No. 19-564

IN THE
SUPREME COURT OF THE UNITED STATES

State of Michigan,

Petitioner,

v.

Eric Lamontee Beck,

Respondent.

On Petition for a Writ of Certiorari
to the Michigan Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court's reliance on acquitted conduct to increase respondent's criminal sentence violated the U.S. Constitution.

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BRIEF IN OPPOSITION

Respondent Eric Lamontee Beck respectfully requests that this Court deny the petition for a writ of certiorari. The Court has denied review of the question presented numerous times in recent years. There is no reason for a different outcome here.

STATEMENT OF THE CASE

1. On June 11, 2013, Hoshea Pruitt was shot to death. Two people witnessed events related to the incident. Pet. App. 5, 81. The first, Jamira Calais, later testified that she saw "a man in a white shirt get shot three or four times." Tr. 182 (Jan. 29, 2014); *see also* Pet. App. 81. She also reported seeing at least four or five people in the vicinity, Tr. 190-91 (Jan. 29, 2014), including noticing "a man in a black shirt run across the street" after the shooting. Pet. App. 81. But she could not identify the shooter. *Id.* The second witness, Mary Loyd-Deal, was in her home when she heard a verbal altercation and then shots fired. *Id.* 81, 91 n.2. She called 911 to report the incident but did not identify the perpetrator on the call. *Id.* 92-93 n.3. Nor did she identify any shooter to the responding officer who interviewed her; to the contrary, she told him that she looked out her window only *after* the shooting had occurred. Tr. 200-01 (Jan. 29, 2014).

2. The State eventually came to believe that respondent was the perpetrator. It charged him with six crimes: felon in possession of a firearm; carrying a dangerous weapon with unlawful intent; murder; and three attendant counts of possession of a firearm during the commission of a felony (often called "felony firearm" under state law). Pet. 4; Pet. App. 80.

During the preliminary hearing, Ms. Loyd-Deal claimed that she could now identify the shooter, and that it was respondent. Pet. App. 81, 92-93 n.3. At the same time, "her story wavered as far as whether she saw the shooting or whether she was in her kitchen"—talking on the phone—"at the time of the shooting." *Id.* 5, 91 n.2; Tr. 200-01 (Jan. 29, 2014). Ms. Loyd-Deal was very sick (indeed, "barely alive") when she provided this testimony, and she died shortly thereafter. Pet. App. 5. So there was never any opportunity after the preliminary hearing for clarification or cross-examination on this critical point.

This left the State at trial to introduce simply Ms. Loyd-Deal's preliminary hearing testimony. Pet. App. 81, 92-96. It also introduced testimony from a new witness, Aaron Fuse. *Id.* 81. At the time of his testimony, Mr. Fuse had unrelated criminal charges pending against him. Tr. 21-23, 32-24 (Jan. 30, 2014). He did not observe the shooting, and the State presented no telephone records demonstrating that Mr. Fuse ever spoke on the phone with respondent in the days following the incident. *See id.* 34-35. But Mr. Fuse claimed that respondent had indeed called him several days afterwards and said he "had done 'something stupid' and shot someone while arguing about a woman." Pet. App. 81. As a result of this testimony, Mr. Fuse received a favorable plea deal. Tr. 22-23, 32-34 (Jan. 30, 2014).

The jury convicted respondent of felon in possession and the felony-firearm charge tied to that offense (that is, possessing a firearm during the course of being a felon in possession). Pet. App. 3; *see also* Tr. 12-15 (Jan. 21, 2014). It acquitted him of all remaining charges, including murder. Pet. App. 3. The trial judge later opined that "the inconsistency" in Ms. Loyd-Deal's testimony must have affected the jury's

verdict. *Id.* 5. The jurors apparently believed she saw respondent at some point with a gun. *Id.* 91 n.2. But they had "reasonable doubts" about the more serious allegations, "given that she also testified that she was in the kitchen on the phone when she initially heard shots fired." *Id.* 5, 91 n.2; *see also* Tr. 97 (Jan. 30, 2014).

Respondent's felony-firearm conviction carried a mandatory five-year sentence of imprisonment, and the trial judge imposed that sentence. Pet. App. 3-4.

Respondent's felon-in-possession conviction carried a maximum term of life in prison. Pet. 5. Leaving aside any consideration of the alleged conduct for which the jury acquitted him, the applicable sentencing range for this charge under the Michigan Sentencing Guidelines would have been 7 to 46 months in prison. Appellant's Supp. Br. on Appeal 17-18 (Mich. June 13, 2018).

The trial court, however, sentenced respondent on this count to 240-400 months. Pet. App. 3-4. As justification for that heightened sentence, the trial judge relied in two ways on acquitted conduct—specifically, on the State's allegation "that the defendant committed the murder," *id.* 4. First, the trial judge raised the guidelines range to 22-76 months based on his finding that respondent "discharged [a firearm] at or toward a human being or a victim" and that he killed someone with that firearm. *Id.* 3; Sentencing Tr. 6-8 (May 1, 2014); Appellant's Supp. Br. 17-18. Second, the judge departed upwards even from that range based on his finding "that [respondent] did shoot the victim." Pet. App. 6.

