SUPREME COURT OF NEW JERSEY
DOCKET NO. 083298

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Certification from a Judgment of the Superior Court of,
v.	:	New Jersey, Appellate Division.
MARK MELVIN,	:	Sat Below:
Defendant-Petitioner.	:	Hon. Carmen Messano, P.J.A.D. Hon. Douglas M. Fasciale, J.A.D.
	:	Hon. Lisa Rose, J.A.D.

**BRIEF ON BEHALF OF DEFENDANT-PETITIONER
IN RESPONSE TO THE BRIEF OF
THE ATTORNEY GENERAL AS AMICUS CURIAE**

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DEFENDANT IS CONFINED

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SENTENCING A DEFENDANT BASED ON CONDUCT A JURY ACQUITTED HIM OF COMMITTING VIOLATES DUE PROCESS, FUNDAMENTAL FAIRNESS, AND THE RIGHT TO A TRIAL BY JURY.

In its brief, the Attorney General purports to answer the question of whether "a judge, in imposing an individualized sentence within the applicable sentencing range for a defendant's convicted crimes, [can] consider the full context of those crimes . . . ." (AG 3) (emphasis added)[1] In doing so, the Attorney General performs a sleight of hand by functionally redefining "those crimes" as "any conduct," including conduct constituting a crime a defendant was acquitted of committing, as long as a judge believes there is credible evidence in the record that the defendant is guilty of that crime. In commingling the two concepts—the crimes a defendant has actually been convicted of and the crimes a judge thinks the defendant committed—the Attorney General disrespects the special constitutional significance of an acquittal and the core constitutional role of the jury. The Attorney General's invitation to reduce acquittals and juries to mere speedbumps on the way to a judge's own determination of a defendant's criminal culpability must be rejected.

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[1] AG - Brief of the Attorney General as amicus
Dsa - appendix to defendant-petitioner's supplemental brief

A. The Attorney General Fundamentally Misapprehends The Constitutional Significance Of An Acquittal.

Mark Melvin has maintained his innocence of the shooting at the center of this case for the eight years since he was arrested. He therefore chose go to trial not once, but twice, to let a jury of his peers determine his guilt. At the end of the second trial, he heard what are perhaps the two most important words in the legal system, and certainly the two most important words he had heard in his life: "Not Guilty."

In the Attorney General's view, however, those words are not so important. Instead, those words are a mere technicality. Because the standard of proof is higher at trials than at sentencing, the Attorney General argues that there is nothing problematic about considering at sentencing what the jury rejected at trial. But the law is not a math problem, resolved by the different percentages given to two different concepts. The law protects substantive values and seeks justice, which cannot be promoted by the Attorney General's "gotcha" approach, in which a defendant who believes he has prevailed at trial learns at sentencing that he can be guilty again when the judge imposes punishment due to differing standards of proof.

An acquittal means that a defendant is cloaked again with the presumption of innocence, which cannot be pierced to punish him at sentencing. While the same logic may not apply in the

context of uncharged conduct or conduct that resulted in a hung jury, "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." People v. Beck, 939 N.W.2d 213, 225 (Mich. 2019). Relying on differing standards of proof to punish a defendant for acquitted conduct at sentencing is constitutionally intolerable because "conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process." Ibid.

Moreover, by punishing a defendant on the basis that he committed an offense he was not convicted of committing unconstitutionally uncouples punishment from proof of guilt beyond a reasonable doubt. "[T]he whole reason the Constitution imposes that strict beyond-a-reasonable-doubt standard is that it would be constitutionally intolerable, amounting 'to a lack of fundamental fairness,' for an individual to be convicted and then 'imprisoned for years on the strength of the same evidence as would suffice in a civil case.'" United States v. Bell, 808 F.3d 926, 930 (D.C. Cir. 2015) (quoting In re Winship, 397 U.S. 358, 364 (1970)) (Millett, J., concurring). "In other words, proof beyond a reasonable doubt is what we demand from the government as an indispensable precondition to depriving an

individual of liberty for the alleged conduct." Ibid. (emphasis in original). Properly adjudicated guilt is a prerequisite to punishment in our system. When a defendant is punished on the basis of guilt found by one man using a preponderance-of-the-evidence standard, that fundamental principle is violated. Thus, the issue is not, as the Attorney General frames it, whether there is "competent, credible[,]" "relevant and trustworthy" evidence in the record that the defendant committed a crime. (AG 1-3, 21, 22, 24, 25, 33, 34, 43, 45, 53, 55) The issue is that it is constitutionally intolerable to sentence a defendant for crimes a jury acquitted him of, regardless of any judge's view on the evidence that was presented to the jury.

