No. _____

In the

SUPREME COURT OF THE UNITED STATES

DEMETRIUS TROY BRADLEY,

Petitioner

v.

STATE OF MICHIGAN,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Do the jury-trial and due process guarantees of the Sixth and Fourteenth Amendments prohibit judges from considering, at sentencing in a criminal case, conduct that a jury has unanimously found the defendant to be "not guilty" of as an aggravating factor to increase the sentence within the statutory limits authorized by the jury's verdict?

2. Assuming that the Sixth and Fourteenth Amendments prohibit judges from considering acquitted conduct at sentencing, is that a new substantive rule of constitutional law that is retroactive on collateral review?

PARTIES

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OPINIONS BELOW

The opinion of the highest state court to review the merits, the Michigan Court of Appeals, appears at Appendix A to the petition and is unpublished.

The opinion of the state court whose decision was being reviewed by the Michigan Court of Appeals appears at Appendix B to the petition and is unpublished.

The decision of the Michigan Supreme Court denying discretionary review appears at Appendix C to the petition and is not yet reported.

JURISDICTION

On July 28, 2022, the Michigan Supreme Court denied discretionary review. Appendix C.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VI, provides:

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

U.S. Constitution, Amendment XIV, Section 1, provides:

> 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.

Michigan Compiled Laws § 777.33 provides, in relevant part:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following subdivisions apply and by assigning the number of points attributable to the applicable subdivision that has the highest number of points:
>
> (a) A victim was killed. 100 points. . . .
>
> (2) All of the following apply to scoring offense variable 3: . . .

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

STATEMENT OF THE CASE

I. Introduction

On December 18, 2014, Petitioner Demetrius Bradley was charged by Wayne County, Michigan, prosecutors with the first-degree premeditated murder of John Petty, Mich. Comp. Laws § 750.316, the assault with intent to murder of Larnell Fleming, Mich. Comp. Laws § 750.83, being a felon in possession of a firearm, Mich. Comp. Laws § 750.224f, and possessing a firearm during the commission of a felony, Mich. Comp. Laws § 750.227b.

Two jury trials were held on these charges, the first in April 2015, and the second in November 2015. At the first trial, Mr. Bradley was convicted of being a felon in possession of a firearm, Mich. Comp. Laws § 750.224f, but the jury deadlocked on the remaining charges. (TT 4/28/15, 14).

At the second trial, Mr. Bradley was ***acquitted*** of first- and second-degree murder as to John Petty, Mich. Comp. Laws §§ 750.316, 750.317, but ***convicted*** of assault with intent to murder of Larnell Fleming, Mich. Comp. Laws § 750.83, and possession of a firearm during the commission of a felony ("felony firearm"), Mich. Comp. Laws § 750.227b. (TT 11/11/15, 9).

The trial court instructed the jury that the elements of felony firearm were (1) "that the defendant committed the crimes of homicide—murder first degree—premeditated, ***or*** second degree murder, and/***or*** assault with intent to murder" ***and***

(2) "that at the time the Petitioner committed those crimes he knowingly carried or possessed at firearm." (TT 11/10/15, 94)(emphasis added).

On December 4, 2015, Judge Catherine L. Heise, who presided at both trials, sentenced Mr. Bradley to imprisonment for 35 to 55 years for assault with intent to murder, 1 to 5 years for felon in possession of a firearm, and 2 years for felony firearm.

II. Trial Testimony

At both trials, the prosecutor alleged that Petitioner Bradley shot at Larnell Fleming while Fleming was driving a vehicle. The prosecutor alleged that this caused Fleming to speed away to escape the gunfire, resulting in a collision that killed John Petty and injured a third motorist, Michael Terrell.

Defense counsel argued – and the jury agreed – that Petitioner Bradley was not guilty of murdering Petty because Petty's death was caused by Fleming's reckless driving, and that Petitioner was only guilty of assaulting Fleming with intent to kill, which occurred when Petitioner shot into the vehicle ***after the automobile accident.*** (TT 11/10/15, 59-60, 64).

Larnell Fleming (age 29) testified that, on December 18, 2014, he picked up his friend John Petty at about noon and that the two drove around all day. At approximately 10:30 p.m., the two left a liquor store on Van Dyke Avenue and headed north. Fleming noticed a white truck trailing them. (TT 11/5/15, 27-29).

The truck pulled alongside Fleming on the driver's side. The truck's passenger, whom Fleming identified as Petitioner Bradley, rolled down his window and shot at Fleming's car. Bullets went through the door, and glass shattered. Fleming sped away and eventually lost control, colliding with another vehicle, which was driven by Michael Terrell. (TT 11/5/15, 27-36, 118).

The impact caused Fleming to black out. When he regained consciousness, he crawled out of his vehicle and walked to a nearby party store. He was taken to the hospital, where he gave a statement to police. (TT 11/5/15, 36-40). He later gave another statement at the police station, during which he identified Petitioner Bradley as the shooter for the first time. (TT 11/5/15, 40-42); (TT 11/9/15, 119).

John Petty, meanwhile, was ejected from the vehicle and lay dead in the street. He died from blunt force internal injuries. (TT 11/9/15, 16-19).

Officer-in-charge Kelly Lucy testified that police collected eight guns from the house where they believed Petitioner was residing, but none matched the shell casings found at the scene. (TT 11/5/15, 205-207); (TT 11/9/15, 50-51).

On December 23, 2015, five days after the shooting, Detroit Police Officer Richard Reardon received a dispatch to intercept a stolen Chrysler 300. Reardon and other officers spotted the vehicle and pulled it over on Van Dyke Avenue. The sole occupant was the driver, Petitioner Bradley. Three cell phones were seized from the vehicle. (TT 11/5/15, 193-195).