In explaining this sentence, the trial judge acknowledged that the jury "could not find, beyond a reasonable doubt, that the defendant committed the homicide." Pet. App. 5 (emphasis removed). But he believed "that there is a preponderance of the

evidence that [respondent] did" commit murder. *Id.* (emphasis removed). "[I]n the Court's opinion," respondent "was the person who perpetrated the killing. And I do find by a preponderance of the evidence that that has been shown. And I do consider that in going over the guidelines in this matter." *Id.* 5-6 (emphasis removed).

3. Respondent "appealed and challenged his convictions and sentences on multiple grounds, including that the trial court erred by increasing his sentence on the basis of conduct of which he had been acquitted." Pet. App. 6. The Michigan Court of Appeals affirmed respondent's convictions and rejected his acquitted-conduct argument. *Id.* 80, 83-84. The appellate court also remanded for a reason not pertinent here, *id.* 87-88.[1]

4. The Michigan Supreme Court granted review to consider whether increasing respondent's sentence based on acquitted conduct violated the Due Process Clause or the Sixth Amendment right to trial by jury. Pet. App. 8. After briefing and argument, the court vacated respondent's sentence on the ground that basing a criminal defendant's sentence based on acquitted conduct violates due

[1] At the time of respondent's sentencing, Michigan courts treated the Michigan guidelines as binding absent a "substantial and compelling reason" to depart from them. Pet. App. 84-85. Subsequently, the Michigan Supreme Court held, in light of *Alleyne v. United States*, 570 U.S. 99 (2013), that the guidelines should be treated as "advisory," subject only to the constraint that any sentence be substantively "reasonable." *People v. Lockridge*, 870 N.W.2d 502, 519-21 (Mich. 2015). Because, in respondent's case, "the trial court articulated substantial and compelling reasons for departing [from the guidelines], rather than focusing on the 'reasonableness' of the sentence imposed," Pet. App. 87, the Michigan Court of Appeals remanded for the trial court to determine whether it "would have imposed a materially different sentence" if it had not believed its "discretion [was] constrained by the guidelines." *Id.* 6 & n.3.

process. *Id.* 22-27. Specifically, the Michigan Supreme Court held that once a defendant is "acquitted of a given crime," it violates due process to sentence him "as if he committed that very same crime." *Id.* 2. Because the trial court "did exactly that in this case," the court vacated respondent's sentence and remanded for resentencing without reliance on any acquitted conduct. *Id.* 27; *see also id.* 26 & n.24.

Justice Viviano filed a concurring opinion. He agreed that due process prohibits increasing a sentence based on acquitted conduct. Pet. App. 28. Justice Viviano also asserted that "the consideration of acquitted conduct at sentencing raises serious concerns under the Sixth Amendment" because it robs a jury's acquittal of "nearly all practical effect," in contravention of "the historical role of the jury" in mitigating punishment. *Id.* 29, 45, 51. Furthermore, he concluded that the Sixth Amendment forbids a court from relying on its own fact-finding to impose a punishment that would not be permissible under state law based on the jury's verdict alone. *Id.* 29-37. He then determined that that rule was violated in this case because respondent's sentence "would not survive reasonableness review without the judge-found fact of homicide." *Id.* 28-29; *see also id.* 29-37.

Three Justices dissented. They contended that "[o]nce the prosecutor overcomes the presumption of innocence by obtaining a conviction" on some other charge, due process does not prevent a trial court from "considering conduct underlying an acquitted charge when sentencing the defendant for [the] convicted offense[]." Pet. App. 65. (Clement, J., dissenting). The dissenters also concluded that "the consideration of such conduct does not violate a defendant's Sixth Amendment rights." *Id.* 70 n.5.

REASONS FOR DENYING THE WRIT

I. The Court should decline to review the Michigan Supreme Court's decision.

The State asks this Court to grant certiorari to consider the Michigan Supreme Court's holding that increasing a defendant's sentence based on acquitted conduct violates due process. Further review, however, is unwarranted. This Court has repeatedly denied review of this issue in the past, and the addition of the Michigan Supreme Court's decision to the existing legal landscape provides no reason for different action here. Furthermore, the Michigan Supreme Court's decision is correct because the trial court's reliance on acquitted conduct violated the Due Process Clause and the Sixth Amendment right to trial by jury.

