No. 20-5320

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNATHAN LAMAR BURKS - PRO SE PETITIONER

vs.

STATE OF MICHIGAN - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Mr. Johnathan Lamar Burks
Pro Se Prisoner Petitioner
BELLAMY CREEK CORRECTIONAL FACILITY
1727 West Bluewater Highway
Ionia, Michigan
48846

QUESTION(S) PRESENTED

WHETHER THE GENERAL SIXTH AMENDMENT RULE ANNOUNCED BY THE COURT IN APPRENDI, AS EXTENDED BY ALLEYNE, OVERRULES THE COURT'S HOLDINGS IN BOTH MCMILLAN AND WATTS, WHICH STANDS FOR THE PROPOSITION THAT DUE PROCESS PERMITS A SENTENCING COURT TO CONSIDER CONDUCT OF WHICH A DEFENDANT HAD BEEN ACQUITTED AT TRIAL, USING A PREPONDERANCE OF THE EVIDENCE STANDARD, AND IF SO, WHETHER DUE PROCESS PRECLUDES A SENTENCING COURT FROM CONSIDERING ACQUITTED CONDUCT IN ARTICULATING A SUBSTANTIAL AND COMPELLING REASON IN SUPPORT OF AN UPWARD DEPARTURE FROM AN ESTABLISHED ADVISORY GUIDELINES MINIMUM SENTENCE RANGE?

LIST OF PARTIES

In accordance with **Sup.Ct.R. 14.1(b)**, a list of all parties involved in the court whose judgement is sought to be reviewed are:

Mr. Johnathan Lamar Burks, Prisoner No. 638048
Pro Se Prisoner Petitioner
BELLAMY CREEK CORRECTIONAL FACILITY
1727 West Bluewater Highway
Ionia, Michigan
48846

and-

Kym L. Worthy (P38875)
WAYNE COUNTY PROSECUTING ATTORNEY
Amy M. Somers (P65223)
Assistant Prosecuting Attorney - Appeals
1441 St. Antoine, Suite 1106
Detroit, Michigan
48226

Phone: (313) 224-8109

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Pro Se Prisoner Petitioner, **Johnanthan Lamar Burks** (hereinafter "**Petitioner**"), most respectfully, but humbly, requests that a writ of certiorari issue to review the judgement(s) set forth below, as they present a question of Constitutional law with respect to the Sixth and Fourteenth Amendments to the United States Constitution, that has not yet been answered by this Honorable Court:

OPINIONS

Post-Conviction Opinions/Judgements

In **People v. Johnathan Lamar Burks, Michigan Supreme Court** (hereinafter "MSC") **No. 161153, the May 26, 2020,** Order of the MSC, the highest state-court to review the merits and deny Petitioner's Application for Leave to Appeal (discretionary review) the **February 27, 2020,** judgement of the Michigan Court of Appeals (hereinafter "MCOA"), appears at **Appendix** A to the petition and is reported at **People v. Burks,** ___ Mich ___ (2020). **App. A.**

In **People v. Johnanthan Lamar Burks, MCOA No. 335955, the February 27, 2020,** Per Curiam Opinion on remand denying Petitioner's appeal as of right appears at **Appendix** B to the petition and is unpublished. **App. B.**

In **People v. Johnanthan Lamar Burks, MSC No. 157838,** the Order of the MSC, the highest state-court to review the merits and, in lieu of granting leave to appeal the **April 3, 3018** judgement of the MCOA, which was held in abeyance pending decisions in **People v. Beck (Docket No. 152934), 504 Mich 605 (2020),** and **People v. Dixon-Bey** (Docket **No. 156746), 504 Mich** ____(2020), those cases having been decided on **July 29, 2019,** the MSC vacated the part of the judgement of the MCOA addressing the sentence for home invasion, and remanded

the case to that court for reconsideration in light of Beck, and denied the application for leave to appeal in all other respects. The November 27, 2019, Order of the MSC, appears at Appendix C to the petition and is reported at People v. Burks, ___ Mich ___ (2019). App. C.

In People v. Johnathan Lamar Burks, MSC No. 157838, the October 30, 2018, Order of the MSC, the highest state-court to review the merits and hold Petitioner's Application for Leave to Appeal the April 3, 2018, judgement of the MCOA in abeyance pending decisions in People v. Dixon-Bey (Docket No. 156746) and People v. Beck (Docket No. 152934), appears at Appendix D to the petition and is reported at People v. Burks, ___ Mich ___ (2018). App. D.

In People v. Johnathan Lamar Burks, MCOA No. 335955, the April 3, 2018, Per Curiam Opinion denying Petitioner's appeal as of right, appears at Appendix E to the petition and is unpublished. App. E.

In People v. Johnathan Lamar Burks, Lower Court No. 16-002935-03-FC, the August 30, 2016, Judgement of Sentence and Commitment to Department of Corrections, appears at Appendix F to the petition. App. F.

STATEMENT OF JURISDICTION

Pursuant to Sup.Ct.R. 10(c), this petition involves a state court that has decided an important question of federal law that has not been, but should be settled by this Court. The date on which the highest state-court, that being the Michigan Supreme Court, decided this case was May 26, 2020. A copy of that order/decision appears at Appendix A.