While the Attorney General is correct that federal courts have not yet embraced the outcome urged here, there is no need for this Court to perpetuate the mistakes of these courts. In coming to the conclusion that the use of acquitted conduct at sentencing violates due process, the Michigan Supreme Court noted "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." Beck, 939 N.W.2d at 225 (listing cases and law review articles arguing that the use of acquitted conduct at sentencing is unconstitutional); (Dsa) 13-15 (same). Because this Court has never condoned the use of acquitted conduct at sentencing,

discussed further in subsection C, infra, this Court should not hesitate to reach the correct conclusion here, notwithstanding the misguided, heavily criticized, and unjust practices of other jurisdictions.

This Court has never hesitated to do the right thing even if that means being the only jurisdiction to do so. See e.g., State v. J.L.G., 234 N.J. 265, 288-306 (2018) (departing from decades of precedent to bar the admission of Child Sexual Assault Accommodation Syndrome because the admission of unreliable evidence is unlawful and unfair, despite the fact that the overwhelming number of other jurisdictions allow the testimony); State v. Henderson, 208 N.J. 208, 285-288 (2011) (holding that the federal test for the admissibility of eyewitness identifications violates due process and becoming the first jurisdiction in the nation to require an updated, scientific standard, despites decades of use of the federal standard and reams of precedent upholding it). And this Court has never hesitated to give more protection to individual liberties than the federal system, especially when it comes protecting the rights of criminal defendants. See, e.g., State v. K.P.S., 221 N.J. 266, 281 (2015) (departing from federal courts and finding right to be heard in an appeal under state constitutional due process and noting that "Article I, Paragraph 1 of our State Constitution provides due process protections

that may exceed those guaranteed by the Federal Constitution"); Henderson, 208 N.J. at 285, n.10; Doe v. Poritz, 142 N.J. 1, 108-09 (1995) (listing cases in which this Court has given more protections to criminal defendants under the state constitution).

Other than urging this Court to follow the ill-advised case law of other jurisdictions, the Attorney General attempts to justify the sentence imposed here by recasting what happened in this case. Rather than finding that Mr. Melvin committed the homicide he was acquitted of committing, the Attorney General urges that the judge merely "found that defendant was the shooter of the gun he was convicted of illegally possessing, not that he committed homicide." (AG 49) The Attorney General not only misstates the record, but its parsing of the record is nonsensical. People kill people; guns don't kill people. Over and over in this record, the judge found exactly that: that Mr. Melvin, while holding the gun, killed two people. See, e.g., 2T 69-17 to 19 ("[T]he facts adduced at the trial which this Court finds reliable, [show] not only did [Mr. Melvin] possess said weapon, but he used it to shoot upon three other human beings."); 2T 72-20 to 23 (noting the "evidence supporting [the court's] conclusion that Mr. Melvin not only possessed the weapon, but also utilized it to shoot 3 other individuals."). Mr. Melvin has been punished for committing murder, not for

possessing a weapon that happened to be used to shoot people. This punishment contravenes the jury's verdict.

The Attorney General also unpersuasively argues that this case is unlike State v. Tindell, 417 N.J. Super. 530 (App. Div. 2011), in which the Appellate Division held it was unlawful for a judge to sentence a defendant based on the judge's belief that the defendant had committed crimes he was acquitted of committing. In that case, according to the Attorney General, considering acquitted conduct was not appropriate because the judge used a crasser tone when taking into account the acquitted conduct. (AG 54) Because, according to the Attorney General, the judge in this case did not directly "criticize an unbefitting verdict," he was free to disregard the jury's verdict on the basis of his belief that the jury's verdict was wrong.

Contrary to the Attorney General's argument, what the judges in this case and in Tindell did was the same: stating that by acquitting the defendant of murder the jury had failed to convict someone who was in fact guilty and sentencing the defendant in accordance with the judge's belief that the defendant was the murderer. The Attorney General seems to be seeking a rule where a judge can disagree with the jury's verdict as long as the judge is polite about it. Such a rule is meaningless. When a judge thinks a verdict is wrong and sentences a defendant for crimes he believes the jury should

have found the defendant guilty of, the sentence violates due process, regardless of the judge's tone.