A. The Michigan Supreme Court's decision does not implicate a conflict warranting this Court's review.

1. As the Michigan Supreme Court noted, the North Carolina and New Hampshire Supreme Courts held decades ago that "reliance on acquitted conduct at sentencing violates due process, grounding that conclusion in the guarantees of fundamental fairness and the presumption of innocence." Pet. App. 22-23 (citing *State v. Marley*, 364 S.E.2d 133 (N.C. 1988); *State v. Cote*, 530 A.2d 775 (N.H. 1987)).[2]

The State observes that various other courts over the years have held to the contrary. Pet. 9-12. But there can be no doubt that, prior to the Michigan Supreme

[2] The State asserts that *Bishop v. State*, 486 S.E.2d 887, 897 (Ga. 1997), is of the same ilk. Pet. 12. But, tracing the reasoning in that decision back to its source, it is clear that the Georgia Supreme Court grounds its prohibition against the consideration of acquitted conduct on the state common-law doctrine of collateral estoppel, not on federal due process. *See Fugitt v. State*, 348 S.E.2d 451, 455 (Ga. 1986).

Court's holding in this case, the question whether increasing a defendant's sentence based on acquitted conduct violates due process did not warrant this Court's review. Over a decade ago, the Court denied a petition for certiorari urging this Court to resolve the disagreement between the North Carolina and New Hampshire Supreme Courts and other courts. *See* Pet. for Cert. 10-11, *Tavarez v. United States*, 555 U.S. 1049 (2008) (No. 08-575). And over the past dozen years, the Court has denied at least twenty other petitions from federal and state courts presenting the question whether the U.S. Constitution allows courts to increase sentences based on acquitted conduct.[3]

2. The Michigan Supreme Court's decision does not call for different action. It merely adds one more state to the two that have long recognized that due process prohibits reliance on acquitted conduct at sentencing. For two reasons, that incremental development does not call for this Court's intervention.

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[3] *See, e.g.*, *Gresham v. Tennessee*, 139 S. Ct. 2724 (2019) (No. 18-1359); *Villarreal v. United States*, 139 S. Ct. 592 (2018) (No. 18-5468); *Musgrove v. United States*, 139 S. Ct. 591 (2018) (No. 18-5121); *Thurman v. United States*, 139 S. Ct. 278 (2018) (No. 18-5528); *Muir v. United States*, 138 S. Ct. 2643 (2018) (No. 17-8893); *Medina v. United States*, 137 S. Ct. 837 (2017) (No. 16-766); *Soto-Mendoza v. United States*, 137 S. Ct. 568 (2016) (No. 16-5390); *Montoya-Gaxiola v. United States*, 137 S. Ct. 371 (2016) (No. 15-9323); *Davidson v. United States*, 137 S. Ct. 292 (2016) (No. 15-9225); *Krum v. United States*, 137 S. Ct. 41 (2016) (No. 15-8875); *Bell v. United States*, 137 S. Ct. 37 (2016) (No. 15-8606); *Siegelman v. United States*, 136 S. Ct. 798 (2016) (No. 15-353); *Roman-Oliver v. United States*, 135 S. Ct. 753 (2014) (No. 14-5431); *Jones v. United States*, 135 S. Ct. 8 (2014) (No. 13-10026); *Ciavarella v. United States*, 571 U.S. 1239 (2014) (No. 13-7103); *Kokenis v. United States*, 566 U.S. 1034 (2012) (No. 11-1042); *Lionetti v. United States*, 558 U.S. 824 (2009) (No. 08-1523); *Morris v. United States*, 553 U.S. 1065 (2008) (No. 07-1094); *Edwards v. United States*, 549 U.S. 1283 (2007) (No. 06-8430); *Clark v. Missouri*, 549 U.S. 1167 (2007) (No. 06-773).

a. The practical effect of the Michigan Supreme Court's federal due process holding is uncertain because the Michigan Constitution likely requires the same prohibition against considering acquitted conduct at sentencing.

States often provide greater protections to the accused than the federal Constitution requires. *See, e.g.*, Barry Latzer, *State Constitutions and Criminal Justice* 3-6, 158 (1991). And states have a wide variety of sentencing systems.[4] In addition, some prohibit consideration of acquitted conduct on state law grounds. *See, e.g.*, *Fugitt v. State*, 348 S.E.2d 451, 455 (Ga. 1986); *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979). The New Hampshire Supreme Court likewise has explained that to the extent this Court suggested in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), that courts may increase sentences based on acquitted conduct, its earlier decision in *Cote* should be understood as "provid[ing] greater protection" as a matter of state law. *State v. Gibbs*, 953 A.2d 439, 442 (N.H. 2008).

Here, the Michigan Supreme Court reserved the question whether its state constitution independently prohibits the consideration of acquitted conduct at sentencing. Pet. App. 8 n.6. But there are two alternative state-law grounds on which the Michigan Supreme Court could either reinstate its holding on any remand here or adopt the same rule in a future case.

