No. _____

In The
Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

ERIC LAMONTEE BECK,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Every regional federal circuit court has addressed the constitutionality of considering conduct underlying an acquitted charge at sentencing, and each one has held that a sentencing court may consider such conduct without offending a defendant's constitutional rights. 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." Contrary to this holding, the Michigan Supreme Court here held that this Court has *not* decided that consideration of acquitted conduct at sentencing is consistent with due process, that it was thus writing on a "clean slate," and that due process *does* "bar sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted" and considering that conduct at sentencing for the offense of conviction.

The question presented is: Whether, when imposing a sentence within the statutory range for the offense of conviction, due process permits a sentencing court to consider conduct underlying an acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

RELATED CASES

People v. Beck, 13-039031-FC, Saginaw Circuit Court. Judgment entered May 1, 2014.

People v. Beck, No. 321806, Michigan Court of Appeals. Judgment entered November 17, 2015.

People v. Beck, No. 152934, Michigan Supreme Court. Judgment entered July 29, 2019.

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PETITION FOR A WRIT OF CERTIORARI

The People of the State of Michigan respectfully petition for a writ of certiorari to review the judgment of the Michigan Supreme Court in this matter.

OPINIONS BELOW

The decision of the Michigan Supreme Court, which is not yet reported,[1] is reprinted in the Appendix (App.) at 1-79. The decision of the Michigan Court of Appeals, which is unreported,[2] is reprinted at App. 80-97.

JURISDICTION

The Michigan Supreme Court issued its opinion on July 29, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

[1] *People v. Beck*, No. 152934, 2019 WL 3422585 (Mich. July 29, 2019).

[2] *People v. Beck*, No. 321806, 2015 WL 7283228 (Mich. Ct. App. Nov. 17, 2015).

RELEVANT CONSTITUTIONAL PROVISIONS

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 of the United States Constitution, in part, provides:

> 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.

STATEMENT OF THE CASE

On July 29, 2019, a divided 4-3 Michigan Supreme Court held that a sentencing judge violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution by considering conduct underlying an acquitted charge at sentencing, even when

that conduct has been proved by a preponderance of the evidence and the imposed sentence falls within the statutorily prescribed range for the offense of conviction. The majority's error was apparent from the start when it framed the issue as "whether a sentencing judge can sentence a defendant *for a crime of which the defendant was acquitted*." App. 1 (emphasis added).[3] In so ruling, the Michigan Supreme Court announced that it was not bound by this Court's decisions in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), or *United States v. Watts*, 519 U.S. 148 (1997), to hold otherwise, despite acknowledging that its position contradicted that of every federal circuit court and the majority of state courts that have addressed the issue. Another petitioner seeking a writ of certiorari has already recognized that the Michigan Supreme Court's opinion "creates a clear split between a state court of last resort and the federal courts of appeals, because federal courts have unanimously applied *Watts* to foreclose both due process and Sixth Amendment challenges."[4] In light of the Michigan Supreme Court's disregard of this Court's precedents and the holdings

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[3] In *United States v. Watts*, 519 U.S. 148 (1997), this Court rejected a nearly identical framing error adopted by the United States Court of Appeals for the Ninth Circuit: "The issue on appeal is whether a judge can sentence a defendant for a crime of which the jury found her not guilty." *United States v. Putra*, 78 F.3d 1386, 1387 (9th Cir. 1996), *overruled by Watts*, 519 U.S. 148.

[4] Supplemental Brief in Support of Petition for Writ of Certiorari at 4, *Asaro v. United States*, 767 F. App'x 173 (2d Cir. 2019) (No. 19-107) [hereinafter *Asaro*].

of other federal circuit and state courts, this petition for a writ of certiorari follows.

On June 11, 2013, Hoshea Pruitt was shot to death during a verbal altercation over a woman named Rajeana Drain. Mary Loyd-Deal, a witness who died before trial, saw the shooting and identified respondent as the shooter during her preliminary-examination testimony. A second witness, Jamira Calais, was present at the shooting, but could not confirm respondent's identity as the shooter. A third witness, Aaron Fuse, testified that respondent called him a few days after Pruitt's death and confessed that he had done "something stupid" and shot someone while arguing over a woman.

Respondent was charged with open murder, carrying a dangerous weapon with unlawful intent, being a felon in possession of a firearm (felon-in-possession), and three counts of carrying a firearm during the commission of a felony (felony-firearm).[5] A jury convicted respondent of felon-in-possession and felony-firearm, but acquitted him of murder, carrying a firearm with unlawful intent, and the two additional counts of felony-firearm attendant to the acquitted charges.

Under the Michigan Sentencing Guidelines, respondent's minimum sentencing range for his felon-in-possession conviction was 22 to 76 months' imprisonment, but in Michigan, the sentencing guidelines are advisory only. *People v. Lockridge*, 870 N.W.2d 502,

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[5] MICH. COMP. LAWS §§ 750.316, 226, 224f, 227b.

