SUPREME COURT OF THE UNITED STATES

DAYONTA MCCLINTON *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 21–1557. Decided June 30, 2023

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

The prosecution in this case argued that Dayonta McClinton, then 17 years old, shot and killed his friend in a dispute over the proceeds of a pharmacy robbery. The jury unanimously acquitted him of killing his friend and convicted him only of robbing the pharmacy.

After that, however, something happened that might strike the average person as quite strange. At McClinton's sentencing for the robbery conviction, the prosecution again argued that McClinton had killed his friend. When the judge agreed, this caused McClinton's Sentencing Guidelines range to skyrocket. While the ultimate sentencing decision is discretionary, "[t]he Guidelines are the framework for sentencing and anchor the district court's discretion." *Molina-Martinez* v. *United States*, 578 U. S. 189, 198–199 (2016) (internal quotation marks and alterations omitted). McClinton's Guidelines range had initially been approximately five to six years. Yet taking into account the killing, the judge sentenced McClinton to 19 years in prison.

As many jurists have noted, the use of acquitted conduct to increase a defendant's Sentencing Guidelines range and sentence[1] raises important questions that go to the fairness and perceived fairness of the criminal justice system. See *Jones* v. *United States*, 574 U. S. 948, 949–950 (2014) (Scalia, J., joined by THOMAS and Ginsburg, JJ., dissenting

[1] For brevity, I will refer to this as "acquitted-conduct sentencing."

from denial of certiorari); see also *United States* v. *Bell*, 808 F. 3d 926, 928 (CADC 2015) (Kavanaugh, J., concurring in denial of reh'g en banc); *United States* v. *Sabillon-Umana*, 772 F. 3d 1328, 1331 (CA10 2014) (Gorsuch, J.); *United States* v. *Watts*, 519 U. S. 148, 170 (1997) (Kennedy, J., dissenting).[2]

These concerns arise partly from a 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. *Southern Union Co.* v. *United States*, 567 U. S. 343, 350 (2012) (internal quotation marks omitted); see also *Blakely* v. *Washington*, 542 U. S. 296, 305–306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary"). Consistent with this, juries were historically able to use acquittals in various ways to limit the State's authority to punish, an ability that the Founders prized. See *Jones* v. *United States*, 526 U. S. 227, 245–246 (1999). 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.

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[2]Many other state and federal judges have questioned the practice. See also, *e.g.*, *State* v. *Melvin*, 248 N. J. 321, 349–352, 258 A. 3d 1075, 1092–1094 (2021); *People* v. *Beck*, 504 Mich. 605, 625–629, 939 N. W. 2d 213, 224–227 (2019); *State* v. *Marley*, 321 N. C. 415, 424–425, 364 S. E. 2d 133, 138–139 (1988); *State* v. *Cote*, 129 N. H. 358, 375–376, 530 A. 2d 775, 785 (1987); *Jefferson* v. *State*, 256 Ga. 821, 827, 353 S. E. 2d 468, 474 (1987); *United States* v. *Tapia*, 2023 WL 2942922, *2, n. 2 (CA2, Apr. 14, 2023); *United States* v. *Brown*, 892 F. 3d 385, 408–409 (CADC 2018) (Millett, J., concurring); *United States* v. *White*, 551 F. 3d 381, 391–397 (CA6 2008) (Merritt, J., dissenting); *United States* v. *Canania*, 532 F. 3d 764, 776–778 (CA8 2008) (Bright, J., concurring); *United States* v. *Mercado*, 474 F. 3d 654, 658, 662–665 (CA9 2007) (Fletcher, J., dissenting); *United States* v. *Baylor*, 97 F. 3d 542, 550–553 (CADC 1996) (Wald, J., concurring); *United States* v. *Concepcion*, 983 F. 2d 369, 395–396 (CA2 1992) (Newman, J., dissenting).

This helps explain why acquittals have long been "accorded special weight," *United States* v. *DiFrancesco*, 449 U. S. 117, 129 (1980), distinguishing them from conduct that was never charged and passed upon by a jury.[3] This special weight includes traditionally treating acquittals as inviolate, even if a judge is convinced that the jury was "mistaken." *Id.*, at 130. In contrast, there appears to be little record of acquitted-conduct sentencing before the 1970s. See C. Murray, Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing, 84 St. John's L. Rev. 1415, 1444, 1427–1437, 1450–1455 (2010) (describing the role of federal statutes and especially the Guidelines in the rise of acquitted-conduct sentencing).[4]

The argument for acquitted-conduct sentencing is generally based on standards of proof. A sentencing judge makes findings by a preponderance of the evidence, whereas a jury applies the higher beyond-a-reasonable-doubt standard. Because an acquittal could reflect a jury's conclusion that the evidence of guilt fell just short of the beyond-a-reasonable-doubt standard, the argument goes, there is no conflict with a judge making a contrary finding of guilt under a lower evidentiary standard.

Yet there is a tension between this narrower conception of an acquittal and the manner in which juries historically used acquittals. See *Jones*, 526 U. S., at 245–246; see also *Blakely*, 542 U. S., at 305–306 (jury trial "is no mere procedural formality, but a fundamental reservation of power in

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[3] The history and nature of acquittals distinguishes the narrow question of acquitted-conduct sentencing from broader questions posed by JUSTICE ALITO about the other kinds of facts judges may consider at sentencing.

[4] Many sentencing courts throughout history have thus gone without acquitted conduct and various States have expressly limited such consideration for decades. See *Cote*, 129 N. H., at 375–376, 530 A. 2d, at 785; *Jefferson*, 256 Ga., at 827, 353 S. E. 2d, at 474; *Marley*, 321 N. C., at 424–425, 364 S. E. 2d, at 138–139. This suggests that JUSTICE ALITO's workability concerns may not be as dire as he fears.

our constitutional structure"). Further, an acquittal could also 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. The fact is that even though a jury's specific reasons for an acquittal will typically be unknown, the jury has formally and finally determined that the defendant will not be held criminally culpable for the conduct at issue. So far as the criminal justice system is concerned, the defendant "has been set free or judicially discharged from an accusation; released from a charge or *suspicion* of guilt." *State* v. *Marley*, 321 N. C. 415, 424, 364 S. E. 2d 133, 138 (1988) (internal quotation marks and alterations omitted).

There are also concerns about 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. Even defendants with strong cases may understandably choose not to exercise their right to a jury trial when they learn that even if they are acquitted, the State can get another shot at sentencing.

Finally, acquitted-conduct sentencing also raises questions about the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system. Various jurists have observed that the woman on the street would be quite taken aback to learn about this practice. See, *e.g.*, *United States* v. *Canania*, 532 F. 3d 764, 778 (CA8 2008) (Bright, J., concurring).

This is also true for jurors themselves. One juror, after learning about acquitted-conduct sentencing, put it this way: "'We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice . . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not

given their proper weight. It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty.'" *Id.*, at 778, n. 4. In this Nation, juries have historically been venerated as "a free school . . . to which each juror comes to learn about his rights." 1 A. de Tocqueville, Democracy in America 316 (A. Goldhammer transl. 2004). One worries about the lesson jurors learn from acquitted-conduct sentencing.

The Court's denial of certiorari today should not be misinterpreted.[5] The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year. If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.

[5]The Court today will deny certiorari in a series of similar cases involving acquitted-conduct sentencing, and the issues discussed here apply to those cases as well.