To start, the Michigan Supreme Court could rely on the Michigan Constitution's guarantee of due process to prohibit increasing sentences based on

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[4] *See* Alison Lawrence, Nat'l Conference of State Legislatures, *Making Sense of Sentencing: State Systems and Policies* 4-9 (2015), http://www.ncsl.org/documents/cj/sentencing.pdf.

acquitted conduct. *See* Mich. Const. art. I, § 17. Although Michigan's due process clause and its federal counterpart "are often interpreted coextensively," the Michigan Supreme Court has explained that the state's due process clause "may, in particular circumstances, afford protections greater than or distinct from those offered" by the federal Due Process Clause. *AFT Mich. v. State*, 866 N.W.2d 782, 809 (Mich. 2015) (citations omitted). As a result, when considering state due process claims, Michigan courts follow federal due process case law from this Court only insofar as they find it "persuasive." *Bauserman v. Unemployment Ins. Agency*, 931 N.W.2d 539, 548 n.12 (Mich. 2019) (citations omitted); *see also, e.g.*, *Charter Twp. of Delta v. Dinolfo*, 351 N.W.2d 831, 843 n.7 (Mich. 1984) (providing an example where the Michigan Supreme Court construed its state due process clause more broadly than the federal counterpart, expressly refusing to be constrained by contrary precedent from this Court).

The Michigan Supreme Court's reasoning in this case indicates that it would be unlikely to find a holding from this Court allowing the consideration of acquitted conduct to be persuasive as to the meaning of the Michigan Constitution. The Michigan Supreme Court has already made clear it is aware that many other courts take a different view of due process, Pet. App. 22 n.20, 24, and three dissenting Justices below argued at length that considering acquitted conduct is not fundamentally unfair, *id.* 63-79 (Clement, J., dissenting). Yet the majority explained that it did not find those decisions or arguments to be "persuasive." *Id.* 22 n.20. Speaking in emphatic terms, the Michigan Supreme Court declared that consideration of acquitted conduct in Michigan courts "ends here." Pet. App. 26. It

stressed that "[l]ittle would seem to more 'undermine the fairness of the fact-finding process' than having the fact-finder render a not-guilty verdict yet allow the judge to impose a sentence based on his own conclusion that the defendant *did* commit the acquitted offense." *Id.* 23 n.23; *see also id.* 24 (agreeing with judges and commentators who believe that using acquitted conduct at sentencing is "inconsistent with fundamental fairness and common sense").

Alternatively, the Michigan Supreme Court could find that increasing a sentence based on acquitted conduct violates the state right to trial by jury. In contrast to the Sixth Amendment, which guarantees simply the right to "trial, by an impartial jury," U.S. Const. amend. VI, Michigan's original constitution stated that the right to jury trial shall "remain inviolate." Mich. Const. of 1835, art. I, § 9. And, "from its very origins as a territory in the American Union," Michigan courts have "vigorously protected the ancient right of a trial by jury." *Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773, 785 (Mich. 1994) (citations omitted). Indeed, even though the Michigan Constitution no longer contains the word "inviolate," Michigan courts have explained that that omission applies only to *civil* cases; the present-day state constitution retains the state's longstanding commitment in *criminal* cases to an "inviolate" right to trial by jury. *People v. McBurrows*, 934 N.W.2d 748, 752 (Mich. 2019); *People v. Antkoviak*, 619 N.W.2d 18, 31-32 (Mich. Ct. App. 2000) (citing *People v. Bigge*, 285 N.W. 5, 7-8 (Mich. 1939)); *see also* Mich. Const. art. I, § 14; Mich. Ct. R. 2.508(A) ("The right of trial by jury as declared by the constitution must be preserved to the parties inviolate.").

In light of this history and text, Michigan courts have found that the Michigan Constitution's jury trial right offers broader protections to criminal defendants than the federal right to a jury trial. *See, e.g.*, *Antkoviak*, 619 N.W.2d at 30-36, 45. The highest courts of other states guaranteeing an "inviolate" jury trial right likewise have found those state constitutional provisions to give "more extensive" protections than the federal Constitution provides. *City of Pasco v. Mace*, 653 P.2d 618, 623-26 (Wash. 1982); *see also, e.g.*, *Geng v. State*, 578 S.E.2d 115, 116-17 (Ga. 2003) (right extends to all misdemeanors); *State v. Bennion*, 730 P.2d 952, 961-65 (Idaho 1986) (right applies whenever the sanctions to which a defendant may be exposed include imprisonment).

A similar holding with respect to acquitted conduct would make sense. The word "inviolate" means "not broken, infringed, or impaired." *Inviolate*, *Black's Law Dictionary* (11th ed. 2019). And the jury historically used partial acquittals to "set the metes and bounds of judicially administered criminal punishments." Pet. App. 42-43 (Viviano, J., concurring). Indeed, the very purpose of an acquittal was to push back against "prosecutorial overreach" and thereby deny the court the ability to punish the defendant for those alleged acts. *Id.* 45 (Viviano, J., concurring). As the Michigan Supreme Court recognized, few things would seem more directly to infringe or impair the right to jury trial than punishing a defendant "as if he committed [the] very same crime" for which the jury issued an acquittal. *Id.* 2.

b. The second reason why review is unnecessary is that the practical difference between a jurisdiction that prohibits reliance on acquitted conduct at sentencing and those that do not is relatively minor. Even in jurisdictions that have

not prohibited consideration of acquitted conduct, judges retain the "power in individual cases to disclaim reliance on acquitted or uncharged conduct." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc), *cert. denied*, 137 S. Ct. 37 (2016); *see also United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc) ("To say that district court judges may enhance a defendant's sentence based on acquitted conduct, however, is not to say that they *must* do so."), *cert. denied*, 556 U.S. 1215 (2009).