A cell phone extraction expert testified that the cell phones were in use in the vicinity of the shooting on December 18, 2014, at the time of the shooting. (TT 11/9/15, 98-103).

At trial, the prosecution played a video of a lengthy custodial interview of Petitioner Bradley. (TT 11/19/15, 124). Mr. Bradley initially denied having been inside the car from which the shooting emanated. He then admitted that he was in the car but asserted that he was in the back seat and did not fire any shots. *People v. Bradley*, No. 331146, 2017 Mich. App. LEXIS 1329, at *2, 2017 WL 3495370 (Mich. Ct. App. Aug. 15, 2017).

Mr. Bradley was found not guilty first- and second-degree murder of John Petty and guilty of assault with intent to murder Larnell Fleming, possession of a firearm by a felon, and possession of a firearm during the commission of a felony (assault with intent to murder). (TT 4/28/15, 14); (TT 11/11/15, 9).

At sentencing on December 4, 2015, the trial court, when scoring Michigan's advisory sentencing guidelines, assessed 100 points for Offense Variable 3, which required a finding that Petitioner Bradley caused the death of Mr. Petty, over defense counsel's specific objection that the jury's acquittal on all charges that Petitioner murdered John Petty prevented the trial court from finding that Bradley caused Petty's death and from relying on that finding in imposing sentence. (TT 12/4/15, 5-20). The judge also heard victim impact statements from

Mr. Petty's surviving relatives and explicitly stated that she considered Petty's death, as well as Petty's relative's statements, in fashioning sentence. (ST 12/4/15, 27-33).

III. Appeal and Postconviction Proceedings

The Michigan Court of Appeals affirmed Petitioner's convictions and sentences. *People v. Bradley*, No. 331146, 2017 Mich. App. LEXIS 1329, at *11-12, 2017 WL 3495370 (Mich. Ct. App. Aug. 15, 2017), lv. den. *People v. Bradley*, 501 Mich. 1043; 909 N.W.2d 256 (April 4, 2018).

On July 12, 2019, Mr. Bradley filed a *pro se* state postconviction motion under Mich. Court Rule § 6.501 *et seq.*, raising claims unrelated to this appeal, which the state trial court denied in an opinion and order dated October 1, 2019.[1]

On March 13, 2020, Mr. Bradley filed with the state trial court a *pro se* "amended" postconviction motion under Mich. Court Rule § 6.502(F),[2] arguing, in relevant part, that the scoring of OV 3 at 100 points for "[a] victim was killed", Mich. Comp. Laws § 777.33(1)(a), for the death of John Petty, violated the Due Process Clause of the Fourteenth Amendment because the jury acquitted Mr. Bradley of the murder of John Petty, citing, *inter alia*, *People v. Beck*, 504 Mich

[1] The Michigan Court of Appeals and Supreme Court subsequently denied discretionary review. *People v. Bradley*, No. 352376, 2020 Mich. App. LEXIS 2833 (Mich. Ct. App. Apr. 17, 2020); *People v. Bradley*, 506 Mich. 962; 950 N.W.2d 724 (Nov 24, 2020).

[2] Mich. Court Rule § 6.502(F) provides: "The court may permit the Petitioner to amend or supplement the motion at any time."

605; 939 N.W.2d 213 (July 29, 2019)(holding that due process is violated where a trial court considers acquitted conduct at sentencing).

On July 29, 2020, the state trial court denied Mr. Bradley's amended petition, stating, in relevant part (Appendix B, pp.7-8)(footnote omitted),

> Mr. Bradley's reliance on *Beck*, however, is misplaced. Under [Mich. Comp. Laws] § 777.33, offense variable 3 is scored at 100 if two conditions are met: death results from the commission of a crime, and homicide is not the sentencing offense. Mr. Bradley is correct – he was acquitted of the homicide charge of Mr. Petty, but he was convicted for the assault with intent to murder of Mr. Fleming. Thus, the homicide of Mr. Petty was not the sentencing offense, but assault with intent to murder Mr. Fleming was. Unlike *Beck*, where the trial court found by a "preponderance of the evidence" that the Petitioner murdered the deceased although the jury acquitted him of the murder, this court considered only whether a death resulted and homicide was not the sentencing offense.
>
> * * *
>
> The holding of the Michigan Supreme Court in the case of *People v. Beck* does not apply to the scoring of Offense Variable 3 in this case. Offense Variable 3 was correctly scored at 100 points, because homicide was not the sentencing offense.

The Michigan Court of Appeals affirmed, citing two reasons. Appendix A (*People v. Bradley*, No. 355549, 2022 Mich. App. LEXIS 407, 2022 WL 187978 (Mich. Ct. App. Jan. 20, 2022)). ***First***, it said, "Since this case was final before *Beck* was decided, *Beck* cannot be retroactively applied in this instance." Appendix A, p.3 (citing *People v. Beesley*, 337 Mich. App. 50, 61-62, n.4, 972

N.W.2d 294, 302, n.4 (Mich. App. 2021)). ***Second***, it said, "Even if *Beck* applied retroactively, the trial court properly considered Petitioner's conduct underlying the assault with intent to murder, felon-in-possession, and felony-firearm charges, not the acquitted conduct." Appendix A, p.4.

