No. 23-5968

IN THE

Supreme Court of the United States

RICHARD LANGSTON,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

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

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The central question presented by the petition is "whether the Sixth and Fourteenth Amendments to the Constitution of the United States prohibit a state court from basing a criminal defendant's sentence on conduct for which a jury acquitted the defendant in the same proceeding." Pet. Cert., i. Put differently, this petition squarely addresses whether the Constitution is offended when the following series of events occurs in a criminal case: (i) a jury acquits a defendant on some charges while convicting him on other charges, (ii) the sentencing judge states on the record that the defendant nevertheless committed the acquitted conduct, and (iii) the judge relies on that acquitted conduct to increase the defendant's sentence.

The respondent State of Connecticut's position is that this scenario is of concern only in jurisdictions employing sentencing guidelines. As the present case illustrates, however, it also sometimes occurs in jurisdictions such as Connecticut that employ indeterminate sentencing systems in which judges generally have broad discretion to impose sentences within a defined statutory range. Indeed, under either paradigm, the cardinal constitutional sin is equally apparent: a sentencing court, by disregarding the jury's not-guilty verdict and making its own contrary finding, directly infringes on a defendant's right to have questions of guilt or innocence for charged conduct decided by a jury and *only* a jury. Because the constitutional violation, if any, occurs when the sentencing judge increases the defendant's sentence based on a finding contrary to the jury's not-guilty verdict, the ultimate "arithmetic" by which that finding translates into a heavier sentence is of

no consequence. What matters is that the finding is made and does in fact result in a heavier sentence. Accordingly, there is no merit to the respondent's argument that no constitutional question is presented by acquitted-conduct sentencing in an indeterminate sentencing jurisdiction.

I. The respondent erroneously seeks to redefine the issue presented as one limited to cases in which criminal defendants are sentenced under a sentencing guidelines system.

The main thrust of the respondent's brief is that, although there is a split among American courts regarding the permissibility of acquitted-conduct sentencing, the present case is not an appropriate vehicle for this Court to examine that split, because what is really at issue is the role of acquitted-conduct sentencing in jurisdictions with structured sentencing guidelines. The respondent therefore suggests that "even if a split of authority exists, the present case does not present the question of law driving the split." (Capitalization altered.) Brief in Opposition (BIO), 16. The respondent's position is based on a misreading of the case law.

To be sure, the petitioner does not dispute that the majority of reported cases in which acquitted-conduct sentencing has been made an issue have arisen in jurisdictions employing sentencing guidelines. This is not surprising because a system setting forth specific guidelines to be followed in calculating a sentence based on particular factual circumstances necessarily requires the judge to make detailed on-the-record factual findings tracking the guidelines. In an indeterminate sentencing system like Connecticut's, by contrast, where a judge simply exercises sentencing discretion within a broad statutory range without defined guidelines factors, there is less need for particularized findings of various facts, and, thus, less

likelihood that a judge will make an *explicit* finding contrary to a jury's acquittal. Nevertheless, as the present case illustrates, explicit acquitted-conduct sentencing still occurs in indeterminate sentencing jurisdictions, albeit perhaps less frequently.[1]

It would therefore be a mistake to leap from the fact that most of the caselaw has arisen from guidelines jurisdictions to a conclusion that the constitutional concerns presented by the caselaw exist only in those jurisdictions. The question is not whether the issue has been raised most frequently under one type of sentencing scheme but, rather, whether the concerns implicated by the practice of acquitted-conduct sentencing are, in fact, implicated under both types of sentencing. An examination of the relevant authorities demonstrates that the constitutional concerns are actually implicated whether the practice occurs in guidelines-based or indeterminate sentencing jurisdictions.

II. The concerns implicated by acquitted-conduct sentencing transcend any particular sentencing scheme.

Justice Sotomayor's extensive statement respecting the denial of certiorari in *McClinton v. United States*, 143 S. Ct. 2400, 216 L. Ed. 2d 1258 (2023), provides a succinct summary of the concerns that are implicated by acquitted-conduct sentencing. *McClinton* arose under the federal sentencing guidelines. Justice

[1] The flip side of this is that, while judges in indeterminate sentencing jurisdictions may less frequently rely on acquitted conduct *on the record*, it is difficult to gauge how frequently judges may engage in the practice *sub silentio*. In other words, the practice may well be equally prevalent in both guidelines-based and indeterminate sentencing jurisdictions, but less detectable in the latter because of the reduced need for sentencing judges to make particularized findings of fact on the record.