520-21 (Mich. 2015) (relying on *Alleyne v. United States*, 570 U.S. 99 (2013), to hold that Michigan's mandatory sentencing scheme violated the Sixth Amendment and rendering the guidelines advisory in all applications).[6] The trial court sentenced respondent to 240 to 400 months' imprisonment for his felon-in-possession conviction, which fell within the statutorily prescribed sentencing range applicable to the offense. Under Michigan law, felon-in-possession is typically punishable by up to five years' imprisonment. MICH. COMP. LAWS § 750.224f(5). However, because respondent was a fourth-offense habitual felony offender, MICH. COMP. LAWS § 769.12(1)(b) raised his maximum potential sentence to "life or . . . a lesser term" of years.

The sentencing judge explained that he imposed the sentence he did, in part, because he found by a preponderance of the evidence that respondent committed

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[6] Although the guidelines remain a highly relevant consideration in the exercise of sentencing discretion and a trial court must consult the guidelines and take them into account at sentencing, a "sentencing court may exercise its discretion to depart from [the] guidelines range without articulating substantial and compelling reasons for doing so." *Lockridge*, 870 N.W.2d at 520-21. When a sentencing judge imposes a minimum sentence above the recommended guidelines' range, Michigan appellate courts review that sentence for reasonableness under the "principle of proportionality," which does not measure proportionality by reference to any deviation from the guidelines, but rather requires " 'sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *People v. Steanhouse*, 902 N.W.2d 327, 337 (Mich. 2017) (quoting *People v. Milbourn*, 461 N.W.2d 1, 3 (Mich. 1990)).

the killing underlying the murder charge of which the jury had acquitted him. The judge explained:

> This gentleman has a prior murder conviction on his record that he pled guilty to for which he served 13 years in prison. That was in 1991. He was discharged from parole in 2007. In 2010, only three years later, he pled no contest to a firearms, possession by a felon for which he received 252 days in jail. And then this charge, offense date was June 11, 2013 where, again, he is in possession of a firearm at a murder scene.
>
> The testimony in this case by one of the witnesses who could not identify him was that a man approached the victim with a gun. She saw a muzzle flash and the victim fell to the ground and the perpetrator ran off.
>
> The other witness, who was not alive at the time of the trial, and was barely alive at the time of the prelim, identified this gentleman as the person who approached the victim with the gun. Gave a positive identification. Indicated she saw the gun. Then her story wavered as far as whether she saw the shooting or whether she was in her kitchen at the time of the shooting. I think the inconsistency, and where she was at the time of the shooting, as well as her not being in court, affected the jury's verdict. *They could not find, beyond a reasonable doubt, that the defendant committed the homicide. But the Court certainly finds*

> *that there is a preponderance of the evidence that he did.*
>
> App. 4-5 (emphasis added in *Beck*).

Respondent challenged his sentence in the Michigan Court of Appeals, which remanded the case for further sentencing proceedings.[7] App. 97. Respondent then sought leave to appeal in the Michigan Supreme Court, which held his application in abeyance for *People v. Steanhouse*, 902 N.W.2d 327 (Mich. 2017). After issuing its opinion in *Steanhouse*, the Michigan Supreme Court ordered oral argument on respondent's application.

On July 29, 2019, a divided 4-3 Michigan Supreme Court held that the sentencing judge violated respondent's due-process rights under the Fourteenth Amendment by considering conduct underlying an acquitted charge at sentencing, even when that conduct was established by a preponderance of the evidence and the imposed sentence fell within the statutorily prescribed range for the offense of conviction.[8] The majority concluded that *McMillan*, 477 U.S. 79, was not dispositive because it involved uncharged rather than acquitted conduct. The court also opined that *McMillan*'s

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[7] The court remanded the case to the trial court for a determination of whether that court would have imposed a materially different sentence had its discretion not been constrained by the sentencing guidelines. *See Lockridge*, 870 N.W.2d at 523-24 (adopting the procedure from *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005)).

[8] The Michigan Supreme Court expressly premised its holding on federal, and not state, law. App. 8.

due-process analysis was called into question after *Alleyne v. United States*, 570 U.S. 99 (2013). Although *Alleyne* addressed a Sixth Amendment claim, the majority concluded that the opinion rendered *McMillan*'s Sixth Amendment *and* due-process holdings unusable because their interwoven nature made it "impossible to conclude that its analysis of the former has been repudiated but its analysis of the latter remains entirely viable." App. 19-20.

The majority also concluded that *Watts*, 519 U.S. 148, was "unhelpful" to resolve the due-process question because the holding in *Watts* was limited by *United States v. Booker*, 543 U.S. 220, 240 n. 4 (2005), to claims involving the Double Jeopardy Clause. App. 21. The majority thus announced it could address the due-process question "on a clean slate." App. 22.

The Michigan Supreme Court held that the consideration of conduct underlying an acquitted charge at sentencing violates due process, grounding that conclusion "in the guarantees of fundamental fairness and the presumption of innocence." App. 22. The majority reasoned that, although a judge may consider *uncharged* conduct at sentencing, once a jury acquits an accused of a charged offense, the conduct underlying that offense becomes "protected by the presumption of innocence [and] may not be evaluated using the preponderance-of-the-evidence standard without violating due process." App. 24. The Michigan Supreme Court acknowledged that its holding contradicted every federal circuit court and the majority of state courts that have addressed the question, but it was

persuaded by the "volume and fervor of judges and commentators who have criticized the practice of using acquitted conduct as inconsistent with fundamental fairness and common sense." App. 24.