> Under [*People v. Stokes*, 333 Mich. App. 304; 963 N.W.2d 643 (Mich. App. 2020) lv denied *People v. Stokes*, 500 Mich 867; 885 N.W.2d 284 (Mich. 2016)], a court may consider the time, place, and manner in which an offense that defendant was convicted of was committed without violating *Beck*. *Stokes*, 333 Mich. App. at 311. Here, the trial court did not consider the first-degree murder charge in its assessment of points for OV 3, as the trial court only considered whether homicide was the sentencing offense and whether a death resulted from the commission of a crime, and found Petty's death resulted from "the commission of [defendant's] assault on Mr. Fleming with the intent to murder him." In analyzing defendant's actions that occurred before the motor vehicle accident, the trial court properly considered the time, place, and manner in which an offense that defendant was convicted of was committed, not defendant's acquitted conduct. At sentencing, the trial court did not mention defendant's first-degree murder charge in its assessment of points for OV 3, instead noting "[Petty's] death resulted from the commission of the crimes involving weapons." Indeed, the trial court explicitly found "there is sufficient evidence on the record that the use of the firearm in this case resulted in death." Thus, the trial court did not err when it assessed 100 points for OV 3.

On July 28, 2022, the Michigan Supreme Court denied discretionary review. Appendix C (*People v. Bradley*, ___ Mich. ___, ___ N.W.2d ___, No. 164176).

Petitioner now seeks the writ of certiorari.

REASONS FOR GRANTING THE PETITION

I.

The state trial court considered acquitted conduct in fashioning sentence, in violation of the jury-trial and due process guarantees of the Sixth and Fourteenth Amendments, by scoring Offense Variable 3 at 100 points and by expressly stating that it considered John Petty's death in fashioning Petitioner's sentence, even though the jury acquitted Petitioner of all charges that he caused John Petty's death.

A.

This Court has jurisdiction to review this case because the state court's ruling does not rest on an independent state-law ground.

The state courts denied relief on this claim both (1) on the merits of Petitioner's claim that his Sixth and Fourteenth Amendment rights were violated by the state trial court's consideration of acquitted conduct at sentencing and (2) by finding that the constitutional claim itself was barred by non-retroactivity doctrine. Appendix A. Both of these questions are questions of federal law. Therefore, the state courts' rejection of this claim is not based on an independent and adequate state-law ground, and this Court's jurisdiction is not precluded.

When a state court denies relief on a federal constitutional claim, this Court has jurisdiction to decide that claim and grant relief only where the state court's ruling does not rest on an independent and adequate state-law ground. *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). For example, in *Ake*, the Oklahoma Supreme Court held that the United States Constitution did not require that an indigent defendant have access to the psychiatric examination

and assistance necessary to prepare an effective defense based on his mental condition. That was clearly a federal question cognizable on certiorari review by this Court. But the Oklahoma Supreme Court also denied Ake relief because it held that Ake had "waived" that constitutional claim under Oklahoma state procedural rules (by failing to repeat his request for a psychiatrist in his motion for new trial). *Ake,* 470 U.S. at 74. This Court held that this procedural ruling was not independent of federal law and therefore did not preclude this Court's jurisdiction, for the following reasons. *Ake,* 470 U.S. at 74-75 (citations omitted).

> The Oklahoma waiver rule does not apply to fundamental trial error. Under Oklahoma law, and as the State conceded at oral argument, federal constitutional errors are "fundamental." Thus, the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed. Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.

The same is true here. In this case, the Michigan Court of Appeals held that Petitioner's constitutional claim was barred because the constitutional rule Petitioner invoked was announced after his direct appeal and was not retroactively applicable to Petitioner on collateral review. Appendix A, pp.3-4. But, as shown below, as this Court has held, the question whether a new constitutional rule is retroactively applicable on collateral review is itself a federal constitutional

question. Thus, the state court's decision is not based on a state law ground that is independent of federal law.

Specifically, the Michigan Court of Appeals rejected Petitioner's claim, in part, because it is based on the Michigan Supreme Court's decision in *People v. Beck*, 504 Mich 605; 939 N.W.2d 213 (July 29, 2019), which was announced after the conclusion of Petitioner's direct appeal: "Since this case was final before *Beck* was decided, *Beck* cannot be retroactively applied in this instance." Appendix A, p.3 (citing *People v. Beesley,* 337 Mich. App. 50, 61-62, n.4, 972 N.W.2d 294, 302, n.4 (Mich. App. 2021)). The Michigan Court of Appeals did not further explain this ruling beyond its citation to *Beesley*, which in turn, cited *People v. McPherson*, 263 Mich. App. 124, 135 n 10; 687 N.W.2d 370 (Mich. App. 2004). The cited portion of *McPherson* says, "'[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.'" *McPherson*, *supra* (quoting *Powell v. Nevada*, 511 U.S. 79, 84; 114 S.Ct. 1280; 128 L.Ed.2d 1 (1994), quoting *Griffith v. Kentucky*, 479 U.S. 314, 328; 107 S.Ct. 708; 93 L.Ed.2d 649 (1987))

Thus, the Michigan Court of Appeals in the instant case found that the new rule announced in *Beck* was not retroactively applicable to Petitioner because the new rule was announced after Petitioner's conviction had become final upon the conclusion of direct review. As the quoted portion of *McPherson* reveals, this was

the application of the ***federal*** retroactivity doctrine enunciated by this Court in *Griffith, supra*, ***not*** the application an independent state-law rule.

This is confirmed by subsequent decisions of this Court. This Court has held that, when a state court rejects a federal-law claim "solely on the [state] court's determination that [the constitutional rule] did not apply retroactively," the state court's ruling does not rest on an independent and adequate state-law ground. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 100, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). This is because "[i]f . . . the Constitution establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court." *Montgomery v. Louisiana*, 577 U.S. 190, 197-98, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016)(citing *Griffith* v. *Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). "States may not disregard a controlling, constitutional command in their own courts." *Montgomery, supra.* "[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 577 U.S. at 200. *Cf. Harper*, 509 U.S. at 100 ("The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may

enjoy to limit the retroactive operation of their own interpretations of state law cannot extend to their interpretations of federal law.")(citations omitted).