Sotomayor's statement, however, catalogs many of the reasons acquitted-conduct sentencing "raises important questions that go to the fairness and perceived fairness of *the criminal justice system*"; id., 2401; and not just guidelines sentencing systems. First is the "tension between acquitted-conduct sentencing and the jury's historical role. Juries are democratic institutions called upon to represent the community as 'a bulwark between the State and the accused,' and their verdicts are the tools by which they do so. . . . With an acquittal, the jury as representative of the community has been asked by the State to authorize punishment for an alleged crime and has refused to do so." Id., 2401-2402, citing *Southern Union Co. v. United States*, 567 U.S. 343, 350, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012); *Blakely v. Washington*, 542 U.S. 296, 305-306, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). "This helps explain why acquittals have long been accorded special weight . . . distinguishing them from conduct that was never charged and passed upon by a jury. This special weight includes traditionally treating acquittals as inviolate, even if a judge is convinced that the jury was mistaken." (Citations omitted; internal quotation marks omitted.) *McClinton* at 2402.

If acquitted-conduct sentencing's problematic nature derives from the special inviolate status of acquittals in our constitutional system, a status that differentiates acquittals from uncharged misconduct and places them off limits for sentencing purposes, then the precise sentencing system employed in a given case should make no difference. Whether a judge second-guesses an acquittal in the course of crafting a sentence in an indeterminate sentencing system or by

increasing the sentencing range under guidelines, the judge has infringed upon the jury's inviolate determination that the defendant is not guilty of the acquitted conduct. In either event, the defendant is sentenced based in part on a charge for which the jury, playing its vital democratic role in the justice system, declined to find him responsible and punishable.

Similarly, Justice Sotomayor observed that "an acquittal could . . . reflect a jury's conclusion that the State's witnesses were lying and that the defendant is innocent of the alleged crime. In that case, it is questionable that a jury's refusal to authorize punishment is consistent with the judge giving the defendant additional years in prison for the same alleged crime."[2] Id., 2402. Again, the expressed concern exists independent of whether the sentence is imposed under an indeterminate or guidelines sentencing system. If a defendant is given more time in prison because of conduct a jury declined to find him guilty of, it is difficult to see how the determination of constitutionality could possibility hinge on what type of sentencing scheme was employed. Stated differently, it is difficult to fathom that the Constitution would condone a criminal defendant spending additional years behind

[2] In a slight variation on Justice Sotomayor's point, in the present case, the petitioner's acquittal on the assault charge likely reflected the jury's inability to determine whether the petitioner or another person at the scene fired the shots that struck the victim from behind. See *Langston v. Commissioner of Correction*, 104 Conn. App. 210, 220-23, 931 A.2d 967 (detailing defense counsel's closing argument that petitioner's friend may have been the shooter), cert. denied, 284 Conn. 941, 937 A.2d 697 (2007). Under those circumstances, where the jury refused to attribute the assault to the petitioner, as opposed to some other possible shooter, it was entirely inconsistent with the verdict for the sentencing judge to attribute the shooting to the petitioner, thus giving him extra time in prison.

bars because of acquitted conduct, so long as the additional years were the result of indeterminate sentencing rather than guidelines sentencing. And yet, that is the ultimate implication of the respondent's argument that the present case does not raise the constitutionality of acquitted-conduct sentencing.

Justice Sotomayor presented two other concerns associated with the use of acquitted-conduct sentencing. First are the implications for "procedural fairness and accuracy when the State gets a second bite at the apple with evidence that did not convince the jury coupled with a *lower* standard of proof." (Emphasis in original.) Id. Second, failing to give full preclusive effect to a not-guilty verdict implicates "the public's perception that justice is being done," both for "the woman on the street [who] would be quite taken aback to learn about [acquitted-conduct sentencing]" and for jurors themselves who may feel their role is minimized and marginalized when they see defendants "being sentenced not on the charges for which they have been found guilty but on the charges for which the [prosecutor's] office would have liked them to have been found guilty." (Internal quotation marks omitted.) Id., 2403. These concerns regarding not allowing the state an unfair second bite and the apple and ensuring that jurors and citizens generally perceive that the system is fundamentally fair and respects the role of jurors, exist regardless of whether acquitted-conduct sentencing occurs in an indeterminate or guidelines system.