In dissent, Justice CLEMENT, joined by Justices MARKMAN and ZAHRA, opined that the majority endorsed an overly broad reading of the presumption of innocence and improperly rejected *McMillan* and *Watts*. App. 64-65, 77-78. The dissent reasoned that the presumption of innocence requires proof beyond a reasonable doubt to establish each element of a charged offense, but once a valid conviction is obtained, the presumption does not prevent a trial court from considering conduct underlying an acquitted charge at sentencing. App. 64-65.

REASONS FOR GRANTING THE PETITION

I. The Michigan Supreme Court's Opinion Contradicts that of Every Federal Circuit Court and the Majority of State Courts That Have Addressed the Constitutionality of Considering Conduct Underlying an Acquitted Charge at Sentencing.

Every regional federal circuit court has addressed the constitutionality of considering conduct underlying an acquitted charge at sentencing, and each one has held that a sentencing court may consider such conduct without offending a defendant's constitutional rights, so long as the conduct is proved by a

preponderance of the evidence and the imposed sentence falls within the statutory range for the offense of conviction. *See*, *e.g.*, *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006), *abrogated in part on other grounds as stated in United States v. Nagell*, 911 F.3d 23, 31 n. 8 (1st Cir. 2018); *United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005); *United States v. Hayward*, 177 F. App'x 214, 215 (3d Cir. 2006); *United States v. Ashworth*, 139 F. App'x 525, 527 (4th Cir. 2005); *United States v. Farias*, 469 F.3d 393, 399-400 (5th Cir. 2006); *United States v. White*, 551 F.3d 381, 383-84 (6th Cir. 2008); *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Mercado*, 474 F.3d 654, 655-56 (9th Cir. 2007); *United States v. Magallanez*, 408 F.3d 672, 684-85 (10th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005); *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006). In affirming the constitutionality of considering conduct underlying an acquitted charge at sentencing, nearly all of the federal circuits have held not only that *Watts*, 519 U.S. 148, remains good law, but that *Watts* applies to claims involving the Sixth Amendment right to a trial by jury and the Due Process Clause[9] of the Fifth Amendment.[10] Contrary to

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[9] The fact that this case involves a due-process claim under the Fourteenth rather than the Fifth Amendment is of no moment because the due-process guarantees of the Fifth and Fourteenth Amendments "command[] the same answer." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

[10] *See*, *e.g.*, *Gobbi*, 471 F.3d at 314 (holding that *Watts* remains good law and allows a sentencing judge to consider

the Michigan Supreme Court's holding, several federal circuit courts have specifically held that *Watts* controls when a defendant claims a violation of due process and allows a judge to consider acquitted conduct at sentencing so long as the conduct is proved by a preponderance of the evidence. *See*, *e.g.*, *United States v. Swartz*, 758 F. App'x 108, 111-12 (2d Cir. 2018) (rejecting a defendant's due-process claim); *United States v. Boney*, 977 F.2d 624, 635-36 (D.C. Cir. 1992) (same); *Dorcely*, 454 F.3d at 372 (explaining that *Watts* governs not only double-jeopardy claims but also "plainly encompasses the due process clause"). Further at odds with the Michigan Supreme Court's opinion, several federal circuit courts have cited *McMillan* to support the rule that a judge may consider conduct underlying an acquitted charge at sentencing when the conduct is

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acquitted conduct, without distinguishing between the Fifth and Sixth Amendment interests at issue); *Vaughn*, 430 F.3d at 525-27 (same); *Hayward*, 177 F. App'x at 215 (same); *Ashworth*, 139 F. App'x at 527 (same); *Farias*, 469 F.3d at 399-400 (same); *Magallanez*, 408 F.3d at 684-85 (same). *But see White*, 551 F.3d at 383-84 (applying *Watts* to a Sixth Amendment claim); *Price*, 418 F.3d at 787-88 (same); *Mercado*, 474 F.3d at 655-56 (same). *See also High Elk*, 442 F.3d at 626 (not mentioning *Watts*, but holding that a sentencing judge may consider acquitted conduct at sentencing so long as the conduct is established by a preponderance of the evidence, without distinguishing between the Fifth and Sixth Amendment interests at issue). Only the Eleventh Circuit has concluded that *Watts* has no bearing on the Sixth Amendment question. *See White*, 551 F.3d at 392 n. 2 (MERRITT, J., dissenting); *Duncan*, 400 F.3d at 1304-05 (acknowledging that *Watts* did not directly involve a Sixth Amendment claim, but nonetheless holding that a judge may consider acquitted conduct at sentencing, without distinguishing between the Fifth and Sixth Amendment interests at issue).

established by a preponderance of the evidence. *See*, *e.g.*, *United States v. Horne*, 474 F.3d 1004, 1006 (7th Cir. 2007) (citing *McMillan* and *Watts*, but not identifying the constitutional right at issue); *Dorcely*, 454 F.3d at 371 (citing *McMillan* and *Watts*, and expressly rejecting claims under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment).

State courts are more divided over the propriety of considering conduct underlying an acquitted charge at sentencing. Like the Michigan Supreme Court, a few state courts have rejected the practice on the basis of due process and fundamental fairness. *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); *Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997). But more recently, state courts have affirmed the use of acquitted conduct at sentencing, uniformly concluding that *Watts* applies to resolve the question. *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).