Therefore, the state court's ruling that the new federal constitutional rule Petitioner seeks does not apply retroactively to his case does not rest on an independent and adequate state-law ground and, therefore, does not preclude this Court's jurisdiction.

B.

The Constitutional rule Petitioner seeks is retroactive on collateral review.

"Justice O'Connor's plurality opinion in *Teague* v. *Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), set forth a framework for retroactivity in cases on federal collateral review." *Montgomery*, 577 U.S. at 198.

> Under *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced. *Teague* recognized, however, two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry* v. *Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); see also *Teague*, *supra*, at 307, 109 S.Ct. 1060, 103 L.Ed.2d 334. Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, this Court has recognized that substantive rules "are more accurately characterized as . . . not subject to the bar." *Schriro* v. *Summerlin*, 542 U.S.

> 348, 352, n. 4, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Second, courts must give retroactive effect to new "'"watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Id*., at 352, 124 S.Ct. 2519, 159 L.Ed.2d 442; see also *Teague*, 489 U.S. at 312-313, 109 S.Ct. 1060, 103 L.Ed.2d 334.

"'[O]ur jurisprudence concerning the "retroactivity" of "new rules" of constitutional law is primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies.'" *Montgomery*, 577 U.S. at 227 (quoting *Danforth* v. *Minnesota*, 552 U.S. 264, 290-291, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008)). Therefore, the following argument regarding retroactivity proceeds under the ***assumption*** that this Court will adopt the new rule; in the next section, Petitioner will argue the merits of the new rule and urge this Court to adopt it.

The first question under *Teague* is whether the proposed new rule is "new." Deciding whether a rule is "new" requires a court to determine "whether 'a state court considering [the defendant's] claim at the time his conviction became final would have felt ***compelled*** by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *O'Dell v. Netherland*, 521 U.S. 151, 156, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997)(emphasis added and internal citations omitted). If a reasonable jurist would ***not*** have felt compelled by existing precedent to apply the rule, then the rule is "new." *Beard v. Banks*, 542 U.S. 406,

413; 124 S.Ct. 2504; 159 L.Ed.2d 494 (2004). In other words, the relevant question is not simply whether existing precedent might have ***supported*** the rule, but whether the rule "was ***dictated*** by then-existing precedent." *Id*. at 413 (emphasis in original).

The Constitutional rule at issue here – which the Michigan Supreme Court adopted in *Beck* and which Petitioner urges this Court to adopt now – is that the Sixth and Fourteenth Amendments prohibit judges from considering "acquitted conduct" at sentencing, that is, any conduct underlying a charge of which the defendant was acquitted. This rule is "new" because it is not "dictated" by prior precedent, as shown in the next section regarding the merits of the new rule, which Petitioner hereby incorporates by reference.

The next question is whether the rule is procedural or substantive, because "courts must give retroactive effect to new substantive rules of constitutional law" but not procedural ones. *Montgomery*, 577 U.S. at 198. "Substantive rules include rules forbidding criminal punishment for a class of defendants because of their status or offense." *Id.* (internal quotation marks omitted). For example, this Court held in *Montgomery* that the new rule announced in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), that a mandatory sentence of life in prison without parole for a juvenile offender violates the Eighth Amendment, was substantive and, thus, retroactive, because "it rendered life without parole an

unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient, immaturity of youth." *Montgomery*, 577 U.S. at 208 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)). Similarly, here, the proposed new rule forbids "criminal punishment for a class of defendants because of their status or offense" since it forbids trial courts from imposing increased punishments on defendants because of their status as having been shown, by a preponderance of evidence, to have committed conduct for which they have been acquitted. The rule applies to the class of defendants charged and acquitted at trial, yet still "guilty" under a preponderance of evidence standard. Therefore, the rule is substantive and, thus, retroactive.

Substantive rules also "include[] decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Welch v. United States*, 578 U.S. 120, 129, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). "Procedural rules, by contrast, 'regulate only the ***manner of determining*** the defendant's culpability." *Welch*, 578 U.S. at 129 (quotation marks omitted; emphasis in original). The rule at issue here is a constitutional rule that places particular conduct outside the state's power to punish because it prohibits the state from punishing a defendant for conduct for which he has been acquitted

but that he may nevertheless have committed under a preponderance of evidence standard. The rule also places persons covered by certain statutes beyond the state's power to punish because, as in this case, as shown below, although the ***statute*** governing Offense Variable 3 might arguably require 100 points to be scored in this case, the new rule of constitutional law prohibits Offense Variable 3 from being scored at 100 points. Thus, although Petitioner Bradley might arguably be covered by the statute governing the scoring of OV 3, the new rule prohibits the state from applying the statute to increase Petitioner's punishment. Accordingly, for this reason too, the new rule is substantive.

As a result, the new rule – assuming this Court adopts it – that sentencing courts are forbidden from considering acquitted conduct at sentencing is a new substantive rule of constitutional law. As this Court said regarding the rule announced in *Miller*, the new rule here "is retroactive because it necessarily carries a significant risk that a defendant—here, [acquitted] offenders—faces a punishment that the law cannot impose upon him." *Montgomery*, 577 U.S. at 208-209 (quotation marks omitted). Therefore, the new rule is substantive and, thus, fully retroactive on collateral review under the federal-law test.