And judges sometimes do exercise their discretion to decline to rely on acquitted conduct. *See, e.g.*, *United States v. Bertram*, No. 15-cr-14, 2018 WL 993880, at *4 (E.D. Ky. Feb. 21, 2018), *aff'd in part and rev'd in part on other grounds*, 900 F.3d 743 (6th Cir. 2018). Indeed, in one survey of hundreds of federal district judges, a full 84% said they did not think that acquitted conduct should be considered "relevant conduct" for purposes of sentencing. U.S. Sentencing Comm'n, *Results of Survey of United States District Judges, January 2010 through March 2010* tbl.5 (2010). This collective viewpoint indicates that the question presented is often irrelevant even in jurisdictions that view the Constitution the same way the State does.

At minimum, this Court should allow further percolation. If the question presented is truly a frequently recurring one and the Michigan Supreme Court's conception of due process ultimately spreads to several other jurisdictions, then this Court could choose to wade into the issue at that time.

B. The Michigan Supreme Court's decision is correct.

1. The trial court's reliance on acquitted conduct violated the Due Process Clause.

a. The Michigan Supreme Court correctly held that the Due Process Clause categorically forbids a judge from enhancing a sentence based on alleged conduct for which the defendant has been acquitted.

Whenever the state seeks to deprive an individual of life or liberty, the Due Process Clause imposes a "requirement of 'fundamental fairness.'" *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981) (citations omitted). Of particular relevance here, it is "axiomatic and elementary" in criminal prosecutions that "there is a presumption of innocence in favor of the accused," *Coffin v. United States*, 156 U.S. 432, 453 (1895), which requires courts to be "alert to factors that may undermine the fairness of the fact-finding process." *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *see also Nelson v. Colorado*, 137 S. Ct. 1249, 1255-56 (2017) (reaffirming this "foundation[al]" concept (citations omitted)). Accordingly, the Court has imposed a variety of restrictions to protect the presumption of innocence and the integrity of the adversarial system in general. *See, e.g.*, *Deck v. Missouri*, 544 U.S. 622, 630 (2005) (restricting when defendants may be shackled in front of the jury); *In re Winship*, 397 U.S. 358, 361-64 (1970) (requiring all charges to be proven beyond a reasonable doubt); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (prohibiting prosecutorial suppression of material exculpatory evidence); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prohibiting the prosecution from knowingly introducing false testimony).

In the context of criminal sentencing, due process likewise limits what factors a court may consider. For example, a trial court may not increase a sentence because a defendant chose to exercise the right to appeal. *North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969). Nor is it consistent with "due process of law" to consider as aggravating factors in the sentencing process the "the race, religion, or political affiliation of the defendant" or "the request for trial by a jury." *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (citations omitted).

As one Justice of this Court has already suggested, acquitted conduct is another such off-limits category. *See United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc) (reliance on acquitted conduct in sentencing "seems a dubious infringement of the right[] to due process"), *cert. denied*, 137 S. Ct. 37 (2016). The presumption of innocence "is supposed to do meaningful constitutional work as long as it applies." Pet. App. 16-17. And that presumption hardens upon an acquittal, changing from an abstract concept to a battle-tested deficiency of proof. An acquittal means that the jury deliberated and unanimously concluded that the prosecution failed to make its case. Under those circumstances, sentencing the defendant as if "the defendant *did* commit the acquitted offense" is unacceptable. *Id.* 23 n.23; *see also Nelson*, 137 S. Ct. at 1256 (a state "may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions").

None of the precedent the State cites dictates a contrary result. In *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the Court stated that the "application of the preponderance standard at sentencing *generally* satisfies due

process." *Id.* at 156 (emphasis added). But *Watts* did not address any due process question—much less the question whether reliance on acquitted conduct is an exception to the "general[]" rule it referenced in passing. Instead, *Watts* presented nothing more than "a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause." *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005). And there is nothing wrong with due process prohibiting a practice that another constitutional provision does not proscribe. *Compare, e.g.*, *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 260 (1989) (Eighth Amendment's Excessive Fines Clause does not regulate the size of punitive damages), *with BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (due process forbids grossly excessive damages), *and Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (due process requires judicial review of the size of punitive damages).