Because this petition is timely, Sup.Ct.R. 13.1, this Honorable Court has jurisdiction to hear and decide this petition under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fourteenth Amendment** to the United States Constitution provides:

> **Sec. 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

The **Sixth Amendment** to 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 defense.

The **Fifth Amendment** to the United States Constitution provides:

> No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.Const.Amends.XIV.; VI.; and V., respectively.

STATEMENT OF THE CASE

In the instant case presently before this Honorable Court, Petitioner was charged in the 3rd Judicial Circuit Court for Wayne County, by Information -Felony with eight (8) felony counts, those being **Count 1** - First-Degree Premeditated Murder, contrary to **Michigan Compiled Laws** (hereinafter "MCL") 750.316(a); **Count 2** - Felony Murder, contrary to MCL 750.316(b); **Counts 3-4** -Assault with Intent to Murder, contrary to MCL 750.83; **Count 5** - First-Degree Home Invasion, contrary to MCL 750.110a(2); **Count 6** - Discharge of a Firearm In or At a Building Causing Death, contrary to MCL 750.234b(5); **Count 7** -Possession of a Firearm by a Felon, contrary to MCL 750.224f; and **Count 8** -Felony Firearm, contrary to MCL 750.227b.

The Petitioner's charges stem from an incident that took place on Easter morning, **March 27, 2016**. Petitioner's brother, Hoisea Jackson, had gotten into an argument with his girlfriend and was running from the police. **Trial Transcript** (hereinafter "TT"), **7/27/16, at p.141.** He sustained a minor injury while he was running. Mr. Jackson ran to Andrea Scott's residence in Detroit. **Id., at pp.141-142, 145.** Ms. Scott allowed Mr. Jackson to hide in her room. **Id., at pp.48-50.** Ms. Scott's 3 year-old daughter Aniaya, was also in the home. **Id., at pp.48-49.** Mr. Jackson took off his Nike tennis shoes and left them in the front room before going upstairs. **Id., at p.142, p.144.** Apparently, while Mr. Jackson was upstairs, his shoes were taken by Deangelo Davis, a.k.a., "Black". Mr. Jackson eventually came downstairs to find that his shoes were missing. **Id., at p.145.** Mr. Jackson called his mother and asked her to take him to the hospital so he could be treated for his injury. **Id., at pp.146-147.**

On the way to the hospital, Petitioner called some family members who were at his sister's house. Petitioner was there when Mr. Jackson called. **Id., at p.102.** Reginald Street, Mr. Jackson's friend was also there. **Id., at pp.149-150.**

Mr. Jackson told his family members that Black had shot him in the ankle and taken his shoes. **TT, 7/27/16, at p.148.** After hearing that his brother, Mr. Jackson, had been robbed, Petitioner called his cousin, Paul Kendall. **Id., at p.104.** After receiving Petitioner's call, Mr. Kendall, showed up at the house with a gun. **Id., at pp.105-106.** Petitioner, Mr. Kendall, and Mr. Street left Petititoner's sister's house and proceeded to drive over to the victim's house. Before they left, Mr. Kendall stated, "I'm not going over there for no games, and if you don't have a gun, you don't need to go." **Id., at pp.107-108.**

Mr. Kendall and Mr. Street were armed. When they got to the victim's house, Mr. Kendall, broke the door down, went in, and starting shooting. **Id., at pp.53-55, pp.62-63.** There were gunshots flying through the window of the house as well. **TT, 7/26/16, at p.158.** Petitioner jumped into the driver's seat so they could flee the scene after the shooting. As a result of the gunshots, 3 year-old, Aniaya, was killed. **TT, 7/27/16, at p.61.** Kejuan Kitchen and Mansour Ceesay, where inside the house, were also shot, but survived. **Id., at pp.60-61.**

Petitioner was charged as a Third Habitual Offender, **MCL 769.11**, based on the theory of aiding and abetting. According to the prosecution, Petitioner called upon Mr. Kendall to exact revenge for the taking of his brother's Nike Air Jordan tennis shoes, and then acted as the getaway driver after the shooting. Prior to trial, Mr. Kendall committed suicide in the county jail. **TT, 7/25/16. at pp.5-6; TT, 7/26/16, at p.3, pp.119-120.**

Following closing arguments, and on **August 3, 2016**, the jury acquitted Petitioner on **Counts 1** through 4, and **Count** 6, but guilty on **Count 5** - First-Degree Home Invasion, **MCL 750.110a(2)**, and on **Count** 8 - Felony Firearms, **MCL 750.227b.** See **App. F.**

At his subsequent **August 30, 2016**, sentencing hearing, following arguments with respect to scoring of the advisory guidelines, in which a guidelines minimum sentence range of **57** to **142 months** was set based on Petitioner's

First-Degree Home Invasion, MCL 750.110a(2), conviction. Sentencing Transcript (hereinafter "ST"), 8/30/16, at p.14, and before departing from the advisory guidelines minimum sentence range of 57 to 142 months, and passing sentence, the sentencing court made the following comments:

> "But nonetheless the maximum sentence that this Court can impose, which the People believe is a reasonable sentence under Lockridge is 26 to 40."
>
> "The People would ask the Court to impose that sentence **'based on the defendant's role in this homicide.'** As the Court indicated, **'he was the leader.'** He in fact called Paul Kendall, but for him calling Paul Kendall, probably none of this would have happened."
>
> "... He called [Paul Kendall] over to that situation which **'resulted in the death of not only Anaiya, which is scored'** but we also have two [assault with attempt to murder] victims inside that house." "The People would request 26 to 40 years."