This is an important question of federal law that, in this case, a state court has decided and that has not been, but should be, settled by this Court. Therefore, this Court should grant certiorari to decide this question. SCR 10(c).

C.

The Sixth and Fourteenth Amendments prohibit consideration of acquitted conduct at sentencing.

This Court has never opined on the question whether the Sixth and Fourteenth Amendments prohibit courts from considering acquitted conduct[3] at sentencing. However, this Court has issued decisions on the periphery of that question and some that other courts have cited as resolving the question.

In *McMillan v Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), although the Court did not specifically address acquitted conduct, it did consider the constitutionality of a Pennsylvania statute that allowed sentencing courts to find by a preponderance of evidence a fact ***that the jury had not been asked to decide*** (*i.e.*, whether the defendant "visibly possessed a firearm" during the commission of the offense), resulting in a five-year mandatory minimum sentence. *Id.* at 81. The Court held that the statute did not violate the Due Process Clause of the Fourteenth Amendment or the jury-trial guarantee of the Sixth Amendment. *Id.* at 91-93. This Court explained that it saw no reason to "constitutionaliz[e] burdens of proof at sentencing." *Id.* at 92.

Next, in *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997), the Court addressed a sentencing court's reliance on acquitted conduct

[3] This Court has defined "acquitted conduct" as any "conduct of the defendants underlying charges of which they had been acquitted." *United States v. Watts*, 519 U.S. 148, 149, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997).

but in the context of a claim that the use of such conduct violated the Double Jeopardy Clause of the Fifth Amendment. Citing *McMillan*, the Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. The Court did not address the Fourteenth Amendment right to due process.

The Court's approach to such questions changed in *Jones v. United States*, 526 U.S. 227, 232, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), and then *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), where the Court held, "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 (emphasis added). This rule is based on the "Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment." *Apprendi*, 530 U.S. at 476. "The Fourteenth Amendment commands the same answer in [a] case involving a state statute." *Id.*

Subsequently, this Court extended the *Apprendi* rule by holding that the Fifth, Sixth, and Fourteenth Amendments prohibit sentencing judges from finding facts not found by a jury nor admitted by the defendant that increase the mandatory ***minimum*** sentence or sentence range. *Blakely v. Washington,* 542 U.S. 296, 124

S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005); *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013). To comply with this constitutional imperative, this Court held in *Booker* that the mandatory federal sentencing guidelines were, thenceforth, advisory only. The Michigan Supreme Court subsequently did the same with respect Michigan's theretofore mandatory sentencing guidelines. *People v. Lockridge*, 498 Mich. 358, 870 N.W.2d 502 (Mich. 2015).

The "*Apprendi* revolution," as it has been called, has wrought significant changes in sentencing practices in state and federal courts. Yet, *Apprendi* and its progeny do not answer the question presented here – whether a sentencing court may ***consider*** conduct of which a jury ***acquitted*** the defendant to set a sentence within the range authorized by the jury's verdict. *Apprendi* and its progeny only prohibit sentencing judges from making ***factual findings*** that a jury ***has not made*** that ***increase*** the mandatory sentence or sentence range. *See United States v. White*, 551 F.3d 381, 384 (6th Cir. 2008).

The United States courts of appeal and state courts of last resort have issued conflicting decisions on the question whether a sentencing court may ***consider*** conduct of which a jury ***acquitted*** the defendant to set a sentence within the range

authorized by the jury's verdict.[4] Post-*Apprendi* revolution, the Circuits and some state courts of last resort have held that there is no constitutional impediment to a sentencing judge making factual findings by a preponderance of evidence that the defendant committed conduct underlying charges of which he or she has been acquitted, as long as those findings do not increase the mandatory sentence or mandatory sentence range authorized by the jury's verdict. *United States v. White*, 551 F.3d 381, 383-384 (6th Cir. 2008)(en banc)(citing cases); *In re Coley*, 55 Cal. 4th 524, 146 Cal. Rptr. 3d 382, 283 P.3d 1252, 1275 (Cal. 2012); *State v. Jaco*, 156 S.W.3d 775, 780 (Mo. 2005); *State v. Longo*, 608 N.W.2d 471, 474-75 (Iowa 2000).

Some state courts of last resort, however, have taken a different view. *See, e.g., People v. Beck*, 504 Mich. 605, 939 N.W.2d 213, 216 (Mich. 2019)(holding that the jury-trial and due process guarantees of the Sixth and Fourteenth Amendments prohibit consideration of acquitted conduct at sentencing); *State v. Cote*, 129 N.H. 358, 530 A.2d 775, 784 (N.H. 1987)(holding that a sentencing court cannot consider acquitted conduct in rendering its sentence, because the presumption of innocence is "not to be forgotten after the acquitting jury has left, and sentencing has begun"); *State v. Koch*, 107 Haw. 215, 112 P.3d 69, 79 (Haw.

[4] This fact, together with the fact that this is an important question of federal law that has not been, but should be, settled by this Court, calls for this Court to grant certiorari to resolve the question. SCR 10(a), (b), (c).

2005)(holding that the circuit court had erred by assuming, in sentencing the defendant, that he "had engaged in unlawful conduct of which he had been expressly ***acquitted***")(emphasis in original); *State v. Marley*, 321 N.C. 415, 364 S.E.2d 133, 139 (N.C. 1988)("We conclude that due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element -- premeditation and deliberation -- which, in this case, distinguished first degree murder after the jury had acquitted defendant of first degree murder.").