Tindell also highlights a danger of considering acquitted conduct that could not occur in this case merely because the judge's hands were tied because Mr. Melvin was not convicted of any other offenses: a judge being able to reach an aggregate sentence that exceeds the maximum permitted for the most serious offense of conviction (and is closer to a sentence for the crime a defendant was acquitted of committing) . The Attorney General devotes much of its brief to arguing that the sentence here is fine because it is not higher than the maximum for unlawful possession of a weapon. (AG 1, 21, 33, 36-42) But what if, as in Tindell, there were counts to run consecutively to each other to reach a sentence equivalent to one for murder? Or what if, as in another case pending in the Appellate Division, the same judge as in this case gave a defendant acquitted of murder but convicted of robbery and felony murder (as a non-slayer participant) a life sentence based on the judge's explicit finding that she was personally responsible for the murder? State v. Paden Battle, Docket No. A-001320-17 (App. Div. decision pending). The due process and fundamental fairness analysis required by this Court does not hinge on the statutory

maximum for unlawful possession of a weapon.[2] It hinges on whether the court respected the significance of the acquittal. The clear answer in this case is no.

Having prevailed at trial, the matter of Mr. Melvin's culpability for murder should be at an end: he is not guilty. Instead, the matter was resurrected at sentencing when Mr. Melvin's punishment was explicitly based on one judge's opinion — in direct disregard to the acquittal that the jury returned — that Mr. Melvin is a murderer. This Court has a choice as to whether to perpetuate the errors of other courts or to protect due process, fundamental fairness, the meaning of an acquittal, and public trust in the criminal justice system. Hopefully, in the words of the Michigan Supreme Court: "This ends here." Beck, 939 N.W.2d at 226.

B. The Attorney General Fundamentally Misapprehends The Role Of The Jury.

The Attorney General argues that as long as a defendant's sentence does not exceed the statutory maximum for the offense, there is no violation of the right to a jury trial by sentencing him based on acquitted conduct. (AG 34-42) This argument not only misconstrues the relevant Sixth Amendment inquiry, but ignores entirely that our state constitution may protect the

[2] Nor does the right to a jury analysis hinge on the statutory maximum, as will be explained in subsection B, infra.

right to a trial by jury more robustly than the federal constitution.

The only way to truly respect the right to a trial by jury is to respect the difference in the jury's and judge's roles. Simply put, the jury decides what a defendant did; a judge decides how to punish the defendant. While the latter will often require an analysis of how an offense was committed—in order to determine who the defendant is in terms of the need to deter, rehabilitate, or incapacitate—a judge oversteps when he comes to a different conclusion of what occurred. And while the line between what on one side and who and how on the other may at times get somewhat blurry, this case does not present such an occasion.

Scholars and judges have urged that this distinction—what versus who and how—is the correct way to preserve the right to a jury trial. Thus, even without resort to the Apprendi framework, which is discussed infra, this Court can and should find that the right to a trial by jury as guaranteed by the state constitution is violated when the line is crossed. What versus who, or the "Offense/Offender Distinction" is articulated in Douglas A. Berman & Stephanos Bibas, Making Sentencing Sensible, 4 Ohio St. J. Crim. L. 37, 55-58 (2006), a law review article which provides the basis of the dissent of Justices Kennedy and Breyer in Cunningham v. California, 549 U.S. 270,

297 (2007). The article explains the reason for this distinction: "The jury-trial right attaches to offense conduct and not offender characteristics because the state defines 'crimes,' accuses, and prosecutes based on what people do and not who they are . . . . Once a jury trial or guilty plea has established offense conduct, a judge may consider whether offender characteristics call for more or less punishment of that conduct." Berman and Bibas at 56.

Of course, sometimes considering offender characteristics will involve considering how the defense was committed. This relates to another distinction made by Berman and Bibas: fact versus judgment. That distinction focuses on the principle that "[j]uries are to find offense facts that mandate particular sentencing outcomes, based on a legislature's or sentencing commission's ex ante judgments. Judges are to exercise reasoned judgment at sentencing, ex post, based on relevant sentencing facts." Id. at 58. "In other words, whenever offense facts have fixed and predictable sentencing consequences, then the jury, as the preferred fact-finder, must pass on them. Judges remain authorized, however, to consider a range of facts as part of exercising reasoned judgment at sentencing." Ibid. Thus, a jury needs to find that a defendant committed murder for a judge to sentence the defendant on the basis of a factual finding that he committed the murder. But a judge can consider whether an

offense was committed in an especially cruel and heinous manner, N.J.S.A. 2C:44-1a(1), because that fact does not necessarily lead to a particular sentencing outcome, but rather simply helps guide judicial discretion at sentencing. In other words, circumstances of the offenses may have a rational relationship to the goals of criminal punishment, N.J.S.A. 2C:1-2, but cannot serve to allow a judge to find that a defendant committed a separate crime than the jury found.