III. The major opinions barring acquitted-conduct sentencing have relied on principles of universal applicability.

The major opinions barring the use of acquitted conduct in sentencing illustrate that the unconstitutionality of the practice is not limited in any way to guidelines sentencing schemes. On the contrary, the Michigan Supreme Court made clear in *People v. Beck*, that its focus was the constitutionality of acquitted-conduct sentencing as a general matter, and not limited to guidelines systems or to cases in which sentences are increased by any particular amount as a result of acquitted conduct. This is apparent from the very beginning of the opinion, in which the court framed the issue as follows: "Once a jury acquits a defendant of a given crime, may the judge, notwithstanding that acquittal, take the same alleged crime into consideration when sentencing the defendant for another crime of which the defendant was convicted?" *People v. Beck*, 504 Mich. 605, 608-609, 939 N.W.2d 213 (2019). That is, the constitutional issue, as framed by the Michigan court, was simply whether the *consideration* of acquitted conduct in sentencing is itself impermissible.

The Michigan court's further elaboration of its scope brings the point home: "The jury speaks, convicting on some charges and acquitting on others. At sentencing for the former, a judge might seek to increase the defendant's sentence (under the facts of this case, severely increase, *though we consider the question in principle*) because the judge believes that the defendant really committed one or more of the crimes on which the jury acquitted." (Emphasis added.) Id., 609. Accordingly, the Michigan Supreme Court framed the issue broadly as whether a sentencing court constitutionally may consider conduct of which a jury has already

acquitted the defendant. The language italicized above explicitly clarifies that the severity of the increase was not the focus of the court's inquiry, because the court was concerned about whether the consideration of acquitted conduct in sentencing was unconstitutional "in principle." Id. This directly contradicts the state's suggestion that the "dramatic change" in the defendant's sentence was the court's real concern in *Beck*. Whether acquitted-conduct sentencing is unconstitutional in principle is precisely the question presented by the present petition.

Additionally, the factors on which the Michigan Court based its decision apply equally to any sentencing system. Foremost was the Michigan court's concern with respecting the presumption of innocence, which, the court noted, continues in effect when a jury finds a defendant not guilty. Id., 626. Surely whether a sentencing court's consideration of acquitted conduct is "fundamentally inconsistent with the presumption of innocence itself"; id., 627; does not depend on whether the sentencing proceeds under a system of advisory guidelines like Michigan's or an indeterminate sentencing system like Connecticut's. Furthermore, the Michigan court was persuaded by "the volume and fervor of judges and commentators who have criticized the practice of using acquitted conduct as inconsistent with fundamental fairness and common sense." Id. The respondent has failed to explain how the consideration of acquitted conduct, if it violates fundamental fairness and common sense under a system of advisory guidelines, may comport with due process under Connecticut's indeterminate sentencing system. In either circumstance, a

defendant has been acquitted on a charge, only to find that a judge who disagrees with the jury has increased his sentence based on the acquitted conduct.

Other major cases likewise are premised upon principles that apply to all types of sentencing systems. In *State v. Melvin*, 248 N.J. 321, 258 A.3d 1075 (2021), the New Jersey Supreme Court's foremost concern was fundamental fairness: "In order to protect the integrity of our Constitution's right to a criminal trial by jury, we simply cannot allow a jury's verdict to be ignored through judicial fact-finding at sentencing. Such a practice defies the principles of due process and fundamental fairness." Id., 349. Additionally, the New Jersey court was concerned that permitting a judge to ignore a jury's verdict of acquittal has the tendency to undermine public confidence in the rule of law: "The trial court, after presiding over a trial and hearing all the evidence, may well have a different view of the case than the jury. But once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable. The public's confidence in the criminal justice system and the rule of law is premised on that understanding. Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial." Id., 352. Again, these principles are equally at stake in any jurisdiction, irrespective of the sentencing scheme it employs.

In *State v. Cote*, 129 N.H. 358, 530 A.2d 775 (1987), as well, the New Hampshire Supreme Court's major concern was respect for the presumption of innocence. As the *Cote* court observed: "The concept [of acquittal] is intertwined

with the notion, so central to our system of justice, that until guilt is proven beyond a reasonable doubt, a defendant is innocent . . . . It is true that a jury, in the private sanctity of its own deliberations, may acquit in a given case simply because the evidence falls just short of that required for conviction beyond a reasonable doubt. Nevertheless, we do not invade the inner sanctum of the jury to determine what percentage of probability they may have assigned to the various proofs before it. Indeed, in one case a jury might assign no weight whatever to the State's proof, while in another it may find the State's proof more probably true than not, but of course still insufficient for a criminal conviction. The inescapable point is that our law requires proof beyond a reasonable doubt in criminal cases as the standard of proof commensurate with the presumption of innocence; a presumption not to be forgotten after the acquitting jury has left, and sentencing has begun." Id., 374.