Another petitioner seeking a writ of certiorari has already recognized that the Michigan Supreme Court's opinion here "creates a clear split between a state court of last resort and the federal courts of appeals,

because federal courts have unanimously applied *Watts* to foreclose both due process and Sixth Amendment challenges."[11] "By creating a clear split between a state court of last resort and the federal courts of appeals, the Michigan Supreme Court's decision in *Beck* heightens the need for this Court's review of the question presented."[12] The Michigan Supreme Court's opinion conflicts with the decisions reached by every federal circuit court and the majority of state courts that have addressed the constitutionality of considering conduct underlying an acquitted charge at sentencing. This Court should intervene to resolve the split and to correct the Michigan Supreme Court's unorthodox interpretation and application of this Court's precedents.

II. The Michigan Supreme Court Dramatically Expanded the Principle of the Presumption of Innocence Beyond What This Court's Precedents Can Bear.

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397

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[11] *Asaro*, *supra* note 4, at 4.

[12] *Id.* at 6.

U.S. 358, 364 (1970). Indeed, the requirement of proof beyond a reasonable doubt to support a *conviction* is an "'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id*. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Contrary to its widely accepted role, the Michigan Supreme Court applied the presumption of innocence to facts presented at sentencing for a conviction already validly obtained, making the striking assertion in the process that the presumption carries equal, if not greater, weight at sentencing as compared to trial.

In *Williams v. New York*, 337 U.S. 241, 252 (1949), this Court held that the Due Process Clause of the Fourteenth Amendment does not prevent a sentencing judge from considering out-of-court information at sentencing, even when that information would have been inadmissible at trial. Tribunals passing on the *guilt* of a defendant have long been "hedged by strict evidentiary procedural limitations," but once guilt is established, this nation's tradition has always allowed sentencing judges to exercise "wide discretion in the sources and types of evidence used to assist . . . in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id*. at 246. Both our historical jurisprudence and modern penological goals are served when a judge possesses "the fullest information possible concerning the defendant's life and characteristics" at sentencing. *Id.* at 247.

The *Williams* Court did not address whether due process imposes a certain standard of proof at sentencing, but emphasized that "[t]he due-process clause

should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *Id.* at 251. Although sentencing procedure is not immune from scrutiny under the Due Process Clause, the *Williams* Court concluded that the possibility of abuse arising from the exercise of broad *discretionary* sentencing power did not warrant the creation of a "rigid constitutional barrier." *Id*. at 251, 252 n. 18.

In the decades after *Williams*, challenges to sentencing procedure emerged under the Double Jeopardy Clause of the Fifth Amendment, the Sixth Amendment's guarantee of a right to a trial by jury, and the Due Process Clauses of the Fifth and Fourteenth Amendments. In *Winship*, 397 U.S. at 364, this Court held that due process requires proof beyond a reasonable doubt to establish every element of a charged crime. But in *Patterson v. New York*, 432 U.S. 197, 210 (1977), this Court stressed that a legislature's definition of the elements of the offense is usually dispositive: "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt *all of the elements included in the definition of the offense* of which the defendant is charged." (Emphasis added.) The state need not prove beyond a reasonable doubt every fact "the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." *Id.* at 207.

In *McMillan v. Pennsylvania*, 477 U.S. 79, 84-85 (1986), this Court held that sentencing factors are not

elements of an offense that must be proved beyond a reasonable doubt to satisfy due process. At issue in *McMillan* was a Pennsylvania statute that imposed a mandatory five-year minimum sentence for certain enumerated felonies if, at sentencing, the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm during commission of the offense. *Id*. at 81. Affirming the constitutionality of the statute, this Court explained that the law gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. Although acknowledging that due process could restrain a state's unbridled power to redefine crimes to the detriment of criminal defendants, the *McMillan* Court did not attempt to identify such constitutional limits, beyond explaining that a state may not disregard the presumption of innocence. *Id.* at 86-87.

The *McMillan* Court had little difficulty concluding that "the preponderance standard satisfies due process" when the relevant fact supports a sentencing factor rather than an element of the offense. *Id.* at 91. After all, "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *Id.* at 91 (citing *Williams*, 337 U.S. 241).[13] Having concluded that visible possession was a sentencing factor rather than an element of the

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[13] *See also Meachum v. Fano*, 427 U.S. 215, 222 (1976) (explaining that, once a valid conviction is obtained, a "criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him").

offense, the *McMillan* Court rejected in short order the defendants' additional claim that the Pennsylvania statute violated their Sixth Amendment right to a jury trial: "[W]e need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.* at 93.

In *Witte v. United States*, 515 U.S. 389 (1995), this Court rejected a double-jeopardy challenge to a judge's consideration of relevant *uncharged* conduct at sentencing. "[B]y authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial, our cases necessarily imply that such consideration does not result in 'punishment' for [the uncharged] conduct." *Id.* at 400-01 (citing *McMillan*, 477 U.S. 79, and *Patterson*, 432 U.S. 197). Accordingly, "where the legislature has authorized such a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment only for the offense of conviction for purposes of the double jeopardy inquiry." *Id.* at 403-04.