ST, 8/30/16, at p.14 (underlining in original)||bold print, alteration, and single quotation marks added). After giving Petitioner the opportunity to allocute, the sentencing court went on to comment that:

> "In this particular case you mobilized an angry, volatile young person that you knew to be angry and volatile, and who had a penchant for using guns to come over and rally with you because of someone's missing tennis shoes."
>
> "A three-year old child has no future. There is a heartache for that family because it was your idea. You were the one who instigated the phone call and all of the action that led to a three-year old child being murdered on Easter Sunday."
>
> "And but for your active involvement, that three-year old child would be alive today. You bear enormous responsibility."

Id., at pp.18-19.

In sentencing Petitioner to a term of 18 to 40 years' imprisonment for the First-Degree Home Invasion, MCL 750.110a(2), and to a term of 2 to 2 years' imprisonment for the Felony Firearm, MCL 750.227b, convictions, the sentencing court stated that, "I do think that the guidelines do not adequately reflect the serious harm that was done in this particular matter. Id., at pp.19-20.

In sentencing Petitioner to a minimum term of 216 months' (18 years)

imprisonment, the sentencing court exceeded the top end of the established guidelines minimum range of 57 to 142 months based on Petitioner's conviction of First-Degree Home Invasion, MCL 750.110a(2), by approximately 6 years, 2 months, based on acquitted conduct in assessing Offense Variable (hereinafter OV) 3 at 100 points, MCL 777.33(2)(b), which is scored for death of a victim. ST, 8/30/16, at p.14.

On November 28, 2016, following a timely Claim of Appeal, Petitioner was appointed appellate counsel to represent him in the MCOA. On appeal, Petitioner argued, inter alia, that he was entitled to be resentenced because his sentence is not reasonable, and was based on acquitted conduct. On April 3, 2018, the MCOA affirmed Petitioner's convictions and sentences. App. E.

Petitioner next sought discretionary review of his convictions and sentences in an Application for Leave to Appeal to the MSC. In an Order dated October 30, 2018, that court held Petitioner's application for leave to appeal the April 3, 2018 judgement of the MCOA in abeyance, pending its [MSC] decisions in People v. Dixon-Bey and People v. Beck. App. D. On November 27, 2019, the MSC, having decided Beck and leave to appeal having been denied to Dixon-Bey, in lieu of granting Petitioner leave to appeal, the MSC vacated the judgement of the MCOA addressing the Petitioner's sentence for home invasion, and remanded the case to the MCOA for reconsideration in light of Beck. Leave to appeal was denied in all other respects. App. C.

On February 27, 2020, on remand, the MCOA once again affirmed Petitioner's sentence of 18 to 40 years' imprisonment for first-degree home invasion, MCL 750.110a(2). On remand, Petitioner argued that the trial court improperly considered the murder of the 3 year old victim in sentencing him above the advisory guidelines contrary to the MSC decision in Beck, because Petitioner was acquitted of that crime. App. B. In rejecting Petitioner's argument, the MCOA opined that, "[a]lthough trial court commented on the death that resulted from

the shooting, the trial court did not equate defendant's conduct with the murder and sentenced him accordingly for an acquitted murder[]..." "We conclude that sentencing court's rationale for imposing its sentence did not violate Beck and adhere to our prior rejection of defendant's contention that the sentence was improperly premised on acquitted conduct[.]" App. B., at p.3 (ellipses and alteration added).

Returning to the MSC in an application for leave to appeal the February 27, 2020 judgement of the MCOA, and in an Order dated May 26, 2020, the MSC denied Petitioner's application, citing that, "we are not persuaded that the question presented should be reviewed by this Court." App.A.

This matter is presently before this Honorable Court for consideration of Petitioner's Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

> Last year, in **People v. Beck**, 504 Mich 605 (2019), the Michigan Supreme Court has decided an important question of federal law that has not been, but should be settled by this Court.

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

> No State shall make or enforce any law which shall be 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.

U.S.Const.Amend.XIV. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and is incorporated to the States under the Fourteenth Amendment, **Ramos v. Louisiana**, 140 S.Ct. 1390, 1397 (2020)(citing **Duncan v. Louisiana**, 391 U.S. 145, 149 (1968)); **People v. Beck**, 504 Mich 605, 615 (2019)(citing **Duncan**, 391 U.S., at 149). The Sixth Amendment to the United State Constitution provides, in part:

> 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 previously ascertained by law, and to be informed of the nature and cause of the accusation.

U.S.Const.Amend.VI.