A judge's use of discretion is appropriate until the judge crosses the line of how a crime was committed and passes into determining what crime was committed. In ordinary cases, keeping on the appropriate side of the line should not be challenging. Cunningham, 549 U.S. at 297 (Kennedy, J. and Breyer J., dissenting) ("The line between offense and offender would not always be clear, but in most instances the nature of the offense is defined in a manner that ensures the problem of categories would not be difficult."). Thus, contrary to the Attorney General's professed concerns, by insisting that judges display proper respect for the right to a jury trial, this Court would in no way be infringing on sentencing courts' ability to consider the "whole person." (AG 19); see also United States v. White, 551 F.3d 381, 391 (2008) (Merritt, J., dissenting) (encouraging the court to adopt the offender/offense distinction to avoid violating the right to a jury trial and explaining that

"[o]n the offender characteristics side of the divide, sentencing judges may consider all that they have heard when it comes to . . . defendants' prospects for rehabilitation, risk of future harmful conduct, and other similar considerations").

A state constitutional jurisprudence that prohibits consideration of acquitted conduct at sentencing would protect the right to a jury trial without engaging in the complicated and internally divisive Apprendi-line of cases, and defendant urges this Court to do just that. Such a jurisprudence would ban the consideration of acquitted conduct entirely and reverse any sentence based on such consideration as an abuse of discretion. See, e.g., State v. Lawless, 214 N.J. 594, 609-615 (2013) (holding that when trial court considers inappropriate evidence in imposing sentence the court violates the sentencing guidelines and the sentence must therefore be vacated). This Court has always held the right to a jury verdict in the highest esteem, a right so important that it has never been subordinated to arguments of harmless error or judicial expediency, and cannot be waived by anyone other than a defendant. See, e.g., State v. Vick, 117 N.J. 288, 292 (1989) (the requirement that the jury find every element of an offense charged beyond a reasonable doubt "is so basic and so fundamental that it admits of no exception no matter how inconsequential the circumstances"); State v. Ingenito, 87 N.J. 204, 212-213 (1981)

("The responsibility of the jury in the domain of factual findings, and ultimate guilt or innocence, is so pronounced and preeminent that we accept inconsistent verdicts that accrue to the benefit of a defendant . . . . [T]he jury in a criminal prosecution serves as the conscience of the community and the embodiment of the common sense and feelings reflective of society as a whole."). The Attorney General seeks to functionally render this sacrosanct right a nullity when it comes time to impose punishment. This result cannot stand under the New Jersey Constitution.

However, a proper application of New Jersey v. Apprendi, 530 U.S. 466 (2000) would yield the same result in this case. Apprendi stands for a simple proposition: any fact that increases the penalty to which defendant is exposed must be found by a jury, not by a judge. Id. at 490. Judicial fact-findings that expose a defendant to a harsher punishment than allowed by the jury's verdict alone violate Apprendi.

Three Justices of the Supreme Court of the United States have explained how an as-applied Apprendi challenge would operate in this context. While the explanations do not have the force of law, they are helpful guidance for how the Sixth-Amendment right should be applied in this context and how the Court may rule when it finally grants certiorari on this issue. In Rita v. United States, 414 US 338, 372 (2007), Justices

Scalia and Thomas, concurring in the judgment, explained that "for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant. Every sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment." Justice Ginsburg joined Scalia and Thomas to dissent from a denial of certiorari in Jones v. United States, 574 U.S. 948, 948-950 (2014), to further elaborate on what the Sixth Amendment prohibits: sentences that are "substantively reasonable" but for judicial fact-finding. Between the stated viewpoint of Justices Thomas and Ginsburg in Jones, Justice Breyer's position explained in Cunningham, discussed above, and now-Justice Kavanaugh's discomfort with sentencing based on acquitted conduct as articulated in United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."), it seems unlikely the practice of enhancing sentences based on acquitted conduct could survive once the current Court reviews it. Therefore, Mr. Melvin's sentence could not survive.