IV. The distinctions between guidelines sentencing and indeterminate sentencing systems have been substantially reduced by this Court in *Blakely v. Washington* and *United States v. Booker*

Finally, the respondent greatly overstates the practical distinction between indeterminate and guidelines sentencing schemes in the wake of this Court's holdings in *Blakely v. Washington*, supra, 542 U.S. 296, and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). In those two cases, this Court held that state (*Blakely)* and federal (*Booker*) sentencing guidelines schemes requiring judges making certain designated findings to increase sentences beyond the maximum otherwise authorized by the jury's verdict are unconstitutional. In *Booker*, the Court went on to remedy this constitutional defect

in the federal sentencing guidelines system by eliminating the federal statute's provisions that made the guidelines mandatory, thus transforming them into advisory guidelines. *United States v. Booker*, supra, 245. Other jurisdictions, including the Michigan Supreme Court and New Jersey Supreme Court, subsequently followed suit and eliminated from their sentencing schemes those elements that ran afoul of the constitutional principles of *Blakely* and *Booker*, thus making their guidelines advisory and giving judicial discretion a larger role. See *People v. Lockridge*, 498 Mich. 358, 391, 870 N.W.2d 502 (2015); *State v. Natale*, 184 N.J. 458, 487-88, 878 A.2d 724 (2005).

Post-*Booker* and *Blakely*, accordingly, reasonable exercise of judicial discretion within a designated sentencing range remains the essence of sentencing in all jurisdictions, regardless of the degree to which (now directory) guidelines direct that discretion. The respondent nevertheless maintains that application of an advisory guideline may "result in the [acquitted conduct] *substantially increasing*" a defendant's sentence, while a judge considering acquitted conduct in an indeterminate system like Connecticut's "merely *factor[s] the evidence . . . heard at trial . . . into its discretion* to sentence the petitioner within the narrow ranges prescribed by statute . . . ." (Emphasis added.) BIO, 23. Even ignoring the respondent's questionable assertion that indeterminate sentencing always involves *narrow* sentencing ranges, the respondent's reasoning does not withstand scrutiny. To a defendant spending additional years behind bars as a result of a judge's finding that he committed the very conduct of which the jury acquitted him, there

can be no comfort in being told that the judge *merely* factored the acquitted conduct in with other factors, and that it is therefore unclear how *substantial* the increase really was. The fact that acquitted conduct was a factor at all in increasing the defendant's sentence is the essence of the constitutional question.

As the respondent's own argument demonstrates, where judges have indeterminate discretion that is not directed by advisory guidelines, the weight a particular judge gives a particular factor is entirely unpredictable. The generalization made by the respondent—that single factors will have a more substantial effect in a guidelines jurisdiction—is therefore entirely speculative and unwarranted. If consideration of acquitted conduct were permissible, a Connecticut court, acting in the absence of guidelines, could potentially make that conduct *the* predominant factor in determining a defendant's sentence. Indeed, that is precisely what happened here: the sentencing court's discussion of the harm done by the defendant focused almost exclusively on the effects of the very shooting the jury acquitted the petitioner of, rather than the robbery and firearms charges of which he was convicted. Where, as here, the acquitted conduct becomes the sentencing judge's major factual focus, the respondent's assertion that it did not "substantially increase" the sentence rings entirely false.

CONCLUSION

In short, there is no merit to the respondent's assertion that the concerns surrounding acquitted-conduct sentencing are in any way confined to sentencing under guidelines. The broad discretion given to a sentencing judge in Connecticut

may result in acquitted conduct greatly increasing a defendant's sentence. Additionally, acquitted-conduct sentencing implicates the presumption of innocence, common sense, due process concerns regarding fundamental fairness, and the importance of preserving public confidence in the courts. All of those factors are fundamental concerns of equal importance throughout our federal and state criminal justice systems, and are thus equally important in jurisdictions with guidelines sentencing and those such as Connecticut with indeterminate sentencing. The Court should grant certiorari, as this petition presents an ideal case to address all of the concerns underlying the ongoing and contentious practice of acquitted-conduct sentencing.

Respectfully submitted,

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