The State's next case, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), did involve the Due Process Clause. But it did *not* involve acquitted conduct. Instead, *McMillan* held that uncharged conduct established by a preponderance of the evidence could support raising a sentence's mandatory minimum. *Id.* at 86-91. *McMillan*, therefore, does not undermine the Michigan Supreme Court's recognition that the presumption of innocence hardens after an acquittal. At any rate, *McMillan* is no longer good law. This Court subsequently held in *Alleyne v. United States*, 570 U.S. 99 (2013), that facts increasing a defendant's mandatory minimum sentence may not be proven simply by a preponderance of the evidence. *See id.* at 111-12; *United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (plurality opinion) (noting abrogation).

Finally, the State is wrong that the Michigan Supreme Court's due process holding conflicts with *Dowling v. United States*, 493 U.S. 342 (1990), and *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). In those cases, this Court stated that an acquittal does not establish that "the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt." *89 Firearms*, 465 U.S. at 361; *see also Dowling*, 493 U.S. at 349. Neither case, however, dealt with criminal sentencing. *89 Firearms* involved civil forfeiture, 465 U.S. at 365-66, and *Dowling* concerned the introduction of acquitted conduct as "other acts" evidence under Fed. R. Evid. 404(b)(2) to prove a different criminal offense, 493 U.S. at 345-46. That due process allows courts to rely on acquitted conduct for those limited purposes hardly dictates that it is permissible to deprive a person of his liberty based on such rejected allegations.

b. Even if the Due Process Clause does not categorically prohibit increasing a sentence based on acquitted conduct, the trial court's reliance on acquitted conduct here still violated that constitutional provision. Wholly apart from whatever restrictions the Sixth Amendment may impose during sentencing, Justice Breyer has recognized that a judicial finding cannot be used to enhance a defendant's sentence when it would result in "unusual and serious procedural unfairness." *Apprendi v. New Jersey*, 530 U.S. 466, 563 (2000) (Breyer, J., dissenting). This "is the kind of problem that the Due Process Clause is well suited to cure." *Blakely v. Washington*, 542 U.S. 296, 344 (2004) (Breyer, J., dissenting).

As Justice Breyer explained, in certain cases it would be "egregious" to "punish[] an offender convicted of one crime as if he had committed another."

Apprendi, 530 U.S. at 562. For example, it would violate due process to charge "an offender with five counts of embezzlement" and "ask[] the judge to impose maximum and consecutive sentences because the embezzler murdered his employer," *id.*—or to ask "a judge to sentence an individual for murder though convicted only of making an illegal lane change." *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting). Similarly, it would be "egregious" to condone sentencing respondent here as if he committed a murder, given that he was convicted only of possessing a gun as a felon and the jury *rejected* the State's allegation that he committed murder.

2. The trial court's reliance on acquitted conduct violated the Sixth Amendment.

a. Increasing a defendant's sentence based on acquitted conduct also contravenes the Sixth Amendment right to trial by jury.[5]

The right to jury trial is "a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 306; *see also United States v. Haymond*, 139 S. Ct. at 2369, 2375 (2019) (plurality opinion) (right to jury trial is intended to "preserve the people's authority over its judicial functions"). The jury thus is more than "a low-level gatekeep[er]," tasked merely with determining whether the defendant violates some law and leaving the decision

[5] Although the Michigan Supreme Court rested its decision solely on due process grounds, respondent pressed his acquitted-conduct claim under the Sixth Amendment as well. Pet. App. 8. In addition, the concurring and dissenting opinions below both engaged with the Sixth Amendment. *See id.* 28-62, 70.

of what conduct actually deserves punishment to the court. *Jones v. United States*, 526 U.S. 227, 243-44 (1999). Instead, the jury must be able to forbid a judge from punishing a defendant for certain allegations. *See Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (right to jury trial is designed to dictate "the way in which law should be enforced and justice administered").

Historically, the jury fulfilled its role as a "circuitbreaker in the State's machinery of justice," *Blakely*, 542 U.S. at 306-07, through its unreviewable and "unassailable" power to acquit defendants of criminal charges. *Yeager v. United States*, 557 U.S. 110, 122-23 (2009). Each crime at common law carried a determinate sentence. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 892 (2010). And juries generally knew which punishment or punishments would follow from any given verdict. *See* Judge Nancy Gertner, *A Short History of American Sentencing*, 100 J. Crim. L. & Criminology 691, 692-94 (2010). Thus, English and early American juries could protect a defendant from a particular degree of punishment by acquitting on a more serious charge. *See id.* at 693; *see also* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 303-04 (1978).

Often, the jury exercised its acquittal power because it was not persuaded by the prosecution's case. Other times, it did so contrary to the evidence, with the express purpose of mitigating unduly harsh sentences—a practice praised by William Blackstone as "pious perjury." *See Apprendi v. New Jersey*, 530 U.S. 466, 479 n.5 (2000) (quoting 4 William Blackstone, *Commentaries on the Laws of England* *238-39 (1769)); *see also* Pet. App. 48 (referencing various Framers'

approval of this practice). Either way, "[t]he trial jury exercised an important role in what was functionally the choice of sanction, through its power to manipulate the verdict by convicting on a charge that carried a lesser penalty." John H. Langbein, *The Origins of Adversary Criminal Trial* 57-58 (Oxford Press ed. 2003).