As the Michigan Supreme Court observed in *Beck*, 939 N.W.2d at 225-26,

> While we recognize that our holding today represents a minority position, one final consideration informs our conclusion: the volume and fervor of judges and commentators who have criticized the practice of using acquitted conduct as inconsistent with fundamental fairness and common sense. Regarding jurists, see, e.g., [*United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006)] (Barkett, J., concurring specially) ("I strongly believe . . . that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment"); *id.* at 1351-1352 & n 2; [*United States v. Canania*, 532 F.3d 764, 778 (8th Cir. 2008)] (Bright, J., concurring) ("I wonder what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); *United States v Mercado*, 474 F.3d 654, 662 (CA 9, 2007) (Fletcher, J., dissenting) ("Such a sentence has little relation to the actual conviction, and is based on an accusation that failed to receive confirmation from the defendant's equals and neighbors"); *United States v*

White, 551 F.3d 381, 392 (CA 6, 2008) (Merritt, J., dissenting) ("[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); *United States v Brown*, 892 F.3d 385, 408; 436 U.S. App. D.C. 136 (CA DC, 2018) (Millett, J., concurring) ("[A]llowing courts at sentencing 'to materially increase the length of imprisonment' based on conduct for which the jury acquitted the defendant guts the role of the jury in preserving individual liberty and preventing oppression by the government.") (citation omitted); *id.* at 415 (Kavanaugh, J., dissenting in part) ("[T]here are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness . . . .").

Regarding commentators, for just a sampling, see Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can be Done About It*, 49 Suffolk Univ L Rev 1, 25 (2016) (quoting other sources for the proposition that "[t]he use of acquitted conduct has been characterized as, among other things, 'Kafka-esque, repugnant, uniquely malevolent, and pernicious[,]' 'mak[ing] no sense as a matter of law or logic,' and . . . a 'perver[sion] of our system of justice,' as well as 'bizarre' and 'reminiscent of *Alice in Wonderland*'"); Ngov, *Judicial Nullification of Juries: The Use of Acquitted Conduct at Sentencing*, 76 Tenn L Rev 235, 261 (2009) ("[T]he jury is essentially ignored when it disagrees with the prosecution. This outcome is nonsensical and in contravention of the thrust of recent Supreme Court jurisprudence."); Beutler, *A Look at the Use of Acquitted Conduct at Sentencing*, 88 J Crim L & Criminology 809, 809 (1998) (observing that "[t]he use of acquitted conduct in sentencing raises due process and double jeopardy concerns that deserved far more careful analysis than they received" in *Watts* and noting "the fundamental differences between uncharged and acquitted conduct which trigger these constitutional concerns").

"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." *Beck*, 939 N.W.2d at 221. *See, e.g.*, *United States v Horne*, 474 F.3d 1004, 1006 (CA 7, 2007); *United States v Dorcely*, 454 F.3d 366; 372 U.S. App DC 170, 175-177; *United States v Faust*, 456 F.3d 1342, 1347-1348 (CA 11, 2006); *United States v Boney*, 977 F.2d 624; 298 US App DC 149, 160-161 (1992) (due process) (collecting cases).

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." *Beck*, 939 N.W.2d at 221. "First, *McMillan* did not involve the use of acquitted conduct [but uncharged 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." *Beck*, 939 N.W.2d at 221.

Watts fares no better as a basis rejecting the claim that due process and the jury trial guarantee prohibit a sentencing court from relying on acquitted conduct at sentencing, as this "Court made clear that *Watts* addressed only a double-jeopardy

challenge to the use of acquitted conduct[,] . . . explicitly limit[ing] it to the double-jeopardy context." *Beck*, 939 N.W.2d at 224 (citing *Booker*, 543 U.S. at 240, n.4 (observing that *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument," so it was "unsurprising that we failed to consider fully the issues presented to us in these cases").

The due process right is different from the Double Jeopardy Clause. For starters, due process means that "[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." *Beck*, 939 N.W.2d at 222. When a jury acquits a defendant, the jury has ruled – unanimously – that the prosecution has not overcome the presumption of innocence as to the charged offense. That is different from ***uncharged*** conduct, which is conduct that has not been presented to (or ruled upon) by a jury and that, thus, may be relied upon at sentencing, unless, of course, it increases the mandatory minimum or statutory maximum sentence. *See Alleyne*, *supra.*

"Due process also requires adequate notice. A defendant sentenced for conduct the jury acquitted him of surely has a notice complaint." *Beck*, 939 N.W.2d at 222. This is "because '[i]t is not unreasonable for a defendant to expect that conduct underlying a charge of which he's been acquitted to play no

determinative role in his sentencing[.]'" *Id.* (quoting *United States v. Canania,* 532 F.3d 764, 777 (8th Cir. 2008)(Bright, J., concurring)). "Because *McMillan* concerned uncharged conduct and not acquitted conduct, it does not address these constitutional due-process questions." *Beck*, 939 N.W.2d at 223.

Fundamental fairness and the presumption of innocence compel the conclusion that "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent." *Beck*, 939 N.W.2d at 225. The fact that the prosecution has overcome this presumption as to one charge does not allow a court to ignore that it has not done so as to others. *See Estelle v Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)("To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process" and "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt"). Ignoring the jury's unanimous conclusion that the defendant is "not guilty" of the charged offense by allowing the sentencing judge to impose a sentence as if the defendant was guilty of that offense surely "undermine[s] the fairness of the fact-finding process."