A natural successor to *Witte*, in *United States v. Watts*, 519 U.S. 148 (1997), this Court considered in two cases the constitutionality of using acquitted conduct or pending charges to enhance a defendant's sentence. Relying on *Williams*, this Court reaffirmed its historical jurisprudence calling for the fullest consideration of available information at sentencing, explaining that under the pre-Guidelines federal sentencing regime it was "'well established that a sentencing judge may

take into account facts introduced at trial relating to other charges, *even ones of which the defendant has been acquitted*.'" *Id*. at 152 (quoting *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (SCALIA, J.)) (emphasis added). The enactment of the Federal Sentencing Guidelines did not alter this aspect of a sentencing court's discretion. *Id.* The *Watts* Court thus held that use of conduct underlying an acquitted charge at sentencing does not violate the Double Jeopardy Clause because "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." *Id.* at 154.

To affirm the defendants' sentences, the *Watts* Court also rejected the lower courts' rationale that an acquittal means the jury necessarily rejected the facts underlying an acquitted charge. "'[An] acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.'" *Id.* at 155 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984)). "'[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.'" *Id*. at 156 (quoting *Dowling v. United States*, 493 U.S. 342, 349 (1990)). Acknowledging its two previous holdings that the preponderance standard at sentencing satisfies due process,[14] the

[14] *McMillan*, 477 U.S. at 91; *Nichols v. United States*, 511 U.S. 738, 748 (1994).

Watts Court "h[e]ld 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." *Id*. at 157.

This Court later observed that *McMillan* was notable "not only for acknowledging the question of due process requirements for factfinding that raises a sentencing range, but also for disposing of a claim that the Pennsylvania law violated the Sixth Amendment right to a jury trial as well." *Jones v. United States*, 526 U.S. 227, 242 (1999). But lingering constitutional concerns remained:

> *McMillan* . . . recognizes a question under both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth: when a jury determination has not been waived, may judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime? The seriousness of the due process issue is evident from *Mullaney*'s[15] insistence that a State cannot manipulate its way out of *Winship*, and from *Patterson*'s recognition of a limit on state authority to reallocate traditional burdens of proof; the substantiality of the jury claim is evident from the practical implications of assuming Sixth Amendment indifference to treating a fact that sets the

[15] *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

> sentencing range as a sentencing factor, not an element.

Id. at 242-43.

Addressing these concerns, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court considered whether due process requires proof beyond a reasonable doubt found by a jury to support any fact that increases a statutory maximum sentence. This Court held that it does: "'[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" *Id*. at 476 (quoting *Jones*, 526 U.S. at 243 n. 6). New Jersey relied on *McMillan*, claiming it allowed the state to increase a defendant's maximum sentence using the preponderance standard because penalty enhancements proved at sentencing are not elements of a crime. *Id.* at 493. But this Court disagreed, explaining that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490 (emphasis added).[16]

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[16] In *Ring v. Arizona*, 536 U.S. 584, 605 (2002), this Court reaffirmed its conclusion in *Apprendi* that the characterization of a fact as an "element" or a "sentencing factor" is not determinative of whether a judge or jury must decide the fact. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602.

This Court clarified the scope of *Apprendi*'s holding in *Blakley v. Washington*, 542 U.S. 296, 303-04 (2004) (citations omitted):

> Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," . . . and the judge exceeds his proper authority.

Blakely held that a sentence enhanced above the statutory maximum violates the Sixth Amendment and *Apprendi* if the enhancement depends on finding facts beyond those admitted by the defendant or found by the jury. *Id*. at 304. In so holding, the Court distinguished *McMillan* and *Williams*, reasoning that "*McMillan* involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact," and "*Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial court record in determining whether to sentence a defendant to death." *Id.* at 304-05. *Blakely* was thus neither governed by nor in conflict with *McMillan* or *Williams*, as

"neither case involved a sentence greater than what state law authorized on the basis of the verdict alone." *Id.* at 305.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court rejected on Sixth Amendment grounds the constitutionality of the Federal Sentencing Guidelines. Writing for the Court, Justice STEVENS explained that *Apprendi* and *Blakely* illustrate that a defendant has a "right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment." *Id.* at 232 (STEVENS, J., opinion of the Court) (quoting *Blakely*, 542 U.S. at 301). The Guidelines violated this holding because they required judges to impose enhanced sentences based on judicially found facts (other than prior convictions) neither admitted by the defendant nor found by the jury beyond a reasonable doubt. *Id.* at 244. "[E]veryone agrees," explained Justice STEVENS, "that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges[.]" *Id.* at 233.

The Government argued that both *Witte* and *Watts* precluded the application of *Blakely* to the Sentencing Guidelines, but this Court disagreed: "In neither *Witte* nor *Watts* was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment. The issue we confront today simply was not presented." *Id.* at 240. Rather than doing away with the Federal Sentencing Guidelines entirely,

however, this Court struck down the provisions that rendered the guidelines mandatory. *Id.* at 245 (BREYER, J., opinion of the Court).