Apprendi and its Progeny

In **Apprendi**, the Court announced the general Sixth Amendment rule 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." **Apprendi v. New Jersey**, 530 U.S. 466 (2000)(bold print and alteration added). The **Apprendi** Court struck down as unconstitutional a statue that provided for a possible increase in the maximum term of imprisonment from 10 to 20 years if the trial court found by a preponderance of the evidence, that the defendant "acted with purpose to

intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." **Apprendi, 530 U.S., at 469** (citation omitted). The Court rejected the lower courts' conclusions that the statute was constitutional because the finding of intent to intimidate was a mere "sentencing factor" under **McMillan. Id., at 492** (citing **McMillan v. Pennsylvania, 477 U.S. 79 (1986)).**

In **Harris,** the Court was presented with the question "whether **McMillan** stands after **Apprendi.**" **Harris v. United States, 536 U.S. 545, 550 (2002).** There, a majority of the Court held that **Apprendi** did not bar judicially found facts altering "mandatory minimum" sentences. However, only a plurality of the **Harris** Court joined the portion of Justice Kennedy's opinion that distinguished **Apprendi** from **McMillan. Id., at 556-568.** The dissenting opinion took notice, observing that, "[t]his leaves only a minority of the Court embracing the distinction between **McMillan** and **Apprendi** that forms the basis of today's holding ...." **Id., at 583** (Thomas, J., dissenting).

Next came the Court's decision in **Blakely.** In that case, the Court addressed a challenge to the State of Washington's "determinate" sentencing scheme and opined that "indeterminate sentencing" does not infringe on the power of the jury. **Blakely v. Washington, 542 U.S. 296, 308 (2004).** Essentially, the **Blakely** Court held the Washington scheme unconstitutional to the extent that it permitted the trial court to impose a sentence greater than the "statutory maximum" sentence authorized by the jury verdict on the basis of the court's finding that the defendant has acted with "deliberate cruelty." **Id., at 303-304.** The **Blakely** Court again emphasized 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."** **Id., at 303** (bold print added).

In **Booker,** the Court addressed the application of **Apprendi** to a

"determinate" sentencing scheme similar to that of Washington's, in this case, the federal sentencing guidelines. Two different majorities of the Court held that the guidelines were unconstitutional under **Apprendi** and **Blakely**, **United States v. Booker**, 543 U.S. 220, 226 (2005), and that the proper remedy for the constitutional infirmity was to make the guidelines advisory rather than mandatory. **Id., at 245.** The wake of **Apprendi, Blakely,** and **Booker**, have been significant in both State and Federal courts.

In Michigan, first in a footnote in **People v. Claypool, 470 Mich 715, 730 n.14 (2004)**, and later in more depth in **People v. Drohan, 475 Mich 140, 146 (2006)**, the Michigan Supreme Court (hereinafter "MSC") concluded that the **Apprendi/Blakely** decisions did not apply to Michigan's sentencing scheme at all. In so holding, the MSC opined that "the trial court's power to impose a sentence is always derived from the jury's verdict" because the jury's verdict authorized the "statutory maximum" sentence set by statute. **Drohan, 475 Mich, at 161-162.**

Enter Alleyne

In **Alleyne**, Petitioner was charged with using or carrying a firearm in relation to a crime of violence, which carries a 5-year mandatory minimum sentence, that increases to a 7-year minimum "if the firearm is brandished," and to a 10-year minimum sentence "if the firearm is discharged." **Alleyne v. United States, 133 S.Ct. 2151, 2155 (2013)**(citation omitted). In convicting **Alleyne**, the jury form indicated that he had "[u]sed or carried a firearm during and in relation to a crime of violence," but not that the firearm was "[b]randished." **Id.** (alteration in original). When the presentence report recommended a 7-year sentence, **Alleyne** objected, arguing that the verdict form clearly indicated that the jury did not find brandishing beyond a reasonable doubt and that raising his mandatory minimum sentence based on a sentencing judge's finding of brandishing would violate his Sixth Amendment right to a jury trial. **Id., at 2156.** Overruling **Alleyne**'s objection, the District Court, relied on this Court's

holding in **Harris**, that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. **Alleyne**, 133 S.Ct., at 2156 (citation omitted).

In **Harris**, the Court considered the same statutory provision and the same question presented to the Court in **Alleyne**. In **Harris**, the Court declined to apply **Apprendi** to facts that increased the mandatory minimum sentence but not the maximum sentence. **Alleyne**, 133 S.Ct., at 2157. In the **Harris** Court's view, judicial factfinding that increased the mandatory minimum did not implicate the Sixth Amendment. Because the jury's verdict "authorized the judge to impose the minimum with or without the finding," the Court was of the view that the factual basis for increasing the minimum sentence was not "'essential'" to the defendant's punishment. **Id.** (citing **Harris**, 536 U.S., at 560-561 (plurality opinion)). From this, the Court drew a distinction between "facts increasing the defendant's minimum sentence and facts extending the sentence beyond the statutory maximum." **Id.**, at 2158.

The Court, in **Alleyne**, overruled **Harris**, and for the first time concluded that mandatory minimum sentences were equally subject to the **Apprendi** rule, holding that "a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." **Id.**, at 2160. Because there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum, **Harris** was inconsistent with **Aprendi**. **Id.**, at 2163.