As stated above, "allowing courts at sentencing 'to materially increase the length of imprisonment' based on conduct for which the jury acquitted the

defendant guts the role of the jury in preserving individual liberty and preventing oppression by the government." *United States v Brown*, 892 F.3d 385, 408; 436 U.S. App. D.C. 136 (CA DC, 2018)(Millett, J., concurring)(citation omitted). "Such a sentence has little relation to the actual conviction, and is based on an accusation that failed to receive confirmation from the defendant's equals and neighbors[.]" *United States v Mercado*, 474 F.3d 654, 662 (CA 9, 2007) (Fletcher, J., dissenting). Indeed, "defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence; and we know that defendants find it unfair even when acquitted conduct is used only to calculate an advisory Guidelines range because most district judges still give significant weight to the advisory Guidelines when imposing a sentence." *United States v. Settles*, 382 U.S. App. D.C. 7, 10-11, 530 F.3d 920, 923-24 (2008)("At his sentencing, Settles himself cogently explained the point directly to the court: 'I just feel as though, you know, that that's not right. That I should get punished for something that the jury and my peers, they found me not guilty.'").

The unfairness of considering acquitted conduct at sentencing is indicated by the recent and near-unanimous approval in the U.S. House of Representatives of a bill that, if passed by the Senate and signed by the President, would prohibit federal district court judges from considering acquitted conduct at sentencing. *See*

Prohibiting Punishment of Acquitted Conduct Act of 2021, H.R. 1621, 117th Cong. § 2(a)(1).

This Court should grant certiorari to declare what to most people is a matter of basic fairness, obvious logic, and simple common sense: A sentencing judge should not be allowed to punish a defendant as if he has committed a crime that a jury has unanimously found him "not guilty" of committing.

D.

Petitioner's sentencing judge relied on acquitted conduct at sentencing.

In this case, Petitioner Bradley was acquitted of first- and second-degree murder as to John Petty, Mich. Comp. Laws §§ 750.316, 750.317, but convicted of assault with intent to murder of Larnell Fleming, Mich. Comp. Laws § 750.83, being a felon in possession of a firearm, Mich. Comp. Laws § 750.224f, and possessing a firearm during the commission of a felony ("felony firearm"), Mich. Comp. Laws § 750.227b. (TT 11/11/15, 9).

At sentencing, the state trial court assessed 100 points under Michigan's advisory sentencing guidelines for "[a] victim was killed", Mich. Comp. Laws § 777.33(1)(a)(Offense Variable 3), based on the death of John Petty. Petitioner objected to that scoring because the jury acquitted Petitioner of causing Petty's death; the court overruled the objection, explicitly stating that it would consider that "death resulted from the commission of the crimes involving weapons" in

sentencing Petitioner. (ST 12/4/15, 5-20). Although scoring 100 points for OV 3 in this case may be the result of a proper interpretation of the ***statute itself***, it violated due process and the jury-trial guarantee of the United States Constitution because it ignored the jury's explicit finding that Petitioner was "not guilty" of the charge that he caused John Petty's death.

By finding Petitioner not guilty of the murder charges, the jury necessarily found that Petitioner was not the factual cause of John Petty's death, since an element of murder in Michigan is that the defendant was both the factual and proximate cause of death. *See People v. Smith*, 478 Mich. 64, 70; 731 N.W.2d 411 (Mich. 2007)("[T]he elements of second-degree murder are as follows: (1) a death, (2) ***the death was caused by an act of the Petitioner***, (3) the Petitioner acted with malice, and (4) the Petitioner did not have lawful justification or excuse for causing the death.")(emphasis added); *People v. Dykhouse*, 418 Mich. 488; 345 N.W.2d 150 (Mich. 1984)(holding that the elements of first-degree premeditated murder are the same as second-degree murder, except that the malice element requires an intent to kill and there is an additional element, the premeditated and deliberated intent to kill); *People v. Feezel*, 486 Mich. 184, 194-95; 783 N.W.2d 67 (Mich. 2010)("[I]n the criminal law context, the term 'cause' has acquired a unique, technical meaning. Specifically, the term and concept have two parts: factual causation and proximate causation. Factual causation exists if a finder of

fact determines that 'but for' Petitioner's conduct the result would not have occurred.")(quotation marks and citation omitted). *See also* TT 11/10/15, 92-93 (jury instructions given in this case on the murder charges).

Yet, despite Petitioner's acquittal of the murder charges, the sentencing judge relied, at least in part, on acquitted conduct at sentencing by scoring OV 3 at 100 points, because that scoring required the judge to find that Petitioner was the factual cause of Petty's death. *People v. Laidler*, 491 Mich. 339, 345, 817 N.W.2d 517 (Mich. 2012)(holding that, for OV 3 to be scored at 100 points, "the Petitioner's criminal actions must constitute a factual cause of a death"). Further, the sentencing judge, in fact, found that Petitioner was the factual cause of Petty's death at sentencing, stating, "I do believe that there was a death that resulted from the commission of the crimes involving the weapons." (ST 12/4/15, 8).

The state trial court also relied, at least in part, on acquitted conduct by allowing the family members of John Petty to speak at sentencing about the impact of Petty's death on their lives, as if the jury had found that Petitioner caused his death, and by explicitly considering their statements as to how they were affected by Mr. Petty's death – which the jury found Petitioner was ***not*** criminally responsible for – in fashioning Petitioner's sentence. (ST 12/4/15, 27-30).

Further, the state trial court explicitly considered, at least in part, Mr. Petty's death in fashioning Petitioner's sentence, saying, in explaining its rationale for

sentence, "The jury did acquit Mr. Bradley of the murder charge of Mr. Petty ***but I can't get out of my mind*** the recklessness involved in this entire incident; shooting at a car whether it's moving or whether it's parked, dropping seven rounds into a car, ***Mr. Petty lying in the street,***. . . . ***I thought about the family members who have lost loved ones . . . . And all of these factors are the ones that I took into account . . . . I thought of all these and I listened to the victim impact statements.***" (12/4/15, 32-33)(emphasis added). Even apart from the scoring of OV 3, these considerations violated Petitioner's the constitution because they reveal that the sentencing judge held Petitioner criminally responsible for causing John Petty's death, contrary to the jury's unanimous verdict.