Apprendi and *Blakely* prohibited the use of judicial fact-finding to increase a statutory maximum sentence, but did not define the constitutional limits of judicial fact-finding used to increase a mandatory minimum. This Court tackled that issue in *Alleyne v. United States*, 570 U.S. 99 (2013). At the outset, Justice THOMAS, joined by Justice SOTOMAYOR, Justice GINSBURG, and Justice KAGAN,[17] addressed the tension between the holding in *Apprendi*—any fact that increases a statutory maximum is an element and must be submitted to the jury and found beyond a reasonable doubt—and that in *McMillan*—facts found to increase a mandatory minimum are sentencing factors and not elements of the crime so long as the legislature has defined them as such. *Id.* at 105-06 (THOMAS, J., plurality opinion). Discerning no difference between facts that increase a mandatory maximum and those that increase a mandatory minimum, Justice THOMAS explained that "[b]oth kinds of facts alter the *prescribed* range of sentences to which a defendant is exposed . . . ." *Id.* at 108 (emphasis added). Justice THOMAS thus opined that the Sixth Amendment right to a trial by jury, in conjunction with the Due Process Clause, requires that any "[f]acts that increase the mandatory minimum sentence are therefore elements and must

[17] Justice BREYER concurred in the judgment and joined Parts I, III-B, III-C, and IV of the opinion.

be submitted to the jury and found beyond a reasonable doubt." *Id*.[18]

Writing for a majority of the Court, Justice THOMAS explained that, "because the legally prescribed range *is* the penalty affixed to the crime, . . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Id*. at 112 (THOMAS, J., opinion of the Court). In rejecting a judge's authority to find facts increasing a *mandatory* minimum sentence, however, the majority in *Alleyne* took care to note that the opinion did not render unconstitutional the exercise of sentencing discretion *within the limits prescribed by law*:

> Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. *See*, *e.g*., *Dillon v. United States*, 560 U.S. [817, 828-29 (2010)] ("[W]ithin established limits[,] . . . the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); *Apprendi*, 530 U.S. [at 481] ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various

[18] Elaborating on the connection between crime and punishment, Justice THOMAS opined that a "crime" consists of "every fact which 'is in law essential to the punishment sought to be inflicted.'" *Id.* at 109 (quoting 1 J. Bishop, CRIMINAL PROCEDURE 50 (2d ed. 1872)).

> factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute"). This position has firm historical roots as well. As Bishop explained:
>
> > "[W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment." Bishop § 85, at 54.
>
> "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Apprendi*, *supra*, [at 519] (THOMAS, J., concurring). Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law.

Alleyne, 570 U.S. at 116-17 (brackets in *Alleyne* except first, fourth, and ninth sets; footnote omitted).

Considered in tandem, this Court's precedents make clear that the presumption of innocence requires proof beyond a reasonable doubt to establish every element of a charged crime. *Winship*, 397 U.S. at 364. However, once a valid conviction is obtained, sentencing judges may consult broad sources and types of information to craft a sentence, unrestrained by the same due-process guarantees that attend trial. *Williams*, 337 U.S. at 246-48. Due process requires proof

beyond a reasonable doubt to establish every element of an offense, but the same standard is not required for sentencing factors. *McMillan*, 477 U.S. at 84-86. When a fact represents a sentencing factor, the preponderance standard generally satisfies due process. *Id.* at 91-92.

Watts, 519 U.S. at 155-57, resolved that an acquittal does not prove a defendant's innocence as to conduct underlying the acquitted charge, and so due process does not preclude a sentencing judge from considering that conduct at sentencing for a separate offense, so long as the conduct is proved by a preponderance of the evidence. In *Apprendi*, 530 U.S. at 490, this Court pushed back on, but did not expressly overrule, *McMillan*'s statement that states have latitude to decide which facts are "elements" of an offense and which are "sentencing factors" that need only be proved by a preponderance of the evidence at sentencing. A state's characterization of the fact is not what matters; rather, when a fact—regardless of how the state labels it—"increases the penalty for a crime *beyond the prescribed statutory maximum*[,] [that fact] must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* (emphasis added).

Blakely, 542 U.S. at 303-05, affirmed *Apprendi*'s holding, adding to the conversation the reasons *McMillan* and *Williams* were distinguishable: *McMillan* involved a sentencing scheme that imposed a *statutory minimum* if a judge found a particular fact, and *Williams* involved an indeterminate-sentencing scheme that allowed, but did not compel, a sentencing judge to

rely on facts outside the record to fashion a sentence. Finally, *Alleyne*, 570 U.S. at 112, applied *Apprendi*'s rule with equal force to facts that increased a defendant's mandatory minimum because both kinds of facts "alter[] the prescribed range of sentences to which a defendant is exposed."

Admittedly, *Alleyne*'s holding would have dictated a different result in *McMillan*. But a majority of the Court in *Alleyne* did not overrule *McMillan*[19] and the Court did not address or discredit *McMillan*'s proposition, reaffirmed in *Watts*, that the preponderance standard at sentencing generally satisfies due process.[20] The *Alleyne* Court did, however, emphasize that the "penalty affixed to the crime" is the "legally prescribed" range supported by the jury's verdict, *id.* at 112, and that nothing in its opinion limited "the broad discretion of judges to select a sentence *within the range authorized by law*." *Id.* at 117 (emphasis added).

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[19] See *Alleyne*, 570 U.S. at 119-20 (SOTOMAYOR, J., concurring); 570 U.S. at 124 (BREYER, J., concurring in part and concurring in the judgment) (voting only to overrule *Harris v. United States*, 536 U.S. 545 (2002)).