In response to the Court's general Sixth Amendment rule announced in **Apprendi**, as extended by **Alleyne**, in **People v. Lockridge**, 498 Mich 358 (2015), the MSC held that the Court's holdings in **Apprendi** and **Alleyne**, applies to Michigan's sentencing guidelines and renders them constitutionallly deficient to the extent to which the guidelines **require** judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs)

that mandatorily increase the floor of the guidelines minimum sentence range, i.e. the "mandatory minimum" sentence under Alleyne. Lockridge, 498 Mich, at 364 (citations omitted)(emphasis in original). Following the Court's remedy in Booker, to cure the constitutional violation, the MSC severed MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory. Lockridge, 498 Mich, at 364 (citation omitted). In addition, the MSC struck down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure. Lockridge, 498 Mich, at 364-365.

Consistently with the remedy imposed by this Court in Booker, the MSC held that a guidelines minimum sentence range calculated in violation of Apprendi and Alleyne is advisory only and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness. Id., at 365 (citing Booker, 543 U.S., at 264). In Steanhouse, the MSC wrote that, "[t]he legislative sentencing guidelines are advisory, and the appropriate inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the principle of proportionality. People v. Steanhouse, 500 Mich 453, 459-460 (2017).

The Michigan Court of Appeals (hereinafter "MCOA"), in Dixon-Bey, explained as follows:

> To determine whether a departure sentence is more proportionate than a sentence within the guidelines range, the trial court should consider whether the guidelines accurately reflect the seriousness of the crime, factors not considered by the guidelines, and factors considered by the guidelines, but given inadequate weight. To facilitate appellate review, the trial court must justify the sentence imposed with an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.

People v. Dixon-Bey, 321 Mich App 490, 525 (2017). On appeal, the reasonableness of a sentence is reviewed for an abuse of discretion. Steanhouse, 500 Mich, at 471.

Use of "Acquitted Conduct" for Purposes of Sentencing

In Beck, the MSC held that, "[r]eliance on acquitted conduct at sentencing violated due process, as it was grounded in the guarantees of fundamental fairness and the presumption of innocence." People v. Beck, 504 Mich 605, 626 (2020)(citations omitted)[alteration added). As in Petitioner's case, the defendant, in Beck, was jury-convicted as a fourth-offense habitual offender of being a felon in possession of a firearm (felon-in-possession) and carrying a firearm during the commission of a felony (felony-firearm), second offense, but acquitted of open murder, carrying a firearm with unlawful intent, and two additional counts of felony-firearm attendant to those charges. Id., at 610.

Defendant's applicable guidelines range for a felon-in-possession conviction was 22 to 76 months, but the court imposed a sentence of 240 to 400 months (20 to 33 1/3 years), to run consecutively to the mandatory five-year term for second-offense- felony-firearm. Id. The trial court explained its reasons for the sentence imposed as, inter alia, its finding by a preponderance of the evidence that the defendant committed the murder of which the jury acquitted him. The trial court, in pertinent part, states:

> "With respect to that charge the Court does find that there are compelling reasons to go over the guidelines. The Court believes that ... to sentence within the guidelines would not be proportionate to the seriousness of the defendant's conduct or the seriousness of his criminal history. And for that reason the Court is going to go over the guidelines in setting a sentence that is, in fact, proportionate to those things."
>
> "This gentleman has a prior murder conviction on his record that he pled guilty to for which he served 13 years in prison...." "And then this charge, offense date was June 11, 2013 where, again, he is in possession of a firearm at murder scene."
>
> "They [the jury] 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."
>
> "And that this is the reason for the Court's finding that, in fact, this gentleman, in my opinion, did kill the victim for no other reason than jealousy...." "And, certainly, provided the weapon. But in the Court's opinion, he didn't just provide it, he actually 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."

Beck, 504 Mich, at 610-612 (alteration and ellipses added).

On appeal to the MCOA, **Beck** 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. **Id., at 612.** In response, in an unpublished opinion, the MCOA remanded the case to the trial court for further sentencing proceedings (a **Crosby** remand) under **People v. Steanhouse, 313 Mich App 1 (2015), aff'd in part and rev'd in part by People v. Steanhouse, 500 Mich 453 (2017). Beck, 504 Mich,** at 612; See **United States v. Crosby, 307 F.3d 103 (2nd Cir.2005); Lockridge, 498 Mich, at 305-308. Beck** next sought leave to appeal to the MSC, in which the defendant argued that the trial court's reliance on conduct of which he was acquitted to increase his sentence violates his constitutional rights under **U.S.Const.Amend.VI.** and **U.S.Const.Amend.XIV.**, as interpreted by the United States Supreme Court. **Beck, 504 Mich, at 613-614.**

In agreeing with **Beck's** argument that the trial court's reliance on conduct of which **Beck** was acquitted to increase his sentence violates his constitutional rights under both the Sixth and Fourteenth Amendments to the United States Constitution, **U.S.Const.Amend.VI.; U.S.Const.Amend.XIV.**, the MSC opined that, as a general matter, the Fourteenth Amendment incorporates the Sixth Amendment right to a jury trial in State prosecutions, **Beck, 504 Mich, at 615** (citing **Duncan, 391 U.S., at 149**), and the Fourteenth Amendment right to due process

includes "the presumption of innocence - that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" Beck, 504 Mich, at 615 (citing In re Winship, 397 U.S. 358, 363 (1970)(quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). A defendant is entitled to a presumption of innocence as to all charged conduct until proven guilty beyond a reasonable doubt, and that presumption is supposed to do meaningful constitutional work as long as it applies. Id., at 621.

