, MCL 750.81(1), and one count of resisting or obstructing a police officer ("resisting or obstructing"), MCL 750.81d(1). Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 93 days in jail for each of the assault convictions and 58 months to 15 years' imprisonment for the resisting or obstructing

conviction. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

I. RELEVANT FACTUAL BACKGROUND

This case arises from defendant's assaults of a female victim and his subsequent resistance of police officers while being arrested, on February 18, 2018, in Detroit, Michigan. The victim testified that she was walking along Schoolcraft Road when defendant used his motor vehicle to pin her against a fence. Defendant got out of the car, grabbed ahold of the collar of the victim's coat, and threw her to the ground. Defendant then got on top of the victim. Defendant and the victim began "tussling." Defendant grabbed the victim's coat, which was zipped down to her knees, and he tried to pull the coat apart and open it. In particular, defendant was grabbing at the chest area of the victim's coat and trying to rip the coat open. The victim thought that defendant was trying to rape her, and she began yelling, "Help." Two other vehicles pulled up, and an occupant of one of the vehicles got out of the car. Defendant stood up, and the victim noticed that defendant's pants were halfway down his thighs and that she could see his naked buttocks. Defendant got in his car and drove off.

A car chase then ensued in which the drivers of the two cars that had come upon the scene pursued defendant's vehicle. The victim rode in one of the pursuing vehicles. Defendant parked his car in a liquor store parking lot and then fled on foot. Police officers later arrived in the area and arrested defendant at a gas station. Defendant

resisted various instructions of the police officers while he was being taken into custody. An unused condom in its wrapper was found on the driver's seat of defendant's vehicle. Defendant was charged with, among other things, assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), and assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2), but for each of those charges, the jury found defendant guilty of the lesser included offense of assault. Defendant was also charged with resisting or obstructing, and the jury found him guilty of that offense.

At sentencing, defense counsel agreed that there was evidence at trial of two separate assaults and that defendant could thus be sentenced on both assault convictions. Also, the trial court noted in its sentencing decision that it found, by a preponderance of the evidence, that defendant committed assault with intent to commit criminal sexual conduct involving sexual penetration and assault with intent to commit second-degree criminal sexual conduct, even though the jury had acquitted defendant of those charges. This appeal followed.

II. SENTENCING BASED ON ACQUITTED CONDUCT

Defendant first argues that the trial court erred in basing its sentencing decision on acquitted conduct. We agree.

This issue presents a constitutional question, which is reviewed de novo. People v Beck, 504

Mich ___; ___ NW2d ___ (2019) (Docket No. 152934); slip op at 10-11, cert pending.

In Beck, ___ Mich at ___; slip op at 2, our Supreme Court held that a trial court at sentencing may not base a sentence on the trial court's finding that a defendant engaged in conduct for which the jury acquitted the defendant. "Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime." Id. In other words, "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." Id. at 22. Because the trial court in Beck had "relied at least in part on acquitted conduct when imposing sentence for the defendant's conviction" in that case, our Supreme Court vacated the defendant's sentence and remanded the case to the trial court for resentencing. Id. at 2-3.

In the present case, the trial court's comments at sentencing indicate that the court based defendant's sentences, at least in part, on conduct of which the jury acquitted him. In particular, the court found by a preponderance of the evidence that defendant committed the charged offenses of assault with intent to commit criminal sexual conduct involving sexual penetration and assault with intent to commit second-degree criminal sexual conduct, even though the jury acquitted defendant of those charges and, with respect to each of those charges, found him guilty of the lesser included offense of assault. Because the trial court relied at least in part on acquitted conduct when sentencing defendant, this Court is required under

Beck to vacate defendant's sentences and to remand the case to the trial court for resentencing. Id. at 2-3, 22.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel when defense counsel agreed at sentencing that there was evidence at trial of two assaults and that defendant could thus be sentenced for each assault conviction. We disagree.

To preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or a Ginther[12] hearing. People v Foster, 319 Mich App 365, 390; 901 NW2d 127 (2017). Defendant did not move for a new trial or a Ginther hearing. Because no Ginther hearing was held, this Court's review is limited to the existing record. People v Jordan, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. People v Heft, 299 Mich App 69, 80; 829 NW2d 266 (2012). Findings of fact are reviewed for clear error, and questions of law are reviewed de novo. Id.

"To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that counsel's deficient

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1. People v Ginther, 390 Mich 436; 212 NW2d 922 (1973).

performance prejudiced the defendant." People v Lane, 308 Mich App 38, 68; 862 NW2d 446 (2014). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." People v Head, 323 Mich App 526, 539; 917 NW2d 752 (2018) (quotation marks, brackets, and citation omitted). To establish prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." People v Randolph, 502 Mich 1, 9; 917 NW2d 249 (2018) (quotation marks and citation omitted). "The defendant has the burden of establishing the factual predicate of his ineffective assistance claim." People v Douglas, 496 Mich 557, 592; 852 NW2d 587 (2014).

The Double Jeopardy Clauses of the United States and Michigan Constitutions protect against placing a defendant twice in jeopardy for a single offense, including multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; People v Nutt, 469 Mich 565, 574; 677 NW2d 1 (2004). "There is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements . . . ." People v Lugo, 214 Mich App 699, 708; 542 NW2d 921 (1995). The evidence at trial showed that defendant committed separate and distinct assaults of the victim. "A simple assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery."

People v Terry, 217 Mich App 660, 662; 553 NW2d 23 (1996). The victim testified that defendant pinned her against a fence with his car. Defendant got out of the car, grabbed ahold of the collar of the victim's coat, and threw her to the ground. Defendant then got on top of the victim, and they began "tussling" on the ground. While they were on the ground, defendant grabbed the victim's coat, which was zipped down to her knees, and he tried to pull the coat apart and open it. In particular, defendant was grabbing at the chest area of the victim's coat and trying to rip the coat open. Overall, the evidence supports a conclusion that defendant committed at least two distinct assaults of the victim.

Hence, the two convictions and sentences for assault did not violate the constitutional prohibitions against double jeopardy. Lugo, 214 Mich App at 708. Defense counsel was not ineffective for acknowledging at sentencing that the evidence at trial showed that two assaults occurred and that defendant could thus be sentenced for both assault convictions. Defense counsel is not ineffective for failing to advance a meritless argument. People v Ericksen, 288 Mich App 192, 201; 793 NW2d 120 (2010).

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Michael J. Riordan /s/ David H. Sawyer /s/ Kathleen Jansen

Appendix B: Order of the Michigan Supreme Court Denying Discretionary Review

June 17, 2020

No. 161016

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v.

GERALD RAYNARD FULLER,
Defendant-Appellee.
_____/

SC: 161016
COA: 345500
Wayne CC: 18-002067-FH

On order of the Court, the application for leave to appeal the January 21, 2020 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 17, 2020