[20] *McMillan* explained that state legislatures generally have latitude to define which facts constitute elements of an offense and which constitute sentencing factors, applying that proposition to a statute that allowed judicially-found facts to increase a mandatory minimum sentence. That *application* was inconsistent with the holding in *Alleyne*. But *Alleyne*'s holding does not mandate a similar rejection of the proposition from *McMillan* that due process is satisfied when true sentencing factors are proved by a preponderance of the evidence.

Applied here, the statutory range for respondent's offense of conviction, felon-in-possession, was "life or . . . a lesser term" of years given his status as a fourth-offense habitual felony offender. MICH. COMP. LAWS § 750.224f(5); MICH. COMP. LAWS § 769.12(1)(b).[21] Accordingly, the jury's guilty verdict for the felon-in-possession charge authorized the sentencing judge to impose a sentence of life or any term of years; this was the penalty affixed, by law, to the crime. Respondent's sentence of 240 to 400 months' imprisonment fell within the statutory range authorized by the jury's verdict. The sentencing judge did not offend due process because he considered conduct underlying an acquitted charge to fashion a sentence within that statutorily prescribed range. *See Alleyne*, 570 U.S. at 117 ("[E]stablishing what punishment is available by law and setting specific punishment within the bounds that the law has prescribed are two different things.") (quotation marks and citation omitted).

The sentencing judge also did not violate the presumption of innocence, which requires proof beyond a

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[21] Had the trial court chosen to impose a life sentence, it would not have been permitted to impose a term of years for the minimum sentence. MICH. COMP. LAWS § 769.9(2) ("The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence."). Generally, when a sentence involves a term of years, MICH. COMP. LAWS § 769.34(2)(b) provides that the minimum sentence may not exceed 2/3 of the statutory maximum. *See also People v. Tanner*, 199 N.W.2d 202 (Mich. 1972). However, the 2/3s rule does not apply when a defendant is convicted of an offense punishable by a prison sentence of life or any term of years. *People v. Harper*, 739 N.W.2d 523, 534 n. 31 (Mich. 2007).

reasonable doubt to establish *every element of the offense of conviction*, because the fact that respondent killed Pruitt was *not* an element of his convicted offense. This Court explained in *Alleyne* that a fact is an element of a crime only if it increases the statutorily prescribed range of penalties to which a defendant is exposed. *Id.* at 116. But here, the statutorily prescribed range of penalties affixed to respondent's felon-in-possession conviction—life or any term of years—remained the same regardless of whether the sentencing judge found that respondent killed Pruitt. The Michigan Sentencing Guidelines *recommended* that the sentencing judge impose a term-of-years sentence, with the minimum falling between 22 and 76 months' imprisonment, but this recommendation was not binding on the sentencing judge. *See Lockridge*, 870 N.W.2d at 520-21. This Court's precedents permitted the sentencing judge to consider conduct underlying respondent's acquitted charge of murder when fashioning a sentence, within the statutorily prescribed range, for his felon-in-possession conviction.[22] The Michigan Supreme Court erred by holding otherwise.[23]

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[22] This is not to say that sentencing based on acquitted conduct does not raise important public policy concerns. That a practice may offend public policy, however, does not make it unconstitutional. See *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008) (affirming the constitutionality of considering acquitted conduct at sentencing under this Court's precedents, while acknowledging the public policy concerns of such practice and the authority of Congress and the Sentencing Commission to intervene).

[23] Justice VIVIANO opined in his concurring opinion that respondent's sentence violated the Sixth Amendment because the

III. The Michigan Supreme Court Erroneously Rejected the Due-Process Holdings From *McMillan* and *Watts*.

This Court first held in *McMillan*, and later reaffirmed in *Watts*, that the preponderance standard at sentencing generally satisfies due process. The Michigan Supreme Court, however, concluded that *McMillan* did not apply because it involved uncharged rather than acquitted conduct, only the latter of which enjoys protection under the presumption of innocence. "[U]ncharged and therefore unconsidered-by-a-jury conduct is apples to acquitted conduct's oranges." App. 18. The majority reasoned that, although a judge may rely on *uncharged* conduct at sentencing, allowing the consideration of conduct underlying an acquitted

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sentence would be "unreasonable" if the judge could not consider Pruitt's death. App. 36. Federal circuit courts, however, have uniformly rejected the proposition that judicial fact-finding used to support a sentence imposed *within the statutory range* violates a defendant's constitutional rights. *See*, *e.g.*, *United States v. Benkahla*, 530 F.3d 300, 312 (4th Cir. 2008); *United States v. Hernandez*, 633 F.3d 370, 374 (5th Cir. 2011); *United States v. Ashqar*, 582 F.3d 819, 824 (7th Cir. 2009); *United States v. Treadwell*, 593 F.3d 990, 1017-18 (9th Cir. 2010); *United States v. Redcorn*, 528 F.3d 727, 745-46 (10th Cir. 2008). In 2014, Justice SCALIA, joined by Justice THOMAS and Justice GINSBURG, dissented from an order denying a petition for a writ of certiorari on this question, opining that "[i]t unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge." *Jones v. United States*, 135 S. Ct. 8, 8 (2014) (SCALIA, J., dissenting). A majority of the members of this Court, however, have not adopted this position.

charge permits a judge to "punish[ ] [the defendant] as if he had been convicted of all the charges." App. 17.