In concluding that reliance on acquitted conduct at sentencing violates due process, as grounded in the guarantees of fundamental fairness and the presumption of innocence, id., at 626 (citations omitted), the MSC went on to write that:

> When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard. But when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that the defendant engaged in certain conduct, the defendant continues to be presumed innocent. To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself.

Id. (citing State v. Marley, 321 N.C. 415, 425 (1988)). "We can think of no reason that a jury's finding the defendant not guilty of a charge undoes that guarantee. In fact, the jury's view that the State did not meet its burden of proof should cut the other way." Id., at 621.

As previously noted above, when the MSC decided Beck, Petitioner's case was remanded to the MCOA with instructions to vacate Petitioner's sentence for home invasion and to reconsider Petitioner's sentence in light of Beck. App. C. On remand, the MCOA once again rejected Petitioner's argument that his sentence is unreasonable and in violation of his right to due process such that, the trial court's departure from the applicable advisory guidelines is based on conduct

of which he was acquitted. In affirming Petitioner's sentence for home invasion, the MCOA relied on the trial court's explanation for its sentence by stating:

> Well, [defendant], if you have a small child, then you of all people should have known that possible harm and what possible heartache could come from gunfire being utilized in a small residential place where there was a three-year-old child.
>
> In this particular case you mobilized an angry, volatile young person that you knew to be angry and volatile, and who had a penchant for using guns to come over and rally with you because of someone's missing tennis shoes.
>
> A three-year old child has no future. There is heartache for that family because it was your idea. You were the one who instigated the phone call and all of the action that led to a three-year old child being murdered on Easter Sunday.
>
> I know that your position has been that you did not do anything, that you were just there watching. Well, the jury didn't believe that, and I don't believe that, and I don't believe that. Nobody brings spectators to a murder. You were involved. You were there in the car with the shooter driving there, and you were there with the shooter driving away. And, but for your involvement, that three-year old child would be alive today. You bear enormous responsibility.

App. B., at p.3 (alteration in original).

In support of his proposition that, in departing from the established advisory guidelines minimum range of 57 to 142 months, the trial court relied upon acquitted conduct, Petitioner points to the part of the record that the MCOA elected not to which, in relevant part, provides:

> PROSECUTION: But nonetheless the maximum sentence that this Court can impose, which the People believe is a reasonable sentence under Lockridge is 26 to 40 [years].
>
> The People would ask the Court to impose that sentence based on the defendant's role in this homicide. As the Court indicated, he was the leader...."
>
> He called [Paul Kendall] over to that situation which resulted in the death of not only Anaiya, which is scored but we also have two AWIM victims inside that house....

ST, 8/30/16, at p.14 (underlining in original)(emphasis, ellipses, and alteration added).

With respect to the trial court's reliance on conduct of which Petitioner

was acquitted, Petitioner looks to Offense Variable (hereinafter "OV") 3, which is physical injury to victim, MCL 777.33, and provides, in pertinent part, the following:

> Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.

MCL 777.33(2)(b). Petitioner asserts that, in assessing OV-3 at 100 points under MCL 777.33(2)(b), the trial court clearly relied on conduct of which Petitioner was acquitted, specifically, first-degree premeditated murder and felony murder. See ST, 8/30/16, at pp.6-7. In addition, Petitioner was acquitted of two counts of assault with intent to murder. Here, the trial court's reliance on acquitted conduct in assessing OV-3 at 100 points under MCL 777.33(2)(b), contradicts the MCOA assertion that, "the trial court did not equate [Petitioner's] conduct with the murder." App. B., at p.3 (alteration added). As such, Petitioner's advisory guidelines minimum sentence range of 57 to 142 months was established on the basis of his conviction of home invasion, and Petitioner's present sentence of 18 to 40 years' imprisonment was established on the basis of his acquitted conduct, in this case, murder.

Petitioner submits that, although he was sentenced as a third-habitual offender under MCL 769.11, his two prior felony convictions were for nonviolent offenses, both of which are for uttering and publishing, ST, 8/30/16, at p.5, of which Petitioner pled guilty. Id., at pp.4-5. Petitioner is without a history of juvenile adjudications. Moreover, the trial court assessed OV-14 at 10 points, MCL 777.44, which is offender role, concluding that Petitioner was the leader in a multiple offender situation, despite the fact that it appeared that the jury was concerned that Petitioner's involvement was based on duress or coercion, as evident in the fact that the jury specifically asked the trial court about the defense of duress. Finally, in this case all the witnesses who had prior knowledge of Petitioner testified that Petitioner was not a hitman or an

enforcer, and he did not carry a gun. In this case, because the trial court departed from the applicable advisory guidelines minimum sentence range of 57 to 142 months, it was required to apply the "principle-of-proportionality," "'which requires the sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" **People v. Milbourn**, 435 Mich 630, 636 (1990). As demonstrated above, the trial court considered only the seriousness of the circumstances surrounding the offenses of first-degree premeditated murder and felony murder, both of which Petitioner was acquitted by a jury.