Thus, Petitioner's right to due process was violated. As the Michigan Supreme Court stated in *Beck*, "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a 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.'" *Beck*, 939 N.W.2d at 225 (footnotes omitted)(quoting *State v. Marley*, 321 N.C. 415, 425, 364 S.E.2d 133, 139 (N.C. 1988)).

The Michigan Court of Appeals took a different view. *See* Appendix A, p.4.

> Under [*People v. Stokes*, 333 Mich. App. 304, 310; 963 N.W.2d 643 (2020) lv den. *People v. Stokes*, 507 Mich 939; 957 N.W.2d 824 (2021)], a court may consider the time, place, and manner in which an offense that Petitioner was convicted of was committed without violating *Beck*. *Stokes*, 333 Mich. App. at 311. Here, the trial court did not consider the first-degree murder charge in its assessment of points for OV 3, as the trial court only considered whether homicide was the sentencing offense and whether a death resulted from the commission of a crime, and found Petty's death resulted from "the commission of [Petitioner's] assault on Mr. Fleming with the intent to murder him." In analyzing Petitioner's actions that occurred before the motor vehicle accident, the trial court properly considered the time, place, and manner in which an offense that Petitioner was convicted of was committed, not Petitioner's acquitted conduct. At sentencing, the trial court did not mention Petitioner's first-degree murder charge in its assessment of points for OV 3, instead noting "[Petty's] death resulted from the commission of the crimes involving weapons." Indeed, the trial court explicitly found "there is sufficient evidence on the record that the use of the firearm in this case resulted in death." Thus, the trial court did not err when it assessed 100 points for OV 3.

This simply ignores the reality that – however parsed – the sentencing court found that Petitioner's actions caused Petty's death and relied on that finding to determine the sentence imposed, even though the jury explicitly found that Petitioner was "not guilty" of causing Petty's death.

First, contrary to the Michigan Court of Appeals' reasoning, the jury's guilty verdicts on the charges of assault with intent to murder Larnell Fleming, being a felon in possession of a firearm, and possessing a firearm during the commission

of a felony do not justify scoring of OV 3 at 100 points. This is because (1) none of these charges contain an element that Petitioner was the factual cause of John Petty's death, which is the finding necessary to score OV 3 at 100 points, and (2) the jury found Petitioner "not guilty" of the only charges that do contain an element that Petitioner was the factual cause of John Petty's death, first- and second-degree murder. To be sure, the felony-firearm charge required the jury to find that Petitioner possessed a firearm during the commission of a felony, but the jury was instructed that it could use the charge that Petitioner assaulted Larnell Fleming as the felony during which Petitioner possessed the firearm (TT 11/10/15, 94), and the only logical conclusion is that it did, because itry found Petitioner not guilty of the only other felonies that it was instructed could be used to find Petitioner guilty of possessing a firearm during the commission of a felony, *i.e.*, the murder charges.

Second, the Michigan Court of Appeals' conclusion that the state trial court properly scored OV 3 at 100 points appears to rely primarily on a statement in *People v. Stokes*, 333 Mich. App. 304, 310; 963 N.W.2d 643 (Mich. App. 2020), that "a court may consider the time, place, and manner in which an offense that Petitioner was convicted of was committed without violating *Beck*." Appendix A, p.4. The Michigan Court of Appeals held that the trial court considered those things here because the trial court scored OV 3 at 100 points, reasoning that

"'[Petty's] death resulted from the commission of the crimes involving weapons.'" *Id*. But, as shown above, the ***jury*** did not find that Petty's death resulted from the crimes involving weapons crimes and, to the contrary, the ***jury*** found that Petitioner did not cause Petty's death but, instead, agreed with defense counsel's argument that Petty's death was caused by Fleming's ***reckless driving***. Thus, even assuming, for the sake of argument, that *Stokes* was correctly decided, the Michigan Court of Appeals' application of its holding to this case is simply untenable in light of the jury's verdict and the requirements of due process.[5]

In sum, "[b]ecause the trial court in this case relied at least in part on acquitted conduct when imposing sentence for the [Petitioner's] conviction of [felony] firearm," this Court should vacate the decision of the Michigan Court of Appeals and remand to the state trial court for a resentencing hearing that respects

[5] Furthermore, the Michigan Court of Appeals' reasoning in this case, relying on the statement in *Stokes* that "[n]othing in *Beck* precludes a sentencing court from generally considering the time, place, and manner in which an offense is committed", has been expressly overruled by the Michigan Supreme Court. The Michigan Court of Appeals relied on that same reasoning in *People v. Roberts (On Remand)*, 331 Mich. App. 680, 688; 954 N.W.2d 221 (Mich. App. 2020), which the Michigan Supreme Court reversed on that very basis. *People v. Roberts*, 506 Mich. 938; 949 N.W.2d 455 (Mich. 2020). *See People v. Jackson*, unpublished opinion per curiam of the Court of Appeals issued Feb 25, 2021 (Docket No 344242), 2021 Mich. App. LEXIS 1267, at *7-9, 2021 WL 745674 ("Based on our Supreme Court's decision to reverse *Roberts*, it appears that the prohibition in *Beck* extends to circumstances surrounding the sentencing offense if the circumstances concern acquitted conduct that the sentencing offense does not contemplate.").

the jury's verdict that Petitioner is "not guilty" of causing John Petty's death. *Beck*, 939 N.W.2d at 216 (footnote omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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