Apprendi and *Alleyne* support that a fact is an element of a crime entitled to the presumption of innocence only when that fact alters the statutorily prescribed sentencing range affixed to the sentencing offense. Yet, the statutorily prescribed sentencing range applicable to respondent's felon-in-possession conviction—life or any term of years—remained the same regardless of whether the judge found at sentencing that respondent killed Pruitt. It therefore cannot be said that, by imposing a sentence within the prescribed range for the offense of conviction, the sentencing judge *was also* punishing respondent for the acquitted offense. The Michigan Supreme Court's rationale misconstrues the concept of "punishment" established by this Court's precedents.

"[A]n acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984). Likewise, "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling v. United States*, 493 U.S. 342, 349 (1990) (addressing a due-process claim). In *Watts*, 519 U.S. at 157, this Court 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."

The Michigan Supreme Court rejected *Dowling*, reasoning that the case involved acquitted conduct presented at trial in a subsequent prosecution for a separate crime rather than at sentencing. App. 20-21. The majority thus implicitly ruled that acquitted conduct presented at trial is entitled to *less* due-process protection than the same conduct presented at sentencing. In *Williams*, 337 U.S. at 246, however, this Court emphasized that tribunals passing on the *guilt* of a defendant have always operated under stricter procedural limitations than those deciding the "kind and extent of punishment to be imposed within limits fixed by law." *Williams* further explained that the "due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *Id*. at 251. The Michigan Supreme Court's conclusion that due process is more robust at sentencing than trial is remarkable.

The Michigan Supreme Court also rejected *Watts*, claiming that in *Booker*, 543 U.S. at 240 n. 4, this Court "explicitly limited [*Watts*] to the double-jeopardy context." App. 21. The majority assigned undue weight to the footnote in *Booker*. In *Booker*, this Court reasoned that *Watts* did not apply to the *Sixth Amendment jury-trial issues* raised before it because *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause[.]" 543 U.S. at 240 n. 4. The *Booker* Court explained it was therefore "unsurprising that we failed to consider fully the *issues presented to us* ***in these cases***." *Id*. (emphasis added). *Booker* did not overrule *Watts*, and this

Court did not say in *Booker* that *Watts* would not apply to a claim under the Due Process Clause.

More importantly, while *Booker* correctly explained that a Sixth Amendment issue "simply was not presented" in *Watts*, *id.* at 240, the same cannot be said of due process. *Watts* did, indeed, reject the defendants' claim that the Double Jeopardy Clause precluded the use of acquitted conduct at sentencing. But the *Watts* Court *also* addressed the proper scope of the preclusive effect of an acquittal, reaffirming its earlier holdings that "application of the preponderance standard at sentencing generally satisfies due process." *Watts*, 519 U.S. at 156. Post-*Booker*, federal circuit courts have regularly cited *Watts* to hold that due process does not prevent a sentencing court from considering conduct underlying an acquitted charge at sentencing. *See*, *e.g.*, *Swartz*, 758 F. App'x at 111-12; *White*, 551 F.3d at 383-84 (explaining that *Watts* involved more than only a double-jeopardy claim); *Dorcely*, 454 F.3d at 371 (explaining that *Watts* involved not only a double-jeopardy claim but provided analysis that also "plainly encompasses the due process clause").

Lastly, the Michigan Supreme Court rejected *McMillan* because it concluded the opinion was called into question by *Alleyne*, and the "interwoven nature of the United States Supreme Court's analysis of the Sixth Amendment and due-process rights ma[de] it impossible to conclude that its analysis of the former has been repudiated but its analysis of the latter

remains entirely viable." App. 19-20.[24] *Alleyne* seemingly redefined how we determine which facts are elements of a crime, requiring submission to a jury and proof beyond a reasonable doubt, and which are sentencing factors, but it did not undermine *McMillan*'s holding that sentencing factors (that are truly sentencing factors) may be proved by a preponderance of the evidence at sentencing.[25] The Michigan Supreme Court erroneously rejected the binding authority of this Court from *McMillan* and *Watts*.

[24] The Michigan Supreme Court's rejection of *McMillan* due to its "interwoven" analysis of the Sixth Amendment and due-process issues is curious, given that the court claimed *it* could parse the issues so as to resolve the case on due-process grounds without wading into any Sixth Amendment issues.

[25] Justice GORSUCH recently opined that *Alleyne* "expressly overruled" *McMillan* and *Harris v. United States*, 536 U.S. 545 (2002), after "[f]inding no basis in the original understanding of the Fifth and Sixth Amendments" for those opinions. *United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (GORSUCH, J., plurality opinion). *Haymond*, however, was a plurality opinion and involved the constitutionality of a congressional statute that *compelled* a federal judge to impose a minimum five-year sentence without empaneling a jury or requiring proof beyond a reasonable doubt. *Id.* at 2373. The mandatory nature of the sentencing statute at issue in *Haymond* makes that case readily distinguishable from the case here.

CONCLUSION

This Court should grant the petition for a writ of certiorari. Alternatively, the Court could consolidate this case with *Asaro v. United States* (No. 19-107) and grant both petitions or grant the petition in *Asaro* and hold this case in abeyance.

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