The Sixth Amendment "preserv[es that] ancient guarantee" in the context of modern sentencing systems—namely, where courts exercise guided discretion to impose sentences within large sentencing ranges. *United States v. Booker*, 543 U.S. 220, 237 (2005); *see also Haymond*, 139 S. Ct. at 2377 (plurality opinion) (Sixth Amendment safeguards jury's "traditional restraint on the judicial power"). As in the past, the only way a modern jury can signal its disapproval of punishing a defendant based on certain allegations is to issue an acquittal. *See United States v. Mercado*, 474 F.3d 654, 663 (9th Cir. 2007) (B. Fletcher, J., dissenting). If judge faced with such an acquittal nevertheless bases the defendant's sentence on the allegations the jury has refused to endorse, the judge tramples the jury's core function. Regardless of whether the judge ultimately imposes a sentence within the permissible range for the crime or crimes of conviction, relying on acquitted conduct to impose a particular sentence improperly transgresses the jury's declaration that the defendant should not be punished based on such allegations.

b. Even if the Sixth Amendment did not categorically forbid reliance on acquitted conduct at sentencing, such reliance would still be unconstitutional where, as here, the resulting sentence would exceed the legal limits that would apply without consideration of the acquitted conduct.

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, the Sixth Amendment "does not permit a defendant to be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002) (quoting *Apprendi*, 530 U.S. at 483). In other words, the Sixth Amendment is violated where the judge "impose[s] a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." *Blakely*, 542 U.S. at 303 (citation omitted).

As several Justices have explained, this rule has an important application to the current federal sentencing system. *See Jones v. United States*, 135 S. Ct. 8, 8-9 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari). Under that system, a sentence can be sustained on appeal only if, in light of the particular facts of that case, it is substantively "reasonable[]." *Gall v. United States*, 552 U.S. 38, 51 (2007); *see also Booker*, 543 U.S. at 261-63; *Rita v. United States*, 551 U.S. 338, 372 (2007) (Scalia, J., concurring in part and concurring in the judgment). A federal sentence violates the Sixth Amendment, therefore, if it could not be deemed substantively reasonable without consideration of acquitted conduct. *See Jones*, 135 S. Ct. at 8 (Scalia, J., dissenting from denial of certiorari); *United States v. Bell*, 808 F.3d 926, 931-32 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc), *cert. denied*, 130 S. Ct. 37 (2016).

This same reasoning applies here. Michigan's sentencing system requires all sentences to be "reasonable[]." Pet. App. 7 n.4. And just as in the federal system, Michigan's reasonableness standard sometimes prohibits a judge, based on a jury

verdict alone, from imposing the maximum sentence authorized by a given Michigan criminal statute. *See, e.g.*, *People v. Willis*, No. 320659, 2018 WL 662233, at *2-3 (Mich. Ct. App. Feb. 1, 2018); *People v. Titus*, No. 336352, 2018 WL 914945, at *6 (Mich. Ct. App. Feb. 15, 2018); *People v. Dixon-Bey*, 909 N.W. 2d 458, 477 (Mich. Ct. App. 2017). Accordingly, a sentence that would be unreasonable under Michigan law but for the consideration of acquitted conduct violates the Sixth Amendment. *See* Pet. App. 29-37 (Viviano, J., concurring).[6]

As the concurring Justice below recognized, this rule renders respondent's sentence unconstitutional. Without considering any acquitted conduct, the guidelines range for respondent's felon-in-possession conviction was 7 to 46 months. *See supra* at 3-4. But the trial court sentenced respondent to 240-400 months of imprisonment, relying on his factual finding—rejected by the jury—that respondent "was the person who perpetrated the killing." Pet. App. 5-6 (emphasis removed). "Such a significant departure would clearly not be reasonable based only on the jury's verdict that [the] defendant was guilty of felon-in-possession and felony-firearm." *Id.* 36 (Viviano, J., concurring).

[6] Michigan's test for "reasonableness" differs slightly from the federal test. In Michigan, "the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality.'" *See People v. Steanhouse*, 902 N.W.2d 327, 329, 335-36 (Mich. 2017). In the federal system, reasonableness is determined by reference to the sentencing goals set forth in 18 U.S.C. § 3553(a). *See Rita*, 551 U.S. at 347-48. But this distinction is immaterial here. The relevant point is that in both systems, the reasonableness requirement sometimes superimposes a ceiling on the lawfulness of a criminal sentence independent of the statutory maximum crafted by the legislature.