Based on the above, Petitioner insists that his departure sentence of 18 to 40 years' imprisonment is premised upon his acquitted conduct of first-degree premeditated murder and felony murder. As such, Petitioner's departure sentence is <u>not</u> more proportionate than a sentence within the calculated advisory guidelines minimum sentence of 57 to 142 months' imprisonment for his conviction of first-degree home invasion. See **Dixon-Bey**, 321 Mich App, at 525. Petitioner contends that, under the MSC recent decision in **Beck**, because his sentence of 18 to 40 years' imprisonment is based on conduct of which he was acquitted, his sentence is fundamentally inconsistent with the due process requirement of the presumption of innocence.

While the State of Michigan has decided an important question of federal law with respect to the Sixth and Fourteenth Amendments to the United States Constitution and the use of acquitted conduct for sentencing purposes, in **Beck**, this Honorable Court has not yet answered the important question of federal law, but should, in order to be settled by the Court. See S.Ct.R. 10(c).

The Court Has Not Yet Definitively Answered the Question of whether, in Light of the Court's Holdings in Apprendi and Alleyne, a Sentencing Court's Reliance on Acquitted Conduct for Sentencing Purposes Violates the Sixth and Fourteenth Amendments to the United States Constitution

For support that due process precludes the use of acquitted conduct in

increasing a defendant's sentence, Petitioner looks first to the general Sixth Amendment rule announced by the Court in **Apprendi**. There, the Court held 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." **Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)**(alteration added)(bold-print for emphasis added). The **Apprendi** Court went on to provide that:

> "[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 the jury, and proven beyond a reasonable doubt."

Id., at 476 (citing **Jones v. United States, 526 U.S. 227, 243 n.6 (1999)**)(alteration added).

Thirteen-years after the **Apprendi** general rule, and in **Alleyne**, the Court extended its **Apprendi** rule in holding that "a fact increasing **either end of the range** produces a new penalty and constitutes an ingredient of the offense." **Alleyne v. United States, 133 S.Ct. 2151, 2160 (2013)**. In **Harris**, the Court drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. **Id., at 2155** (citing **Harris v. United States, 536 U.S. 545 (2002)**). In so holding, the **Harris** Court concluded that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. **Harris, 536 U.S., at 545**. In overruling **Harris**, as being inconsistent with the Court's decision in **Apprendi, Alleyne, 133 S.Ct., at 2155**, the Alleyne Court opined that "[m]andatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury." **Id.**

The substance and scope of this right, said the Court, depends upon the proper designation of the facts that are elemsnts of the crime. **Id., at 2156**.

The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" of "ingredient" of the charged offense. **Alleyne**, 133 S.Ct., at 2158 (citation omitted). In **Apprendi**, the Court held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. Id. (citing **Apprendi**, 560 U.S., at 483 n.10). **Apprendi**'s definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Id.

The McMillan and Watts Decisions

Petitioner avers that the Court's decisions in **McMillan** and **Watts** are inconsistent with the Court's findings in **Apprendi** and **Alleyne**, and should be, as demonstrated below, overruled by the Court.

It was in the Court's decision in **McMillan** when the term "sentencing factor" was first used to refer to facts that are not found by a jury but that can still increase a defendant's punishment. **Alleyne, 133 S.Ct., at 2156** (citing **McMillan v. Pennsylvania**, 477 U.S. 79, 86 (1986)). In **McMillan**, the defendants were convicted of felonies which, under Pennsylvania law, carried mandatory minimum sentences of 5 years' imprisonment if the sentencing judge found by a preponderance of the evidence that the accused visibly possessed a firearm during commission of the offense. **McMillan, 477 U.S., at 81.** The trial court in each of four consolidated cases held that the statute in question violated the Sixth Amendment and the Due Process clause of the Fourteenth Amendment. **Id., at 83.**

This Court granted certiorari and affirmed the judgement of the Pennsylvania Supreme Court, and in doing so, held that:

> "[V]isible possession of a firearm could be treated as a sentencing consideration and not as an element of any offense[,]" "... that a State need not prove beyond a reasonable doubt every fact which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of

> culpability or the severity of the punishment. Because § 9712 came into existence only after defendants were convicted of an enumerated felony, visible possession was not an element of the offense and due process was satisfied by a preponderance of the evidence standard of proof."

McMillan, 477 U.S., at 83 (citations omitted)(alteration and ellipses added).

McMillan and Acquitted Conduct

Despite the fact that McMillan did not involve a trial court's reliance on acquitted conduct, federal courts that have addressed constitutional challenges to the use of acquitted conduct at sentencing have relied almost entirely on McMillan and Watts to reject both due process and Sixth Amendment challenges. People v. Beck, 504 Mich 605, 618 (2019)(citing United States v. Horne, 474 F.3d1004, 1006 (7th Cir.2007)(citing McMillan and Watts but not identifying the constitutional right at issue); United States v. Dorcely, 454 F.3d 366, 372 (D.C. Cir.2005)(rejecting both due process and Sixth Amendment arguments, citing McMillan and Watts); United States v. Faust, 456 F.3d 1342, 1347 (11th Cir.2006)(finding no Sixth Amendment violation discussing Watts)).