Mr. Melvin's sentence is not reasonable absent judicial fact-finding. Twenty years with a ten-year parole disqualifier, the absolute maximum persistent-offender term for a crime that

usually carries a sentence of five to ten years, is not reasonable when considering only what the jury found Mr. Melvin did and his personal characteristics. The sentence did not become more reasonable when it was amended to 16 years with an eight-year parole disqualifier, for two reasons. First, as discussed at length in Mr. Melvin's supplemental brief, nothing about the offense of conviction nor Mr. Melvin's personal characteristics merit this sentence. (Dsa 21-23) Second, this sentence was achieved by working backwards from the maximum sentence, which was imposed based on judicial fact-finding that Mr. Melvin committed much more serious offenses than he was convicted of. An easy way to tell that this sentence is substantively unreasonable is because the judge could only arrive at it by relying on his findings that Mr. Melvin committed murder. Therefore, logic dictates that a lesser sentence would be the only appropriate sentence for someone who did not commit two murders and an assault.

Contrary to the Attorney General's argument, the existence of a statutory sentencing range is not carte blanche for a trial court to impose any sentence within that range for any reason whatsoever. There are factors that must guide a judge's discretion when coming to an appropriate sentence for appropriate reasons. If a judge does not properly channel his discretion, the sentence cannot stand, even if it is below the

theoretical maximum a defendant could have received. See State v. Case, 220 N.J. 49, 66-70 (2014) (reversing a sentence below the statutory maximum when the judge failed to appropriately explain his reasons for rejecting mitigating factors brought to his attention). Just as a sentencing court cannot impose a sentence without any reasons, it cannot impose a sentence based on unlawful reasons. Thus, the sentence in this case cannot be shielded from review simply because it is not more than is statutorily allowed. And because the sentence is more than is substantively reasonable and it is based on inappropriate judicial fact-finding, it cannot stand.

C. Contrary To The Assertions Of The Attorney General, New Jersey Courts Do Not Have A Practice Of Sentencing Defendants Based On Acquitted Conduct.

New Jersey courts understand that consideration of acquitted conduct at sentencing is unlawful. Despite the Attorney General's assertion that our courts regularly engage in this practice, reading the cases cited by the Attorney General belies that assertion. First, this Court has never condoned the practice. State v. Marzolf, 79 N.J. 167, 184-86 (1967), a case that the Attorney General relies on heavily, is not only a pre-Apprendi case, but involves conduct dismissed as part of a plea agreement, not acquitted conduct. (AG 23) In State v. Fuentes, 217 N.J. 57, 71 (2014), this Court approved of considering the circumstances of the present offense beyond what was in the plea

bargain, not that the defendant committed an entirely different offense. (AG 23)

Second, the Appellate Division has never approved of this conduct in a published case. To the contrary, it prohibited consideration of acquitted conduct in Tindell. Of the twelve unpublished Appellate Division cases the Attorney General appends to its brief, in none of the cases did the Appellate Division come close to condoning consideration of acquitted conduct at sentencing. In those cases, a defendant contended that the sentencing court had considered acquitted conduct, and the Appellate Division either did not address that claim or held that the court had not done so.

New Jersey courts, for the most part, understand and respect the jury's role. The Attorney General, in contrast, takes issue with some of the fundamental purposes of the jury. When the Attorney General urges that sentencing courts must be able to take into account acquitted conduct because "the jury has the prerogative of acquitting or not finding guilt even in the face of overwhelming evidence," (AG 27) it is urging this court to grab more power for judges because juries might get it wrong sometimes (in the Attorney General's estimation). What the Attorney General does not seem to understand is that the power juries wield in the constitutional structure is a feature, not a bug. The "power to mitigate or nullify the law in an individual

case is no accident. It is part of the constitutional design -- and has remained part of that design since the Nation's founding." Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an era of Mandatory Sentencing, 152 U. PENN. L. REV. 33, 36 (2003); see also Jones v. United States, 526 U.S. 227, 248 (1999) ("This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part."); Beck, 939 N.W.2d at 237 ("The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Regardless of whether jury nullification is good policy, or whether there is a right to jury nullification, the fact remains that juries at the time of the founding and at present have the power to exercise jury nullification. But this power is rendered nearly meaningless if consideration of acquitted conduct is permissible.") (internal quotation marks omitted). This Court should not empower judges to prevent juries from acting as they were designed to act.

While jury nullification and mitigation are parts of a functioning jury system, this case represents a system malfunction. This case does not present an example of what the

criminal justice system should strive for, but presents an aberration that regularly takes place in one courtroom in this state. This Court must make clear that it does not condone this practice instead of acting on the Attorney General's invitation to expand it.

CONCLUSION

Considering acquitted conduct in sentencing is unjust and unconstitutional. This Court must vacate Mr. Melvin's sentence and order a resentencing in front of a judge who is not committed to punishing him for a crime he was acquitted of.

Respectfully submitted,

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