

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

REPLY BRIEF FOR THE PETITIONER

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Petitioner makes this very brief response to points made by the Respondent.

1. Respondent argues that this Court lacks jurisdiction because the order for resentencing is not a final order. But it is. The sentence imposed was not ordered to be reconsidered, but vacated, and vacated on the ground that the trial judge had considered material—"acquitted conduct"—that the due process clause of the United States Constitution forbids. On Respondent's view, if a trial verdict of guilty were set aside on the ground that evidence was received in violation of the constitution, requiring a new trial, the reversal would not constitute a final order, as a new trial—just as a new sentencing is required here—will occur. But this is not the law, as the Court regularly considers cases where a new trial has been ordered. See e.g. *Michigan v. Bryant*, 562 U.S. 344, 359; 131 S. Ct. 1143; 179 L. Ed. 2d 93 (2011). And see *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479, 95 S. Ct. 1029, 1038, 43 L. Ed. 2d 328 (1975) (despite what Respondent says, the outcome is preordained—the new sentencing must occur without consideration of the

“acquitted conduct,” just as a new trial in cases such as *Bryant* must occur without the evidence held inadmissible for a constitutional reason).

2. Respondent says that uniformity in sentencing throughout the States is not achievable. Nor does Petitioner seek to achieve it. For example, unlike other states Michigan has an indeterminate sentencing scheme, where, save for offenses where the punishment authorized is life or any term of years, the statutory maximum constitutes the maximum of the sentence to be imposed, the conviction authorizing the defendant’s confinement up to that term, with the minimum imposed by the trial judge constituting the earliest parole date for the defendant. But whether it be this system, or any other, the Michigan Supreme Court has held, with the Court of Appeals following it, as was its duty, that in the exercise of its sentencing discretion a trial judge may not consider acquitted conduct. Whether *that* is compelled by the Constitution or not is something which should be uniform throughout the country, with a State free of course, as with any other federal constitutional provision of this sort, to take a different path by statute, or a principled understanding of its own constitution. But whether the *federal* constitution compels the result that Michigan says it does should be uniform throughout the country, and it is not. This division needs resolution.
3. Respondent says the Michigan decision—contrary to decisions of this Court and the federal circuits, as well as other state courts—is correct. And there is division in the state courts. For the reasons stated in the Petition, this Court should resolve the division; Michigan, Petitioner submits, has resolved the question incorrectly.

Conclusion

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

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