Neither of the State's reasons for resisting this analysis has merit. First, the State protests that respondent's sentence falls within "the statutorily prescribed sentencing range applicable to respondent's felon-in-possession conviction—life or any term of years." Pet. 31; *see also id.* 29-30 n.23. But that assertion misapprehends respondent's *Apprendi* claim. As explained just above, his claim is that—given the state-law reasonableness requirement—his sentence exceeds the legal limit that controls based on the facts the jury found.

Second, the State notes that a majority of this Court's members "have not adopted [the] position" that the *Apprendi* rule applies to facts necessary to sustain the substantive reasonableness of a sentence. Pet. 29-30 n.23. But neither has a majority—indeed, any Justice—rejected that position. And as Justices Scalia, Thomas, and Ginsburg have explained, it "unavoidably follows" from this Court's *Apprendi* jurisprudence that the Sixth Amendment prohibits a sentence that would not be substantively reasonable but for the consideration of allegations the jury rejected. *Jones*, 135 S. Ct. at 8 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari).

II. This Court should also reject the State's alternative request to link this case to *Asaro v. United States*.

As an "[a]lternative[]" to granting certiorari in this case, the State asks this Court to "grant the petition in *Asaro* [*v. United States* (No. 19-107)] and hold this case in abeyance." Pet. 35. The Court should reject that request too. The case law in state and lower federal courts provides no more warrant for granting certiorari in

Asaro than it does here. Furthermore, several features of *Asaro* render it an unsuitable vehicle for addressing the question presented in this case.

1. Contrary to the State's assumption, the parties in *Asaro* appear to disagree over whether that case even raises the same question as this one—namely, whether the Constitution allows a judge to increase a defendant's sentence based on acquitted conduct. Mr. Asaro claims that his case presents that question. *Asaro* Pet. i. But he was never directly charged with, much less expressly acquitted of, the contested conduct that the judge considered while sentencing him (an alleged prior robbery and murder). *Asaro* BIO 3. Those alleged prior crimes merely constituted "two of the fourteen predicate acts forming the basis of a charge of racketeering conspiracy" for which he was previously acquitted. *Id.* And according to the Solicitor General, "the jury's prior general verdict of acquittal" in the racketeering case "does *not* necessarily reflect any specific finding as to those two charged racketeering predicates, as opposed to other elements of the offense." *Id.* 11 (emphasis added).

Mr. Asaro seems poised to contend in any merits briefing that the Government has "waived . . . any argument that [he] was not sentenced for acquitted conduct." *Asaro* Reply 6. But it is uncertain whether this Court would accept that contention. As a general rule, a respondent can defend a judgment below on any basis, *Jennings v. Stephens*, 135 S. Ct. 793, 798-99 (2015), and the Solicitor General seems to have made an effort to discharge his duty to flag "any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2. Indeed, the Solicitor General suggests the issue in *Asaro* is not whether the

Constitution prohibits increasing a sentence based on acquitted conduct, but rather whether any such prohibition extends "*further* to preclude" increasing a sentence based on "acts included as additional support for a racketeering charge in a prior case." *Asaro* BIO 13 (emphasis added). If that is indeed a proper characterization of the issue in *Asaro*, then answering that question would not necessarily resolve the antecedent question whether the Michigan Supreme Court's acquitted-conduct holding is correct.

2. The facts in *Asaro* differ from this case in another respect: The alleged acquitted conduct in that case derives from an entirely different prosecution. *Asaro* Pet. 3. In contrast, "*Beck* concluded that the sentencing court erred in relying on conduct underlying a murder charge directly before the jury *in the same case*." *Asaro* BIO 13 (emphasis added). Neither Mr. Asaro nor the Solicitor General explores whether that distinction might have any legal significance with respect to the arguments Mr. Asaro advances. But one might conclude that disregarding the jury's verdict in the very same proceeding—where jurors are most likely to "perceive the slight," Pet. App. 43 (Viviano, J., concurring)—is a greater affront to the jury trial right. As a result, the State is wrong to presume that a decision from this Court in favor of the Government in *Asaro* would require the Michigan Supreme Court's to revise its holding in this case.

3. Finally, the magnitude of the sentencing increase at issue in the two cases is not necessarily comparable. Mr. Asaro was given roughly 4.5 years of extra prison time based on the conduct at issue, for a total sentence "more than double the high end of the sentence that the Guidelines otherwise recommended." *Asaro* Pet. 23. In

contrast, Mr. Beck was given roughly 16.2 to 29.5 years of extra prison time, for a total sentence five to nine times longer than the maximum sentence that the state guidelines otherwise recommended. *See supra* at 3-4. Insofar as the constitutional inquiry regarding acquitted conduct turns on how "egregious" the increase is, *Asaro* Pet. 23; *see also supra* at 16-17, or how "significant" the deviation from a guidelines recommendation is, *Asaro* Pet. 27; *see also supra* at 19-22 a decision in Mr. Asaro's case would not necessarily govern the outcome in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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