As the MSC acknowledges in Beck, with respect to McMillan's holding:

> There are at least three problems with relying on McMillan as dispositive of claims that the use of acquitted conduct does not violate due process. First, McMillan did not involve the use of acquitted conduct. Second, its constitutional analysis rests on very shaky footing in light of intervening caselaw. Third, even if it is only McMillan's Sixth Amendment analysis that has been abrogated, the intertwining nature of the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process makes it all but impossible not to view its due-process analysis as significantly compromised.

504 Mich, at 624. Petitioner asserts that because McMillan did not involve a trial court's reliance on acquitted conduct, the Court has never addressed tha unique question. The McMillan Court's general holding that it does not violate due process or the Sixth Amendment for the trial court to find facts by a preponderance of the evidence when imposing sentence is clearly inconsistent with the Court's holdings in Apprendi and Alleyne.

Though the McMillan Court declined to "constitutionaliz[e] burdens of proof at sentencing," McMillan, 477 U.S., at 92, that disinclination was expressed in an answer to uncharged conduct and not acquitted conduct. Acquitted conduct is already constitutionalized. Due process encompasses the requirement that the State prove the charges beyond a reasonable doubt, to be sure. But that is not all it guarantees. Beck, 504 Mich, at 620. A defendant is entitled to the presumption of innocence as to all charged conduct until proven guilty beyond a reasonable doubt. This distinction between acquitted conduct and uncharged bad acts presented at sentencing is critical and constitutional. Acquitted conduct shows up at sentencing in the company of the due process protection of the presumption of innocence; uncharged conduct, said the McMillan Court, does not. McMillan, 477 U.S., at 621.

Watts and Acquitted Conduct

Petitioner submits that, because Watts stands for the proposition 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, United States v. Watts, 519 U.S. 148, 157 (1997), its holding is inconsistent with the Court's Sixth Amendment jurisprudence in Apprendi and Alleyne, such that, both decisions stand for the proposition that, "other 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." Apprendi, 530 U.S., at 490; see also Alleyne, 133 S.Ct., at 2160 (holding that, mandatory minimum sentences are equally subject to the Apprendi rule, and stating that "a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense").

While the Court, in Watts, directly addressed a sentencing court's use of acquitted conduct at sentencing, it was in the context of double jeopardy

challenge. Beck, 504 Mich, at 624. In fact, in Booker, five Justices gave Watts side-eye treatment and explicitly limited its holding to the double jeopardy context. Id. (citing Booker, 543 U.S., at 240 n.4).

Petitioner contends that, as demonstrated above, the Court's holdings in McMillan and Watts, are clearly inconsistent with the general Sixth Amendment rule the Court announced in Apprendi, as extended in Alleyne. Petitioner further contends that, as demonstrated above, the use of acquitted conduct, whether for purposes of increasing a defendant's sentence or as compelling and substantial reasons to support a departure sentence from a calculated advisory guidelines minimum sentence, violates the due process guarantee of the presumption of innocence.

In conclusion, Petitioner states that the May 26, 2020, decision of the MSC denying his application for leave to appeal the February 27, 2020 judgement of the MCOA affirming Petitioner's sentence of 18 to 40 years' imprisonment that is based on conduct of which Petitioner was acquitted, is, under its decision in Beck, contrary to the Sixth and Fourteenth Amendments to the United States Constitution, specifically, the due process guarantee of the presumption of innocence until proven guilty by a jury beyond a reasonable doubt. Permitting a trial court's reliance on conduct of which a defendant was acquitted for purposes of sentencing, irregardless of whether the sentence is based on a calculated advisory guidelines minimum sentence range or a departure sentence on the basis of a compelling and substantial reason, prosecutors across the Nation would have an incentive to charge defendants with multiple offenses knowing that, even if a defendant is convicted on some offenses and acquitted on others, the conduct of which the defendant was acquitted can still be considered by the trial court in increasing a defendant's sentence.

CONCLUSION AND RELIEF REQUESTED

WHEREAS, for the reasons set forth above, Petitioner respectfully requests that the Court:

1. Grant Petitioner's Petition for a Writ of Certiorari;

2. Settle the Constitutional question as to whether the use of acquitted conduct by a sentencing court in calculating advisory guidelines minimum sentence ranges or for purposes of finding a substantial and compelling reason for a departure from the calculated advisory guidelines minimum sentence range, violates the **notice** requirement of the Sixth Amendment and the **presumption of innocence** requirement of the Fourteenth Amendment under the general Sixth Amendment rule announced by the Court in **Apprendi**, as extended in **Alleyne**;

3. Overrule the Court's holdings in **McMillan** and **Watts** as being unreconcilable and inconsistent with the Court's general Sixth Amendment rule of **Apprendi**, as extended in **Alleyne**;

4. Find that, the sentencing court, in departing from the calculated advisory guidelines minimum sentence range, relied on acquitted conduct as a substantial and compelling reason to do so. As such, reverse the decisions of both the MSC and MCOA; and

5. Grant Petitioner any further relief that the Court deems just and fair.

Most respectfully submitted,

Johnathan Burks

1-30-20

JOHNATHAN LAMAR BURKS #638048
Pro Se Prisoner Petitioner
Bellamy Creek Correctional Facility
1727 West Bluewater Highway
Ionia, Michigan 48846

Dated: