Filed Under Optional E-briefing Program

SUPREME COURT

of the

State of Connecticut

Judicial District of Hartford

S.C. 20734

STATE OF CONNECTICUT

V.

RICHARD LANGSTON

Brief of the State of Connecticut–Appellee
with attached appendix

To be argued by:

Timothy F. Costello
Senior Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5807
Fax (860) 258-5828
Juris No. 427474
timothy.costello@ct.gov
dcj.ocsa.appellate@ct.gov

Table of contents

Counterstatement of the issues

A. Did the trial court properly deny the defendant's motion to correct because consideration of conduct underlying a charge for which the jury had acquitted him did not violate his rights to due process or trial by jury?

Table of authorities

Page

Cases

Statutes

Rules of Court

Constitutional Provisions

I. Nature of the proceedings

In 1998, the defendant, Richard Langston, robbed and shot a man during a drug deal in Hartford. The State then charged him with one count each of assault in the first degree; General Statutes (Rev. to 1997) § 53a-59(a)(5); criminal possession of a firearm; General Statutes (Rev. to 1997) § 53a-217; and robbery in the first degree; General Statutes § 53a-134(a)(2). Defendant's Appendix (D.App.) at A11-A12. The State further alleged, as a sentence enhancement, that he had committed a class A, B, or C felony with a firearm; General Statutes § 53-202k. Id. Following trial, a jury found the defendant not guilty on the charge of assault in the first degree, but guilty of the remaining charges and the firearm enhancement. Id. at A5-A6. Thereafter, the court, *Spada, J.*, imposed a total effective sentence of 25 years of incarceration to run consecutive to a 10-year sentence that the defendant then was serving.[1] Id.; T.6/30/99 at 11-12.

On February 16, 2021, the defendant filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22, in which he claimed that the court had imposed his sentence in an illegal manner. He contended that the court violated his rights to due process and trial by

---

[1] The defendant pursued a direct appeal, but this Court affirmed his convictions. *State* v. *Langston*, 67 Conn. App. 903, 786 A.2d 547 (2001), cert. denied, 259 Conn. 916, 792 A.2d 852 (2002). Thereafter, he engaged in multiple rounds of habeas corpus litigation, but none succeeded. *Langston* v. *Commissioner of Correction*, 185 Conn. App. 528, 197 A.3d 1034, appeal dismissed, 335 Conn. 1, 225 A.3d 282 (2020) (certification improvidently granted); *Langston* v. *Commissioner of Correction*, 104 Conn. App. 210, 931 A.2d 967, cert. denied, 284 Conn. 941, 937 A.2d 697 (2007).

jury under the state and federal constitutions by considering conduct underlying the charge of assault in the first degree – for which the jury had found him not guilty – in crafting the sentences it imposed on the charges for which the jury had convicted him. D.App. at A13-A25. Following a hearing, on March 30, 2021, the trial court, *Graham, J.*, denied the motion to correct. Id. at A25, A31-A36.

II. Counterstatement of the facts

A. Evidence of the defendant's crimes presented at the criminal trial[2]

On March 4, 1998, at approximately 1:30 a.m., Richard Middleton was riding in a car in Hartford with his sister and her boyfriend, Douglas Shorter. T.5/18/99 at 13-15, 56. They wanted to purchase crack cocaine and were looking for someone selling the drug. Id. at 13, 16, 28, 56-57. Eventually, they pulled over near the intersection of Garden and Mather Streets. Id. at 16, 56-57.

Middleton and Shorter then exited their vehicle and walked along Garden Street to a parking lot where the defendant and a second man were standing. Id. at 16-18, 24, 31. Middleton recognized the defendant from having engaged in a prior drug deal with him. Id. at 35-36, 41. Shorter also recognized the defendant, whom he knew by the nickname "Fluff," as a dealer from whom Shorter had purchased drugs on multiple prior occasions. Id. at 57-58, 62. Using slang, Middleton and Shorter asked if the men were selling drugs. Id. at 19, 58. The defendant and his cohort acknowledged that they were. Id.

---

[2] The defendant's transcript order in this appeal includes only one day of testimony from his multi-day criminal trial. See T.5/18/99. That portion of the trial, however, includes testimony from the victim, Richard Middleton, and eyewitness Douglas Shorter detailing their respective accounts of the defendant's crimes.

Middleton and Shorter then stated that they wanted to purchase crack cocaine. Id. at 19. The defendant responded, "hold on a minute," and ran to a car at the side of the parking lot. Id. at 19-20, 32, 58-59. He reached underneath the front bumper of the car and pulled out an object. Id. at 58-59. The second man remained with Middleton and Shorter and asked where their money was. Id. at 19-20, 58. Middleton then pulled out $100 in cash. Id. at 20-21, 50-51.

The defendant eventually returned. Id. at 20. When he did so, he showed Middleton that he had a gun tucked into his waistband and commented to Middleton, "[Y]ou look like a dude that robbed me…." Id. at 20, 34, 41-42. The defendant then said, "[R]un it … run the money," which Middleton understood as a demand to give up his cash. Id. at 20, 34, 51, 60, 75-76. Middleton yielded his money to the defendant and then turned to leave. Id. at 20-21, 34, 42, 51-52, 60-61, 76.

As Middleton walked away, Shorter saw the defendant pull out his gun and fire it at Middleton.[3] Id. at 61-63, 70, 74, 77. Middleton,

---

[3] Shorter testified that he saw the defendant shoot Middleton. T.5/18/99 at 61-63, 70. While cross-examining Shorter, the defendant highlighted that Shorter's statement to police did not reflect that he had *seen* the defendant shoot Middleton; instead, it indicated only that Shorter had heard two gunshots. Id. at 70-74. Shorter, however, averred that he had told police that he saw the defendant shoot Middleton, and he further reasserted in his testimony that he had seen the defendant shoot Middleton. Id. at 73-74. Shorter then recalled that Middleton "came around the front of the car, running, hobbling, and he got into the back seat of the car and he said, [']he shot me.[']" Id. at 74. Shorter remarked, "[Middleton] was telling me something that I already knew because I seen it." Id.

in turn, heard two gunshots and then realized that he had sustained wounds to both of his legs. Id. at 21, 34-35, 37, 52-53, 77. Despite having been shot, Middleton was able to run, and he and Shorter made it to the car, where Middleton's sister was waiting. Id. at 21-23, 38, 61, 74.

Middleton's sister then drove him to a hospital, where he remained for the next three or four days. Id. at 23. Surgeons could not remove some bullet fragments from Middleton's legs, and he still bears permanent scars. Id. A bullet remains lodged in Middleton's right leg.[4] Id. at 53.

B. The defendant's sentencing

Following trial, the jury found the defendant not guilty of assault in the first degree, but guilty on the remaining charges and the firearms enhancement. D.App. at A5-A6. Thereafter, at the start of the defendant's June 30, 1999 sentencing, the trial court received a

---

[4] The defendant's criminal trial counsel's strategy challenged the State's proof as to the identity of the shooter but did not contest the fact that Middleton sustained a gunshot wound. In closing argument, "[d]efense counsel noted an inconsistency in the identification of the shooter. At trial, [Shorter] testified that he saw the [defendant] shoot the victim, but in his statement to police, [Shorter] stated that he only heard the gunshot. Defense counsel conceded on the basis of the medical evidence that the victim had been shot, but then argued: 'Remember, there were two people here that were involved in this, not just [the defendant], but his unnamed partner, who might have been his partner in a drug deal or who might have taken the gun and decided, I'm going to start shooting.'" *Langston* v. *Commissioner of Correction*, 104 Conn. App. at 220.

presentence investigation report (PSI). T.6/30/99 at 2. As summarized by the State, the PSI documented a "ten-year history of this defendant committing crimes, getting out on bail, [and] committing more crimes while out on bail…." Id. The State noted in particular that the defendant had been on probation for sale of narcotics at the time he committed the charged offenses, as well as two other drug offenses, for which he had been sentenced the previous day, June 29, 1999.[5] Id. at 2-3. Moreover, the State observed that the defendant's record revealed a pattern of increasing violence. Id. at 3. As the State remarked:

> [The defendant] starts out selling drugs, escalates to assaults on an officer and robbery and the shooting of the two victims, *one of which we had in front of your Honor*, the second case which is awaiting trial. And finally, his last offense, the April 21st, '99 offense that is still pending in Manchester involved his operating his girlfriend's car, being pulled over for a motor vehicle violation by a police officer, tried to take off, dragged the officer ten feet, broke away, the police officer had to give chase and eventually he was caught. That case is still pending. But the reason I bring it up is to show the escalating pattern of violence in this man's life and the total disregard for any authority, any police officer, any law, any restrictions that he was supposed to be abiding by while out awaiting trial.

(Emphasis added.) Id.

Turning to the defendant's instant convictions, the State further posited:

---

[5] On June 29, 1999, the defendant had received a ten-year sentence in Geographical Area No. 14 on unrelated drug charges. T.6/30/99 at 12.

> I think that the offenses in this case, which are of a very serious nature, certainly demand a serious sentence. And while he was found not guilty of the assault charges, there is that U.S. Supreme Court case: [*United States* v. *Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997),] which allows the Court to take into consideration conduct for which a defendant was acquitted if the Court finds that that conduct was proven by a preponderance of the evidence. I would certainly submit to the Court that the assault on Mr. Middleton was proven by a preponderance of the evidence and would ask the Court to take that into account in setting its sentence in this matter.
>
> Mr. Middleton is here today. He doesn't wish to directly address the Court; however, he would like me to convey to the Court his feeling that a serious jail sentence is in order here because of what was done to him. As the Court heard, he'll be carrying around pieces of lead in the back of his knees for the rest of his life. Certainly it was not a pleasant experience for him having a gun pointed in his face and being robbed of his cash in a dark parking lot on Garden Street in the north end of Hartford.

Id. at 4.

In response, the defendant's counsel conceded that the defendant had a criminal history and that there was "no question" that the court was going to impose a "fairly lengthy sentence." Id. at 5. His counsel then argued:

> However, I want to make it clear to the Court, first of all, that [the defendant] was acquitted on the shooting. A jury felt that Mr. Langston, although [he] had committed the robbery and was in possession of a firearm, might not have been the

> shooter. There was a second shooter there. So there is some doubt that remains. I would ask the Court to take that into consideration, what the jury's decision was, and in spite of [the trial prosecutor's] citing of a [S]upreme [C]ourt case, whether by preponderance of the evidence or reasonable doubt, the fact remains that he does not stand convicted of the assault for which he was charged.

Id. at 5-6. The defendant's counsel ultimately asked the court to impose a sentence on the instant charges concurrent with the sentence pronounced the previous day. Id. at 7.

Thereafter, the trial court recalled in its sentencing remarks:

> The circumstances resulting in this tragic mishap arose from a drug sale gone bad. The victim testified that in negotiating to buy an eight ball of cocaine from the defendant, after displaying his money of approximately $100, the defendant opened his exterior clothing to expose a handgun tucked into his belt. That seeing the gun, the victim, Mr. Middleton, turned about, started to walk away and was shot in the back of both legs by the defendant. Middleton, to this day, carries one of the bullets in his leg. He is effectively crippled and denied from enjoying the full quality of his life. All because this defendant elected to fire a handgun for the sake of stealing $100.00 from an unsuspecting victim. Further, Mr. Middleton has been denied the opportunity to pursue a meaningful vocational career. He is essentially unable to secure employment and must now, for the remainder of his life, be dependent on the public dole for his support and sustenance. Mr. Middleton is currently on social security disability payments and these will likely continue for the rest of his life. These payments, of course, are shouldered by the taxpayers of

> this country and these payments will likely total in the hundreds-of-thousands of dollars.
>
> ***
>
> We learned at trial that Middleton underwent four days of hospitalization and major surgeries on both of his legs. He now requires, as a relatively young man, the use of a cane to walk. In effect, his life has been stolen from him. The jury found, and I agreed with their conclusion, that the evidence established beyond a reasonable doubt the defendant's guilt in the commission of a class A, B, [or] C felony with a firearm, criminal possession of a firearm and robbery in the first degree. The evidence was telling and the witnesses credible.

Id. at 8-10.

The court then detailed the defendant's extensive criminal record, which included arrests on 28 separate criminal charges over the preceding nine years. Id. at 10-11. The court observed that, though many of those charges remained pending, the defendant's record revealed a "paucity of time served" for the charges on which he had been convicted. Id. at 11. It found that "[t]he behavior displayed by this defendant in these past criminal acts and right through the proceedings of this trial reflects an insensitive, inconsiderate, incorrigible, lack of conscience, lack of accountability and lack of empathy, all requiring the imposition of severe sanctions. Every opportunity was granted by society to this young man to shape and formulate a law-abiding life. He, clearly, has rejected and foreclosed all avenues for rehabilitation and help." Id. Thereafter, the court imposed a total effective sentence of 25 years of incarceration to run consecutive to the ten-year sentence that the defendant had received the previous day. Id. at 11-13.

C. The defendant's motion to correct

On February 16, 2021, the defendant filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22. D.App. at A13-A25. Therein, he alleged that the sentencing court had violated his right to due process under the Sixth and Fourteenth Amendments to the federal constitution and article first, § 8 of the state constitution "by taking into consideration the assault charge, of which he had been acquitted." Id. at A13. Specifically, he noted that the State had argued at trial that the court could consider the conduct underlying the assault charge if it found that conduct proven by a preponderance of the evidence and had contended that it had proven his assaultive conduct by a preponderance of the evidence. Id. at A14-A15. The defendant further observed that, in its sentencing remarks, the trial court had stated that: (1) Middleton had "started to walk away and was shot in the back of both legs by the defendant"; (2) Middleton "underwent four days of hospitalization and major surgeries on both of his legs"; and (3) "because this defendant elected to fire a handgun … [Middleton] has been denied the opportunity to pursue a meaningful vocational career." Id. at A15, quoting T.6/30/99 at 9-10. The defendant also noted that the trial court had remarked that "the evidence is telling and the witness is credible." Id., quoting T.6/30/99 at 10-11. Based upon these comments, the defendant contended that "[c]learly, the court found that [he] committed the shooting and used that in its sentencing determination." Id.

The defendant then acknowledged that, in *United States* v. *Watts*, 519 U.S. 148, the United States Supreme Court had rejected an argument that a court's reliance on acquitted conduct at sentencing violated the double jeopardy clause of the Fifth Amendment, but he contended that the Court had overruled *Watts* in *Nelson* v. *Colorado*, 581 U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017). D.App. at A16.

He further acknowledged that this Court in *State* v. *Huey*, 1 Conn. App. 724, 734, 476 A.2d 613 (1984), aff'd, 199 Conn. 121, 505 A.2d 1242 (1986),[6] and *State* v. *Whittingham*, 18 Conn. App. 406, 415-16, 558 A.2d 1009 (1989), had found that a sentencing court's consideration of, inter alia, evidence bearing on charges for which a jury had acquitted a defendant did not constitute a due process violation. D.App. at A22-A23. Nevertheless, he argued that this Court's opinions in *Huey* and *Whittingham* were over 30 years old and that subsequent cases – in particular *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), *United States* v. *Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), and *Alleyne* v. *United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) – had modified what information a court could consider at sentencing. D.App. at A23-A24. The defendant seemingly conceded, however, that, the trial court's consideration of the acquitted conduct in the instant case did not result in imposition of a sentence beyond the maximum permitted by the defendant's convictions, as required for *Apprendi* to apply. Id. at A24. Instead, he argued that "the sentencing transcript clearly show[ed] the court's reliance on the shooting in its imposition of a twenty-five year sentence, consecutive to the ten year sentence." Id.

The State filed a memorandum in opposition to the defendant's motion to correct. Id. at A26-A30. It noted that the United States Supreme Court in *Watts* had sanctioned consideration at sentencing of conduct underlying an acquitted charge because "acquittal on criminal

---

[6] The defendant failed to note in his motion that, in *State* v. *Huey*, 199 Conn. 121, 126-29, 505 A.2d 1242 (1986), our Supreme Court had affirmed this Court's holding that a sentencing court's consideration of conduct underlying a charge for which a jury acquitted a defendant does not constitute a due process violation. D.App. at A22.

charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." Id. at A26-A27, quoting *United States* v. *Watts*, 519 U.S. at 155. Moreover, the State observed that the *Watts* Court had noted that it previously had held that consideration at sentencing of facts proven by a preponderance of the evidence "generally satisfies due process." Id. at A27, quoting *United States* v. *Watts*, 519 U.S. at 156. Further, the State noted that, in *State* v. *Huey*, 199 Conn. 121, 127, 505 A.2d 1242 (1986), our Supreme Court had held that "[a]s a matter of due process, information may be considered as a basis for a sentence only if it has some minimal indicium of reliability. … As long as the sentencing judge has a reasonable, persuasive basis for relying on the information which he uses to fashion his ultimate sentence, an appellate court should not interfere with his discretion." D.App. at A27. The State then contended that testimony that the trial court had found credible satisfied this standard. Id. Finally, the State posited that this Court's decisions in *Huey* and *Whittingham* undermined the defendant's argument because both decisions had held that a sentencing court did not violate due process rights so long as the information it considered had minimal indicia of reliability. Id. at A29. Moreover, the State noted that our Supreme Court subsequently had reaffirmed this rule in *State* v. *Pena*, 301 Conn. 669, 22 A.3d 611 (2011).[7] D.App. at A29.

---

[7] The State also noted that the defendant had directed a portion of his motion to correct toward a claim that his total effective sentence was excessive, but he did not contend that it exceeded the maximum permitted by statute. D.App. at A28; see id. at A13, A20. The State argued that he could not raise such a claim in a motion to correct and, instead, he could bring that claim before the Sentence Review Division under General Statutes § 51-194 et seq. Id.

Following a hearing and argument, the trial court denied the motion to correct. Id. at A25, A31-A36; T.3/30/21 at 6-11. First, the trial court disagreed with the defendant's contention that the United States Supreme Court had overruled *Watts* in *Nelson* v. *Colorado*. T.3/30/21 at 6-8. The trial court also found *Nelson* distinguishable from the posture of the instant case. Id. The trial court then observed that, although some sister states had criticized *Watts* based upon their respective state constitutional provisions, such disagreement with *Watts* was not universal. Id. at 8. The trial court advised, "I'm going to rely on current Connecticut law." Id.

Next, the trial court observed that the defendant's sentences did not exceed the maxima allowed for the charges on which the jury had found him guilty. D.App. at A33. For that reason, it found his reliance on *Apprendi*, *Booker*, and *Alleyne* to be misplaced. Id. at A34-A35.

Thereafter, the court observed that, under *Watts*, the sentencing court properly could consider conduct underlying a charge for which the jury had acquitted the defendant, so long as the court found the conduct proven by a preponderance of the evidence. Id. at A33. In this regard, quoting from *Watts*, the court noted that, "acquittal on criminal charges does not prove that the defendant is innocent. It merely proves the existence of a reasonable doubt as to his guilt." Id. at A34, quoting *United States* v. *Watts*, 519 U.S. at 155. Further, the court noted that, in *Huey*, our Supreme Court prescribed that, "as a matter of due process information may be considered as a basis for a sentence, only if it has *some minimal indicium of reliability*" and that "there is … no simple formula for determining what information considered by a sentencing judge is sufficiently reliable to meet the requirements of due process." (Emphasis added.) Id. at A34, quoting *State* v. *Huey*, 199 Conn. at 127-28. The court then observed that the sentencing court had, in its sentencing remarks, "found the evidence to be telling

and the witnesses to be credible." Further, the sentencing court had "had ample opportunity to observe the witnesses and reach [its] own conclusions as to what occurred." Id. The court found that the sentencing court had been within its discretion in doing so here. Id. For all of these reasons, the court denied the motion to correct. Id.

III. Argument

A. The trial court properly denied the defendant's motion to correct because consideration of conduct underlying a charge for which the jury had acquitted him did not violate his rights to due process or trial by jury

The defendant claims that the trial court erred in denying his motion to correct an illegal sentence because, he contends, the court sentenced him in an illegal manner. He argues that the sentencing court's consideration of conduct underlying the charge of assault in the first degree, for which the jury had acquitted him, violated his rights to due process and trial by jury under the federal and state constitutions. Defendant's Brief (D.B.) at 6-37. Alternatively, the defendant requests that this Court reverse his sentence under its supervisory authority and prohibit sentencing courts from considering conduct underlying charges for which a jury has acquitted a defendant. Id. at 38-40.

The defendant's claim fails because it is controlled by binding precedent, which has held that, under both the federal and state constitutions, a sentencing court may consider information so long as it has some minimal indicium of reliability – including conduct underlying charges on which a jury has found a defendant not guilty. Further, recent precedents explicating the right to trial by jury, *Apprendi*, *Booker*, and *Alleyne*, have not altered the rule that a court possesses broad discretion to consider information and make findings at sentencing. Instead, those precedents have limited a court's

discretion only where a finding increases either the maximum or minimum sentence established by statute. Moreover, this Court should not impose a rule under its supervisory authority to prohibit consideration of conduct underlying charges for which a jury has returned a not guilty verdict defendant, as such a rule would frustrate sentencing courts' ability – and obligation – to craft sentences tailored to a particular defendant's specific circumstances.

1. Standard of review and relevant legal principles

Pursuant to Practice Book § 43-22, "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." "[A]n 'illegal sentence' is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory." *State* v. *Lawrence*, 281 Conn. 147, 156, 913 A.2d 428 (2007). "A sentence is imposed in an illegal manner when, [inter alia,] it is imposed in a way that violates a defendant's right … to be sentenced by a judge relying on accurate information or considerations solely in the record…." (Brackets in original omitted; quotation marks omitted.) *State* v. *Francis*, 338 Conn. 671, 679, 258 A.3d 1257 (2021). "This principle emanates from the defendant's constitutional right to due process." Id. "To establish that [a] sentence was imposed in an illegal manner, [a] defendant is required to show that the information was materially false or unreliable and that the trial court relied substantially on the information in determining the sentence." (Quotation marks omitted.) *State* v. *Santos*, 125 Conn. App. 766, 774, 9 A.3d 788 (2011).

"Ordinarily, claims that the trial court improperly denied a … motion to correct an illegal sentence are reviewed pursuant to an

abuse of discretion standard." *State* v. *Omar*, 209 Conn. App. 283, 289-90, ___ A.3d ___ (2021); see *State* v. *Francis*, 338 Conn. at 678-79 & n.8. "In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness…. [This Court] will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Brackets in original omitted.) *State* v. *Anderson*, 187 Conn. App. 569, 584, 203 A.3d 683, cert. denied, 331 Conn. 922, 206 A.3d 764 (2019); see *State* v. *Francis*, 338 Conn. at 679. When a motion to correct contains a question of law, however, this Court's review over that discrete question is plenary. See *State* v. *Bischoff*, 337 Conn. 739, 745, 258 A.3d 14 (2021); see also *Ugrin* v. *Cheshire*, 307 Conn. 364, 389, 54 A.3d 532 (2012).

2. Binding precedent controls the defendant's claims

First, the defendant's federal and state constitutional claims fail under a long line of binding precedent. In *Williams* v. *New York*, 337 U.S. 241, 244-45, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), the United States Supreme Court considered whether a New York statute permitting a sentencing court in a capital trial to consider information obtained from outside of the evidence presented at trial violated a defendant's right to due process. The Court observed that, as a historical matter, sentencing courts long had been afforded "wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within the limits fixed by law," and that this latitude had permitted sentencing courts to receive information from a wide variety of sources beyond the evidence presented at trial. Id. at 246. The Court noted that, "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a

sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by law." Id.

The Court explained that this broad discretion derived from practical concerns. Id. Specifically, "[a] sentencing judge … is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined." Id. at 247. The Court proceeded: "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." Id. Subsequently, in *Williams* v. *Oklahoma*, 358 U.S. 576, 586, 79 S. Ct. 421, 3 L. Ed. 2d 516 (1959), applying *Williams* v. *New York*, the Court likewise held that a sentencing court's consideration of facts related to a murder that was not before the court while sentencing a defendant for a kidnapping conviction did not violate the defendant's due process rights.

More recently, in *Nichols* v. *United States*, 511 U.S. 738, 747, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), the Court reiterated that, "[a]s a general proposition, a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." (Quotation marks omitted.). It again noted that, "[t]raditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant," and that "[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also

considered a defendant's past criminal behavior, even if no conviction resulted from that behavior."[8] Id.

Thereafter, in *Witte* v. *United States*, 515 U.S. 389, 397-98, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995), and *United States* v. *Watts*, 519 U.S. at 154-56, after observing the well-established broad scope of information that a sentencing court may take into account, the Court rejected double jeopardy based challenges to sentencing courts' consideration of conduct beyond charges for which juries had convicted defendants because factoring such conduct does not amount to imposing punishment on it.[9] Moreover, the *Watts* Court observed that

---

[8] Since 1970, 18 U.S.C. § 3661 has provided: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." See *United States* v. *Grayson*, 438 U.S. 41, 50 & n.10, 98 S. Ct. 2610, 57 L. Ed. 2d 582 (1978).

[9] In *Watts*, the Supreme Court observed: "Neither the broad language of [18 U.S.C.] § 3661 nor our holding in *Williams* [v. *New York*, 337 U.S. at 244-45,] suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing. Indeed, under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted.'" 519 U.S. at 152, quoting *United States* v. *Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (*Scalia, J.*). The defendant argues that the trial court's reliance on *Watts* was misplaced, and that *Watts* is not binding, because *Watts* addressed only a double jeopardy claim, not a claim regarding the rights to due process or trial by jury. D.B. at 10-11. The defendant misdirects his

a jury "cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty." 519 U.S. at 155. Likewise, the Court further noted that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." Id. at 156-57; see also *United States* v. *Powell*, 469 U.S. 57, 62-69, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984); *Dunn* v. *United States*, 284 U.S. 390, 393, 52 S. Ct. 189, 76 L. Ed. 2d 356 (1932).

Our state precedents have developed similarly. In *State* v. *Chuchelow*, 128 Conn. 323, 324, 22 A.2d 780 (1941), our Supreme Court surveyed the "wide field open to the trial judge in obtaining information, after conviction, relevant to mitigation or aggravation of the seriousness of the offense."[10] The Court advised that a sentencing court properly may consider evidence underlying a charge for which a defendant previously had been convicted but which still was pending on appeal. Id.

Subsequently, in *State* v. *Huey*, 199 Conn. at 126-27, citing *United States* v. *Sweig*, 454 F.2d 181, 184 (2d Cir. 1972), the Court stated that a sentencing court has wide discretion to consider, inter alia, evidence

---

criticism of *Watts*. Though *Watts* ultimately dispensed with a double jeopardy claim, its discussion of the law of sentencing accurately synthesized earlier precedents, dating back to *Williams* v. *New York*, which had broadly authorized sentencing courts to consider a wide range of information at sentencing, including conduct underlying acquitted charges.

[10] General Statutes § 54-91a(c), which governs presentence investigations, requires a broad inquiry into, inter alia, "the circumstances of the offense" and "any damages suffered by the victim…." Accord Practice Book § 43-4(a).

underlying charges for which a defendant has been acquitted.[11] The Court observed that, "[c]onsistent with due process the trial court may consider responsible unsworn or out-of-court information relative to the *circumstances of the crime* and the convicted person's life and circumstance." (Emphasis added.) Id. at 127, citing *Williams* v. *Oklahoma*, 358 U.S. at 584. The Court further advised that "[i]t is a fundamental sentencing principle that a sentencing judge may 'appropriately conduct an inquiry broad in scope, and largely unlimited either as to the kind of information he may consider or the source from which it may come.'" Id., quoting *United States* v. *Tucker*, 404 U.S. 443, 446, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). The Court then prescribed:

> The trial court's discretion … is not completely unfettered. As a matter of due process, information may be considered as a basis for a sentence only if it has *some minimal indicium of reliability*. As long as the sentencing judge has a reasonable, persuasive basis for relying on the information which he uses

---

[11] The *Huey* Court provided a list of the type of information that a sentencing court properly may consider: "To arrive at a just sentence, a sentencing judge may consider information that would be inadmissible for the purpose of determining guilt; … evidence of crimes for which the defendant has been indicted but neither tried nor convicted; … evidence bearing on charges for which the defendant was acquitted; … and evidence of counts of an indictment which has been dismissed by the government." (Citations omitted.) 199 Conn. at 126. Notably, the information that a court may consider is virtually identical to that which a court may consider in probation revocation proceedings. See *State* v. *Megos*, 176 Conn. App. 133, 147, 170 A.3d 120 (2017).

> to fashion his ultimate sentence, an appellate court should not interfere with his discretion.[12]

(Citation omitted; emphasis added.) Id.

After pronouncing this rule, the Court found that a court properly had considered conduct supporting an original charge of sexual assault in the first degree before imposing sentence on a charge of sexual assault in the third degree, to which the defendant had pleaded guilty as part of a plea deal in which the state had reduced the charge. Id. at 124-25, 129. Our Supreme Court has described the *Huey* rule allowing consideration of information, provided it has some minimal indicium of reliability, as a "sweeping standard." *State* v. *Bletsch*, 281 Conn. 5, 21, 912 A.2d 992 (2007).

More recently, in *State* v. *Pena*, 301 Conn. at 681-82, the Court reiterated *Huey*'s prescription that sentencing courts may consider, inter alia, "evidence bearing on charges for which the defendant was acquitted," so long as it has a "minimal indicium of reliability." The *Pena* Court expressly declined to overrule *Huey*, and it regarded *Huey* as controlling.[13] Id. at 677.

This Court likewise has articulated the rule that due process does not require a sentencing court to find information proven beyond a reasonable doubt, and that a court "may consider information largely unlimited in kind or source, so long as it has 'some minimal indicium of

---

[12] *Huey* derived the "minimal indicium of reliability" standard from federal circuit court precedent. *State* v. *Huey*, 199 Conn. at 127, citing *United States* v. *Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982).

[13] As will be discussed below, in *Pena* the Court found that state constitutional rights to due process and trial by jury did not preclude sentencing courts from considering conduct underlying acquitted charges. 301 Conn. at 677, 682.

reliability'" – including evidence of conduct underlying charges for which a jury acquitted a defendant. See *State* v. *Dickman*, 119 Conn. App. 581, 599, 989 A.2d 613, cert. denied, 295 Conn. 923, 991 A.2d 569 (2010); *State* v. *Spears*, 20 Conn. App. 410, 419-20, 567 A.2d 1245 (1989); *State* v. *Mancinone*, 15 Conn. App. 251, 288, 545 A.2d 1131, cert. denied, 209 Conn. 818, 551 A.2d 757 (1988); see also *State* v. *Harris*, 183 Conn. App. 865, 870, 193 A.3d 1223, cert. denied, 330 Conn. 918, 193 A.3d 1213 (2018); *State* v. *Ruffin*, 144 Conn. App. 387, 395-96, 71 A.3d 695 (2013), aff'd, 316 Conn. 20, 110 A.3d 1225 (2015).

Collectively, these cases have established a rule that is binding on this Court and decisive in this case. Specifically, it is controlling precedent that a trial court does not violate a defendant's federal rights to due process or trial by jury by considering information at sentencing that has some minimal indicium of reliability. Our courts have established no exceptions for acquitted conduct, or any other category of information. *Huey* and *Pena* established this rule as a matter of federal constitutional law and state constitutional law, respectively. Their sweeping rule is decisive here because the sworn testimony and trial evidence considered by the sentencing court had some minimal indicia of reliability. As this Court has held, "sworn testimony far exceeds the minimum indicia of reliability required of information relied on by a court in sentencing." *State* v. *Salters*, 194 Conn. App. 670, 680-81, 222 A.3d 123 (2019), cert. denied, 334 Conn. 913, 221 A.3d 447 (2020).

Even beyond *Huey*'s rule itself, our courts' applications of the rule are binding here. For example, in *Pena*, a jury acquitted the defendant of a charged murder and a lesser-included charge of manslaughter but found him guilty of carrying a pistol without a permit and criminal possession of a firearm. 301 Conn. at 670. At the sentencing hearing, the court commented that the convictions did not stand "in isolation,"

and remarked that, "[i]n the court's mind, [the defendant] fired that gun at [the victim]. And although the jury didn't agree with that, the court believes that he did. The evidence was that he had the gun and he shot at [the victim]." Id. at 679-80. Thereafter, the court imposed the maximum sentence available for each of his convictions and ordered the sentences to run consecutively. Id. at 680. On appeal, the *Pena* Court found that *Huey*'s standard controlled and, consequently, that consideration of evidence regarding the acquitted conduct did not violate the defendant's rights because that evidence "had the necessary minimal indicium of reliability – i.e., the presentence investigation report and sworn trial testimony." Id. at 683.

Similarly, in *State* v. *Beasley*, 29 Conn. App. 452, 452-53, 615 A.2d 1072 (1992), a jury acquitted the defendant on a charge of murder, but found him guilty of the lesser included offense of manslaughter in the first degree. At sentencing, the court noted that the jury had acquitted the defendant on the murder charge because it did not believe that the State had proven specific intent. Id. at 454. The court then remarked: "My only reply to that is that shooting a man five times in the back is pretty specific as far as I'm concerned." Id. The court subsequently imposed the maximum penalty available for the manslaughter conviction. Id. On review, this Court applied *Huey* and concluded that consideration of conduct supporting the murder charge did not violate the defendant's rights. Id. at 454-55.

"It is axiomatic that this [C]ourt, as an intermediate body, is bound by Supreme Court precedent and is unable to modify it…. [This Court is] not at liberty to overrule or discard the decisions of our Supreme Court but [is] bound by them…. It is not within [this Court's] province to reevaluate or replace those decisions." (Brackets in original omitted.) *State* v. *Negedu*, 156 Conn. App. 254, 255, 110 A.3d 1235, cert. denied, 316 Conn. 920, 113 A.3d 1016 (2015). Furthermore,

"it is axiomatic that one panel of this [C]ourt cannot overrule the precedent established by a previous panel's holding…. The reversal may be accomplished only if the appeal is heard en banc." (Brackets in original omitted.) *State* v. *Hazard*, 201 Conn. App. 46, 68 n.6, 240 A.3d 749, cert. denied, 336 Conn. 901, 242 A.3d 711 (2020). Based on the aforementioned precedents alone, the defendant's claim fails because the facts of the instant case are indistinguishable from them.

Despite the evident controlling force of *Huey*, *Pena*, and their ancestors and progeny, the defendant argues that his claim is viable because: (1) *Huey*'s approval of consideration of conduct underlying an acquitted charge was nonbinding dicta; (2) *Pena* relied upon *Huey*'s nonbinding dicta; and (3) *Pena* is inapposite to his federal constitutional claim insofar as it was decided only under our state constitution. D.B. at 9 & n.5, 26-29. The defendant's contentions fly wide of the mark.

First, the defendant's criticism that *Huey*'s discussion of acquitted conduct was mere dicta takes too narrow a view of *Huey*'s holding. As mentioned previously, *Huey* implemented a sweeping standard for determining what, out of the broad range of information that may come before a sentencing court, such a court properly may consider in exercising its discretion to fashion an appropriate sentence. The rule is straightforward – any information that has some minimal indicium of reliability satisfies due process. *State* v. *Huey*, 199 Conn. at 127. That sweeping rule is not dicta.

Viewed through that prism, it is plain that, though *Huey* did not concern acquitted conduct specifically, it articulated a rule permitting consideration of evidence regarding acquitted conduct because such information presented at trial through sworn testimony has the requisite minimal indicium of reliability. See *State* v. *Pena*, 301 Conn. at 683; *State* v. *Salters*, 194 Conn. App. at 680-81; see also *State* v.

Morales, 33 Conn. App. 184, 196, 634 A.2d 1193 (1993) ("due process is implicated only when the information to be considered lacks some minimal indicium of reliability." (Quotation marks omitted.)), rev'd on other grounds, 232 Conn. 707, 657 A.2d 585 (1995).

Second, *Pena* did not rely upon nonbinding dicta. Instead, *Pena* correctly applied *Huey*'s sweeping, binding rule and found that, because sworn testimony has some minimal indicium of reliability, a sentencing court properly may consider such testimony, even if it related to conduct underlying acquitted charges.

Third, the fact that *Pena* sanctioned the consideration of acquitted conduct at sentencing under the state constitution does not preclude it from constituting binding precedent as to the defendant's federal constitutional claim. *Pena* simply articulated *Huey*'s sweeping rule as also guiding state constitutional analysis. Together, therefore, *Huey* and *Pena* have occupied the field of federal and state constitutional claims regarding the consideration of acquitted conduct at sentencing.

Moreover, it is illogical to read *Pena* as not speaking to the federal question. It is now well established that the federal constitution establishes "a minimum national standard for the exercise of individual rights," but states may provide "higher levels of protection for such rights" as a matter of state constitutional law. *State* v. *Geisler*, 222 Conn. 672, 684, 610 A.2d 1225 (1992); see also *State* v. *Kono*, 324 Conn. 80, 144-46, 152 A.3d 1 (2016) (*Zarella, J.*, concurring). It would be peculiar for our Supreme Court in *Pena* to have issued an opinion finding that our state constitution provides lesser protection than its federal counterpart and upheld a sentence on that basis in the face of a state constitutional claim, especially where the Court plainly was cognizant of its prior decision in *Huey* and the state and federal

precedents that underlay it, and applied it in its decision.[14] For all of these reasons, *Huey*, *Pena*, and *Beasley* control the defendant's claims.

3. *Apprendi*, *Booker*, and *Alleyne* have not limited sentencing courts' ability to consider acquitted conduct

Next, the defendant suggests that *Watts*, *Huey*, and *Pena* lack precedential value because of developments in federal law in *Apprendi*, *Booker*, and *Alleyne*. D.B. at 15, 34. His argument lacks merit. Those precedents only limited a sentencing courts' ability to find facts where such findings either increase an available sentencing range beyond the maximum otherwise provided by statute or increase the mandatory minimum sentence applicable to a conviction. Neither circumstance is present here.

---

[14] As previously noted, *Huey* adopted its rule as a matter of federal constitutional law. The *Pena* Court decided the matter as a question of state constitutional law. 301 Conn. at 677, 682. Although the *Pena* Court did not engage in analysis within its opinion under the factors prescribed in *State* v. *Geisler*, 222 Conn. at 685, for determining whether the state constitution provides greater protections than the federal constitution, the parties had briefed the claim under those factors, as well as under the federal constitution. See *State* v. *Pena*, Conn. Supreme Court Records & Briefs, April Term, 2011, Appellant's Brief pp.13-34; id., Appellee's Brief pp. 19, 30-34. Because the *Pena* Court acknowledged that it was deciding a state constitutional claim, but nevertheless found *Huey*'s application of federal precedent to be controlling, it necessarily follows that our Supreme Court found that the state constitutional protections are coextensive with their federal counterparts.

In *Apprendi*, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490; accord *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). The Court subsequently clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. … In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without additional findings." (Citations omitted; emphasis in original omitted.) *Blakely* v. *Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); see also *Cunningham* v. *California*, 549 U.S. 270, 274-75, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). More recently, in *Alleyne*, the Court extended *Apprendi*'s rule to facts that establish or increase a mandatory minimum sentence. 570 U.S. at 108.

Subsequently, in *Booker*, the Court found that provisions of the federal sentencing guidelines that mandated an upward departure from the guidelines range upon the finding of certain facts by the sentencing judge violated *Apprendi*. 543 U.S. at 235-37. The Court found the mandatory aspects of the guidelines unconstitutional and, as a remedy, deemed the federal sentencing guidelines advisory. Id. at 258-65; see *Beckles* v. *United States*, 580 U.S. ___, 137 S. Ct. 886, 894, 197 L. Ed. 2d 145 (2017); *United States* v. *Magallanez*, 408 F.3d 672, 682-85 (10th Cir.), cert. denied, 546 U.S. 955, 126 S. Ct. 468, 163 L. Ed 2d 356 (2005).

The Supreme Court, however, has never held that facts that a sentencing judge considers in determining a sentence within a discretionary range authorized by a conviction must be proven beyond

a reasonable doubt and found by a jury. See *United States* v. *Booker*, 543 U.S. at 233 ("when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"). Instead, the propriety of a sentencing court's finding facts and exercising discretion related thereto is determined by reference to the historic roles played by the jury and the trial court. See *Oregon* v. *Ice*, 555 U.S. 160, 167-69, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009); *State* v. *Watson*, 339 Conn. 452, 464-65, 261 A.3d 706 (2021). Where a finding historically has not been one reserved for a jury, a court's making of such a finding will not invade the jury's province or violate the right to trial by jury, so long as the finding does not increase either the mandatory minimum or statutory maximum sentence applicable to a conviction. See *Oregon* v. *Ice*, 555 U.S. at 168-69 (finding court did not violate *Apprendi* by finding facts supporting discretionary decision to impose consecutive sentences); see also *State* v. *Watson*, 339 Conn. at 474-76.

As discussed above, "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed *within the limits fixed by law*." (Emphasis added.) *Williams* v. *New York*, 337 U.S. at 246; see also *State* v. *Chuchelow*, 128 Conn. at 324. The historic pedigree of sentencing courts' consideration of even acquitted conduct in exercising their discretion to set a sentence within the limits fixed by law establishes that *Apprendi* and its progeny do not preclude consideration of such information at sentencing. Indeed, numerous courts have found that the *Apprendi* rule does not preclude courts from considering acquitted conduct in determining an appropriate sentence

for convicted charges. See *United States* v. *Crosby*, 397 F.3d 103, 112 (2d Cir. 2005) (observing that "with the mandatory use of the [federal sentencing] Guidelines excised [post-*Booker*], the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection"), cert. denied, 549 U.S. 915, 127 S. Ct. 260, 166 L. Ed. 2d 202 (2006); *United States* v. *Brika*, 487 F.3d 450, 459 (6th Cir. 2007) (noting "other circuits have seen no reason to disturb *Watts*'s holding in *Booker*'s wake"; collecting cases), cert. denied, 552 U.S. 938, 128 S. Ct. 341, 169 L. Ed. 2d 239 (2007); *United States* v. *Mercado*, 474 F.3d 654, 657 (9th Cir. 2007) (noting and joining "parade of authority" holding that *Booker* did not alter consensus that consideration of acquitted conduct comports with due process; collecting cases), cert. denied, 552 U.S. 1297, 128 S. Ct. 1736, 170 L. Ed. 2d 542 (2008); *United States* v. *Todd*, 515 F.3d 1128, 1137-38 (10th Cir. 2008) (discussing *Booker*'s lack of impact on *Watts*) (*Gorsuch, J.*); see also *United States* v. *Dorcely*, 454 F.3d 366, 372-73 (D.C. Cir.) (analyzing *Booker*, finding "[w]hile the Court did not expressly address the sentencing court's consideration of acquitted conduct, we believe its language is broad enough to allow consideration of acquitted conduct…."), cert. denied, 549 U.S. 1055, 127 S. Ct. 691, 166 L. Ed. 2d 518 (2006); *People* v. *Rose*, 485 Mich. 1027, 1028 & n.3, 776 N.W.2d 888 (2010) (*Kelly, C.J.*, dissenting from denial of certification) (noting "every federal circuit that has considered the issue since *Watts* has concluded that the use of acquitted conduct at sentencing is constitutional; collecting cases). This is so because it is well established that "consideration of information about [a] defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Witte* v. *United States*, 515 U.S. at 401.

Here, the trial court's consideration of conduct underlying the charge of assault in the first degree, and its belief that the defendant shot the victim, did not violate the defendant's right to trial by jury because the court's consideration of those facts, and its factoring of them into its sentencing discretion, did not alter the statutory limits applicable to the sentences it could impose pursuant to the defendant's convictions. See *United States* v. *Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005) ("district courts may find facts relevant to sentencing by a preponderance of the evidence, even where the jury acquitted the defendant of that conduct, as long as the judge does not impose (1) a sentence in the belief that the [federal sentencing guidelines] are mandatory, (2) a sentence that exceeds the statutory maximum authorized by the jury verdict, or (3) a mandatory minimum sentence … not authorized by the verdict"), cert. denied, 547 U.S. 1060, 126 S. Ct. 1665, 164 L. Ed. 2d 405 (2006). Thus, the sentencing court did not violate the defendant's right to trial by jury by taking cognizance of conduct underlying his acquitted charge while exercising its sentencing discretion. See *Gardner* v. *Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (observing defendant "has no substantive right to a particular sentence within the range authorized by statute…."); see also *United States* v. *Ulbricht*, 858 F.3d 71, 128 (2d Cir. 2017) ("[a] district court may consider as part of its sentencing determination uncharged conduct proven by a preponderance of the evidence as long as that conduct does not increase either the statutory minimum or maximum available punishment"), cert. denied, ___ U.S. ___, 138 S. Ct. 2708, 201 L. Ed. 2d 1099 (2018); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.) ("[t]o argue that the presumption of innocence is affronted by considering unproved criminal activity [at sentencing] is as implausible as taking the double jeopardy clause to bar reference to

past convictions"), cert. denied, 382 U.S. 843, 86 S. Ct. 89, 15 L. Ed. 2d 84 (1965).[15]

Notably, the defendant does not – and cannot – claim that his sentences are illegal because they exceed the maximum limits set by statute. The sentences imposed fall within the ranges authorized by each of his convictions and the firearm enhancement, which the jury found proven beyond a reasonable doubt. Specifically, on the defendant's conviction for robbery in the first degree; General Statutes § 53a-134(a)(2); a class B felony, the court imposed a 15-year period of incarceration, which the court enhanced by adding an additional five years of incarceration, as authorized by the jury's adjudication of the

---

[15] One court has observed that "*Watts* notes that proof by a preponderance of the evidence would satisfy due process, but the Court did not say that due process requires it. Rather, in *Watts*, it was the federal sentencing guidelines that required proof by a preponderance of the evidence[; see U.S.S.G. § 6A1.3, commentary;] and the Court only considered whether a higher standard – such as clear and convincing evidence – was constitutionally required. Thus, *Watts* was not an attempt to establish the bottom limit of constitutional propriety, it merely held that a preponderance of the evidence standard of persuasion was constitutionally acceptable, even for acquitted conduct." *Graham* v. *Skipper*, 2021 WL 4582162, *8 (W.D. Mich. Oct. 6, 2021); see also *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986) (observing "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all"); *United States* v. *Magliano*, 336 F.2d 817, 822 (4th Cir. 1964) ("[a]fter conviction, everything of possible pertinency may be considered, though it has no competency as proof of what it purports to indicate").

firearms enhancement; General Statutes § 53-202k. T.6/30/99 at 11-12. On the defendant's conviction for criminal possession of a firearm; General Statutes (Rev. to 1997) § 53a-217; a class D felony, the court imposed a consecutive five-year period of incarceration. T.6/30/99 at 12. The defendant's convictions alone authorized these sentences. See General Statutes (Rev. to 1997) § 53a-35a; see also General Statutes (Rev. to 1997) §§ 53a-28, 53a-37. Thus, the court's consideration of the defendant's conduct and the circumstances of the crimes for which he stood convicted merely informed the court's exercise of its discretion within the sentencing ranges authorized by statute and did not offend the defendant's right to trial by jury.

4. Consideration at sentencing of conduct underlying acquitted charges does not violate federal rights to due process or trial by jury

If this Court were to conclude that *Watts* has no application beyond the double jeopardy context, the defendant's claim still lacks merit. First, even before *Watts*, as a matter of federal constitutional law, sentencing courts properly could consider such conduct. Second, to the extent that some courts have criticized reliance on acquitted conduct at sentencing, those courts by and large have addressed sentencing regimes that more closely resemble the federal sentencing guidelines, whereas Connecticut's sentencing statutes provide straightforward, narrowly-defined ranges within which sentencing courts may exercise discretion to impose an appropriate sentence.

First, consideration of acquitted conduct at sentencing has a well-established history that significantly predates *Watts*. For example, 25 years before *Watts*, after surveying *Williams* v. *New York* and its progeny, the Second Circuit remarked:

> [J]ust as the sentencing judge may rely upon information as to crimes with which the defendant has been charged but not tried … so too … [a] judge could properly refer to the evidence introduced with respect to crimes of which the defendant was acquitted. Acquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant. For all that appears in the record of the present case, the jury may have believed all such evidence to be true, but have found that some essential element of the charge was not proved. In fact the kind of evidence here objected to may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn, since unlike hearsay, the evidence involved here was given under oath and was subject to cross-examination and the judge had the opportunity for personal observation of the witnesses.

United States v. *Sweig*, 454 F.2d at 184. Numerous other courts, prior to *Watts*, also had held that sentencing courts properly could consider conduct underlying a charge for which a jury had acquitted a defendant. See *United States* v. *Mocciola*, 891 F.2d 13, 16-17 (1st Cir. 1989); *United States* v. *Isom*, 886 F.2d 736, 738 & n.3 (4th Cir. 1989); see also *United States* v. *Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985) (observing *Sweig* cited as controlling in circuits where considered; collecting cases). Any suggestion that reliance on *Watts* puts the State's argument on weak footing, therefore, is meritless, as *Watts* was derivative of earlier cases on point.

Next, much of the discord regarding whether consideration of acquitted conduct may offend rights to due process or trial by jury – including many opinions relied upon by the defendant – derives from concern in federal precedents as to how such consideration may impact

determination of a defendant's offense level or guidelines range under the (formerly mandatory) federal sentencing guidelines. See *United States* v. *Watts*, 519 U.S. at 165-68 (Stevens, J., dissenting); *United States* v. *Bell*, 808 F.3d 926, 927-28 (D.C. Cir. 2015) (*Kavanaugh, J.*, concurring in denial of rehearing en banc) (criticizing use of acquitted conduct in "structured or guided-discretion sentencing regimes"; recommending district courts depart downward from guidelines range suggested by acquitted conduct); id. at 931 (*Millett, J.*, concurring in denial of rehearing en banc) (criticizing use of acquitted conduct where "the sentence imposed so far exceeds the Guidelines range warranted for the crime of conviction itself that the sentence would likely be substantively unreasonable unless the acquitted conduct is punished too"); see also *Jones* v. *United States*, 574 U.S. 948, 948, 135 S. Ct. 8, 190 L. Ed. 2d 279 (2014) (Scalia, J., dissenting from denial of certification) (criticizing use of acquitted conduct to "impose[] sentences that petitioners say were many times longer than those the Guidelines would otherwise have recommended"); cf. *United States* v. *Bagcho*, 923 F.3d 1131, 1141 (D.C. Cir. 2019) (*Millett, J.*, concurring) (noting acquitted conduct considered by sentencing court did not alter base offense level in case under federal sentencing guidelines), cert. denied, ___ U.S. ___, 140 S. Ct. 2677, 206 L. Ed. 2d 827 (2020).[16]

Connecticut's sentencing statutes are wholly dissimilar from the labyrinthine federal sentencing guidelines, in that our statutes

---

[16] The federal sentencing guidelines prescribe an interconnected metric from which a sentencing court receives guidance as to the sentencing range applicable and the circumstances in which the court may depart from the guidelines range. See U.S.S.G. §§ 1B1.1, 1B1.2, 1B1.3, 1B1.4, 1B1.5. As noted, in 2005, in *United States* v. *Booker*, 543 U.S. at 245, the Court declared the federal guidelines advisory.

prescribe a set sentencing range for each offense or enhancement found proven by a jury within which a judge may exercise discretion to craft an appropriate sentence. General Statutes § 53a-35a. In contrast, the federal guidelines prescribe a multi-factor metric for determining a guidelines range and then whether and to what degree a sentencing judge may depart from that range. In such a complex sentencing regime, consideration of a single fact will more significantly inform a trial court's exercise of sentencing discretion and the reasonable scope of that discretion. See *United States* v. *Mobley*, 956 F.2d 450, 458-59 (3d Cir. 1992); *United States* v. *Alvarez*, 168 F.3d 1084, 1088 (8th Cir. 1999). Nevertheless, despite some criticism, it remains permissible as a matter of federal precedent regarding the federal sentencing guidelines for a sentencing court to consider acquitted conduct. See *United States* v. *White*, 551 F.3d 381, 384-85 (6th Cir. 2008) (finding considering acquitted conduct permissible where sentencing guidelines advisory), cert. denied, 556 U.S. 1215, 129 S. Ct. 2071, 173 L. Ed. 2d 1147 (2009); accord *United States* v. *Martinez*, 769 Fed. Appx. 12, 16-17 (2d Cir. 2019), cert. denied, ___ U.S. ___, 140 S. Ct. 1128, 206 L. Ed. 2d 191 (2020). This is so because, pursuant to *Apprendi* and its progeny a fact need only be found by a jury where that fact will alter the sentencing range beyond that otherwise authorized by the conviction.

Similarly, the state precedents relied upon by the defendant, in which courts have found violations of federal rights to due process and trial by jury in a sentencing court's consideration of acquitted conduct, deal with departures from statutorily prescribed sentencing guidelines. For example, in *State* v. *Marley*, 321 N.C. 415, 421-22, 364 S.E.2d 133 (1988), a sentencing court considered conduct underlying an acquitted charge as an aggravating factor that permitted the court to depart upward from the statutorily-prescribed range. In the pre-*Apprendi* era, the North Carolina Supreme Court found that doing so violated

the defendant's right to be presumed innocent. Id. at 424-25. In the post-*Apprendi* era, the reliance on that same acquitted conduct would have been regarded as violative of the right to trial by jury because the acquitted conduct, when treated as satisfaction of an aggravating factor, increased the defendant's sentence beyond the base sentence prescribed by statute.

Likewise, in *State* v. *Koch*, 107 Haw. 215, 224, 112 P.3d 69 (2005), a sentencing court relied upon acquitted conduct to trigger the court's ability to impose two maximum statutorily prescribed mandatory minimum sentences. In finding the practice improper, *Koch* seemingly anticipated *Alleyne*'s rule before *Alleyne* was decided.

In *People* v. *Beck*, 504 Mich. 605, 610, 939 N.W.2d 213 (2019), a defendant faced a state sentencing guidelines range of 22 to 76 months under a charge for which a jury had convicted him.[17] However, after the court considered conduct underlying, inter alia, a murder charge for which the jury had acquitted the defendant, the court departed from that guidelines range and imposed a sentence of 240 to 400 months of incarceration. Id. at 610-12. Against this backdrop, the *Beck* court concluded that, where a jury has acquitted a defendant on a charge, "conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard

[17] Michigan's sentencing guidelines are advisory, to the extent that, after the United States decided *Booker*, the Michigan Supreme Court deemed its formerly-mandatory guidelines to be advisory. *People* v. *Beck*, 504 Mich. at 616, citing *People* v. *Lockridge*, 498 Mich. 358, 399, 870 N.W.2d 502 (2015).

without violating due process."[18] Id. at 627. The *Beck* court, however, conceded that its holding represented the minority position. Id. In any event, *Beck*'s outcome appears to have been compelled by the dramatic change that the consideration of the acquitted conduct wrought to the guidelines range, rather than an underlying theory that the consideration of acquitted conduct is never permissible.

Finally, among the cases cited by the defendant, *State* v. *Cote*, 129 N.H. 358, 530 A.2d 775 (1987), is arguably the most favorable to his position. The New Hampshire Supreme Court found that a sentencing court abused its discretion by considering conduct underlying acquitted charges in determining the sentence to impose on the defendant's convictions. Id. at 375-76. *Cote*, however, misread the United States Supreme Court's decision in *Townsend* v. *Burke*, 334 U.S. 736, 739-40, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948) – which had found error in a court's reliance on *erroneous* information that a defendant had previously been convicted of certain crimes when he had been acquitted – as standing for the proposition that a court could not consider acquitted conduct. Moreover, *Cote* predated *Apprendi* and its progeny. Therefore, it did not have the benefit of the United States Supreme Court's guidance that the constitutional requirement of a jury trial and proof beyond a reasonable doubt applies only to a fact

---

[18] *Beck*, however, further provided that, "[w]hen a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard." 504 Mich. at 626. *Beck* permits sentencing courts to find uncharged conduct, "[u]nless … those findings mandate an increase in the mandatory minimum or statutory maximum sentence," which circumstance is governed by *Apprendi* and *Alleyne*. Id. at 626 n.22.

that is "legally essential to the punishment"; *Blakely* v. *Washington*, 542 U.S. at 313; i.e., "any fact that exposes a defendant to a greater potential sentence" than is authorized by the guilty verdict alone. *Cunningham* v. *California*, 549 U.S. at 281.

In contrast to the state cases relied upon by the defendant, numerous other states have held that sentencing courts may consider conduct underlying acquitted charges. See *Peterson* v. *Anchorage*, 500 P.3d 314, 325 (Alaska App. 2021); *State* v. *Kelly*, 122 Ariz. 495, 498-99, 595 P.2d 1040 (App. 1979); *People* v. *Towne*, 44 Cal.4th 63, 86-88, 78 Cal. Rptr. 3d 530, 186 P.3d 10 (2008); *People* v. *Phong Le*, 74 P.3d 431, 435 (Colo. App. 2003); *Williams* v. *United States*, 106 A.3d 1063, 1071 (D.C. 2015); *Nusspickel* v. *State*, 966 So.2d 441, 445-47 (Fla. App. 2007); *People* v. *Deleon*, 227 Ill.2d 322, 340, 882 N.E.2d 999 (2008); *State* v. *Berry*, 630 So.2d 1330, 1334-36 (La. App. 1993); *Logan* v. *State*, 289 Md. 460, 481-82, 425 A.2d 632 (1981); *State* v. *Frost*, 306 N.W.2d 803, 805-06 (Minn. 1981); *State* v. *Clark*, 197 S.W.3d 598, 600-02 (Mo. 2006); *State* v. *Baldwin*, 192 Mont. 521, 524-25, 629 P.2d 222 (1981); *State* v. *Wiles*, 59 Ohio St.3d 71, 78, 571 N.E.2d 97 (1991); *State* v. *Winfield*, 23 S.W.3d 279, 282-83 (Tenn. 2000); *State* v. *Bobbitt*, 178 Wis.2d 11, 16-19, 503 N.W.2d 11 (1993). These precedents echo the analysis of our Supreme Court in *Huey* and *Pena*. They likewise compel the conclusion that *Huey* and *Pena* remain good law.

5. Consideration at sentencing of conduct underlying the charge of assault in the first degree did not violate the defendant's state constitutional rights

Next, the defendant claims that the trial court's consideration at sentencing of conduct underlying the charge of assault in the first degree violated his rights to due process and trial by jury under article first, §§ 8 and 19, of the state constitution, which he claims provide

greater protections than their federal counterparts. D.B. at 26-37. For the reasons set forth herein, the reach of the state constitutional protections is the same as that of the federal rights. Thus, as detailed in the previous section of this brief, the consideration of conduct underlying charges for which the jury acquitted the defendant did not violate his state constitutional rights.

> In determining the contours of the protections provided by our state constitution, [this Court] employ[s] a multifactor approach that [it] first adopted in *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992). The factors that [this Court] consider[s] are (1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of the constitutional framers; and (6) contemporary understandings of applicable economic and sociological norms otherwise described as public policies…. [This Court] ha[s] noted, however, that these factors may be inextricably interwoven, and not every such factor is relevant in all cases.

(Brackets in original omitted.) *State* v. *Bemer*, 339 Conn. 528, 555-56, 262 A.3d 1 (2021). Here, the *Geisler* factors weigh heavily against the defendant's claim.

a. Text of the relevant state constitutional provisions

The text of the relevant state constitutional provisions does not support the defendant's claim. Article first, § 8 provides, in pertinent part:

> In all criminal prosecutions, the accused shall have a right … to be informed of the nature of the cause of the accusation; to be confronted by the witnesses against him; … and in all

> prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law….

In turn, Article first, § 19 provides: "The right of trial by jury shall remain inviolate."

These provisions are substantively identical to their federal counterparts, which similarity compels the conclusion that their reach is coextensive. See *State* v. *Lockhart*, 298 Conn. 537, 551-52, 4 A.3d 1176 (2010) (finding similarity of text of federal and state due process clauses supported "common interpretation of the provisions"). Our Supreme Court has "narrowly described [Article first, § 19] as 'the right which every citizen has to demand a trial in that mode; or, in other words, to be secured from having a judgment rendered against him, without the intervention of the jury'" and held that "right to trial by jury encompasses the right to have the jury serve as the fact finder." See *State* v. *Alonzo*, 131 Conn. App. 1, 6, 26 A.3d 109 (citing *Beers* v. *Beers*, 4 Conn. 535, 536 (1823), and *Seals* v. *Hickey*, 186 Conn. 337, 349-53, 441 A.2d 604 (1982)), cert. denied, 303 Conn. 912, 32 A.3d 965 (2011). Our Supreme Court also has found that "[t]hat provision guarantees the right to a jury trial in all cases for which such a right existed at the time of the adoption of that constitutional provision in 1818." (Quotation marks omitted.) *L & R Realty* v. *Connecticut National Bank*, 246 Conn. 1, 9, 715 A.2d 748 (1998). The defendant has made no showing that defendants were entitled to a trial on information, such as conduct underlying charges for which a jury acquitted a defendant, upon which a court may rely at sentencing. Indeed, as discussed previously, the historic record is to the contrary. Courts at common law conducted an inquiry broad in scope in determining an appropriate sentence. See *Williams* v. *New York*, 337

U.S. at 246 (noting that historically "[o]ut-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders"). Consequently, as addressed above and as will be addressed herein, these provisions have no application where, as here, the defendant was properly tried and convicted before a jury and sentenced within the statutory limits provided for his convictions.

b. Related Connecticut precedents

Second, as the defendant acknowledges, relevant Connecticut precedents undermine his claim. Most clearly, *Pena*'s application of *Huey* has established that our state constitution does not preclude a sentencing court from considering conduct underlying charges for which a jury has acquitted a defendant in crafting an appropriate sentence for charges on which the jury convicted him and the state constitution permits consideration of such information, provided it has "some minimal indicium of reliability." *State* v. *Pena*, 301 Conn. at 677-84. Likewise, this Court too has found that consideration of information at sentencing, so long as its bears a minimal indicium of reliability, comports with state constitutional rights to due process and trial by jury. See *State* v. *Golding*, 14 Conn. App. 272, 282-83, 541 A.2d 509 (1988), rev'd on other grounds, 213 Conn. 233, 567 A.2d 823 (1989).

The defendant contends, however, that *Pena* "was based on an entirely mistaken reading of *State* v. *Huey*, [199 Conn. 121,] and should be overruled." (Bold text omitted.) D.B. at 26. Further, he argues that, because *Pena* was "erroneously decided on stare decisis grounds" under *Huey*, "the question of whether consideration of acquitted conduct violates due process and the right to a jury trial has never been subjected to the appropriate *Geisler* analysis…." Id. at 29.

The defendant's arguments are unavailing, first and foremost, because this Court, as an intermediate appellate court, lacks the authority to overrule our Supreme Court's precedent. See *State* v. *Negedu*, 156 Conn. App. at 255; see also *Stuart* v. *Stuart*, 297 Conn. 26, 45-46, 996 A.2d 259 (2010). Moreover, even if this Court were at liberty to overrule *Pena*, "[t]he doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." *State* v. *Ashby*, 336 Conn. 452, 487, 247 A.3d 521 (2020).

> Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. While stare decisis is not an inexorable command … the doctrine carries such persuasive force that [this Court] ha[s] always required a departure from precedent to be supported by some special justification.… Such justifications include the advent of subsequent changes or development in the law that undermines a decision's rationale … the need to bring a decision into agreement with experience and with facts newly ascertained … and a showing that a particular precedent has become a detriment to coherence and consistency in the law.… When a prior decision is seen so clearly as error that its enforcement is for that very reason doomed … the court should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision. In making this determination, the court should consider whether the parties acted in reliance on the rule at issue.

(Brackets in original omitted; citations omitted; quotation marks

omitted.) *State* v. *Petion*, 332 Conn. 472, 503-04, 211 A.3d 991 (2019) (plurality); see also *State* v. *Evans*, 329 Conn. 770, 805-06, 189 A.3d 1184 (2018) ("[f]actors that may justify overruling a prior decision interpreting a statutory provision include intervening developments in the law, the potential for unconscionable results, the potential for irreconcilable conflicts and difficulty in applying the interpretation…. In addition, a departure from precedent may be justified when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants…."). The defendant has made no showing that *Pena* has proven unworkable or that it has yielded unconscionable results. See *State* v. *Ward*, 341 Conn. 142, 151 n.4, 266 A.3d 807 (2021) (declining to overrule prior precedent where, inter alia, prior decision "of relatively recent vintage" and party requesting overruling "has not identified cogent reasons why [not overruling prior decision] will result in an unworkable scheme or one that will unduly prejudice [the party]….").

Further, the defendant's contention that our Supreme Court erroneously decided *Pena* on stare decisis grounds is mistaken. As previously discussed; footnote 14, supra; the parties in *Pena* fully briefed state constitutional arguments under *Geisler*, and our Supreme Court acknowledged that it was deciding a state constitutional claim. Thus, it cannot be said that our Supreme Court decided *Pena* solely on the basis of stare decisis grounds. Instead, as argued previously, the Court necessarily found that our state constitution guarantees the same protections as the federal constitution. Related Connecticut precedent, therefore, undermines the defendant's argument.

c. Persuasive federal precedents

Third, as discussed above, relevant federal precedents wholly contradict the defendant's arguments, including his contention that consideration of conduct underlying acquitted charges fails to afford

adequate respect for the jury's role and its verdict. Contrary to a central premise of the defendant's claim, a jury's not guilty verdict does not constitute a finding that a defendant *did not* engage in the charged conduct or that the criminal acts *did not* in fact occur.

The United States Supreme Court has refuted the proposition that a jury "reject[s]" certain facts when it finds a defendant not guilty on a charge. *United States* v. *Watts*, 519 U.S. at 155. Rather, "acquittal on criminal charges does not prove the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." Id., quoting *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 361, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984). "An acquittal is not a finding of any fact. An acquittal can only be an acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences…." (Brackets in original omitted.) *United States* v. *Watts*, 519 U.S. at 155, quoting *United States* v. *Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996) (*Wallace, C.J.*, dissenting), rev'd sub nom. *United States* v. *Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997); see *United States* v. *Sweig*, 454 F.2d at 184 (noting that "[a]cquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant" and evidence of conduct underlying acquitted charge "may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn…."); see also *State* v. *Arroyo*, 292 Conn. 558, 585, 973 A.2d 1254 (2009) (noting that inconsistent verdicts permissible because jury may acquit defendant due to "mistake, compromise, or lenity").

The Court also has held that a sentencing court's consideration of facts proven by a preponderance of the evidence "generally satisfies due process." *United States* v. *Watts*, 519 U.S. at 156, citing *Nichols* v.

United States, 511 U.S. 738, 747-48, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), overruled in part by *Alleyne* v. *United States*, 570 U.S. at 124; see also *Williams* v. *New York*, 337 U.S. at 244-51. Moreover, as previously noted, virtually every federal circuit to have directly considered the question has found that consideration of conduct underlying a charge for which a jury acquitted a defendant does not violate federal rights to due process or trial by jury. See *United States* v. *Mercado*, 474 F.3d at 657 (collecting cases); *People* v. *Rose*, 485 Mich. at 1028 & n.3 (*Kelly, C.J.*, dissenting from denial of certification) (collecting cases).

d. Persuasive precedents of other state courts

Decisions of other state courts also do not support the defendant's claim. Indeed, he has presented only one state precedent finding that its state constitution forbids consideration at sentencing of conduct underlying charges for which a jury acquitted a defendant.

In *State* v. *Melvin*, 248 N.J. 321, 329-30, 335-38, 258 A.3d 1075 (2021), which involved two defendants' consolidated appeals, trial courts had considered conduct underlying charges for which juries had acquitted the defendants while imposing sentence on charges for which the juries had convicted them. In doing so, the trial courts were obliged to consider aggravating factors under New Jersey's sentencing scheme.[19] Id. The New Jersey Supreme Court observed that, "[i]n

[19] The New Jersey Supreme Court previously had found its state sentencing guidelines unconstitutional under *Booker*. See *State* v. *Natale*, 184 N.J. 458, 484, 878 A.2d 724 (2005). As a remedy, the court had eliminated the "presumptive terms" contained within the

Apprendi and *Watts*, the United States Supreme Court distinguished discretionary sentencing determinations from the adjudication of elements of an offense with respect to acquitted conduct." Id. at 342. The court, however, concluded that "because neither defendant was sentenced above the statutory maximum for their counts of conviction, *Apprendi* [was] inapplicable." Id. at 343. Nevertheless, the *Melvin* court ultimately found that the sentencing court's use of acquitted conduct at sentencing violated heightened due process protections under the New Jersey constitution. Id. at 352. *Melvin*, however, ultimately is distinguishable because New Jersey's sentencing scheme, like many formerly mandatory schemes reformed through judicial action after *Booker*, more closely resembles the federal sentencing guidelines, wherein a trial court's discretion to sentence within a very broad range authorized by statute remains heavily influenced by the results of a guidelines calculation. This is the direct result of courts' efforts to save former mandatory regimes by making even what had only been aggravated sentences part of the statutory maximum and, thus, all within the trial court's discretion. As a consequence, courts operating under such sentencing schemes potentially could rely upon acquitted conduct to drastically lengthen a defendant's sentence, even within a discretionary range, far beyond what the legislature originally

---

guidelines and provided that, thereafter, "the 'statutory maximum' authorized by the jury verdict or the facts admitted by a defendant at his guilty plea is the top of the sentencing range for the crime charged…." Id. at 487. The court further provided that, "[i]n all other respects, the sentencing process will remain essentially unchanged. Judges will continue to determine whether credible evidence supports the finding of aggravating and mitigating factors and whether the aggravating or mitigating factors preponderate." Id. at 487-88.

considered an appropriate base sentence for the offense. Cf. *United States* v. *Watts*, 519 U.S. at 156-57 & n.2 (questioning, but not deciding, whether heightened standard appropriate where findings "dramatically increase" sentence); *United States* v. *Gonzalez*, 857 F.3d 46, 59-60 (1st Cir. 2017) ("[a]t the outer limits, Guidelines offense-level increases based on uncharged crimes might violate a defendant's Sixth Amendment and due process rights if the additional increases are responsible for such a disproportionate share of the sentence that they become the 'tail which wags the dog of the substantive offense.'").[20] Connecticut's sentencing regime is wholly dissimilar. Our sentencing statutes do not permit upward departures. Instead, they provide narrow ranges applicable to specific offenses or classes of offenses. See General Statutes § 53a-35a. Thus, to the extent that *Melvin* and courts expressing similar reservations have questioned the propriety of sentencing courts relying on conduct underlying charges for which a jury had acquitted a defendant before drastically increasing a defendant's sentence within a statutory range, that potential result does not exist in our law.[21]

---

[20] Concern that a sentencing court-found fact could be a "tail which wags the dog" derives from the United States Supreme Court's pre-*Apprendi* rejection of a claim in *McMillan* v. *Pennsylvania*, 477 U.S. at 88, that a state statute impermissibly authorized dramatic increases of a sentence on the basis of a judicially-found fact.

[21] In addition to the case cited by the defendant, the State has found only one case arguably supportive of his claim that was decided as a matter of state constitutional law; see *People* v. *Grant*, 191 A.D.2d 297, 297, 595 N.Y.S.2d 38, lv. denied, 82 N.Y.2d 719, 622 N.E.2d 317, 602 N.Y.S.2d 816 (1993); but subsequent state authority has

e. Historical insights into the intent of the constitutional framers

The framers of our state constitution considered that "the 'right of trial by jury,' with its well known essential features as then established by our common law, was one of those 'liberties and rights' recognized and established and declared to be forever after 'inviolate.'" (Emphasis omitted.) *State* v. *Griffin*, 251 Conn. 671, 692, 741 A.2d 913 (1999). The jury trial provisions in the state constitution, like their federal counterparts, "reflect a fundamental decision about the exercise of official power − a reluctance to entrust *plenary* powers over the life and liberty of the citizen to one judge. Fear of *unchecked power*, so typical in our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." (Emphasis added.) Id. at 738 (*Berdon, J.*, dissenting) (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)).

However, where a court relies on acquitted conduct in imposing sentence within statutory guidelines, especially those as narrowly defined as in Connecticut law, the court does not exercise plenary or unchecked power. Rather, the authority of the court is circumscribed by the jury's verdict, which grants the court permission to sentence only within the defined range established by the legislature. So long as the court remains within its narrow permitted authority in imposing sentence, it does not frustrate the historic intent of the framers. See *State* v. *Thomas*, 296 Conn. 375, 388-89, 995 A.2d 65 (2010) ("[m]odern precepts of penology require that the discretion of a

---

repudiated that case. See *People* v. *Janick*, 186 Misc.2d 1, 6-7 & n.3, 713 N.Y.S.2d 838 (2000).

sentencing judge to impose a just and appropriate sentence remain unfettered throughout the sentencing proceedings").

f. Public policy

Finally, permitting a sentencing court to find conduct underlying a charge for which a jury acquitted a defendant proven by a lesser standard of proof than beyond a reasonable doubt does not undermine the role of the jury. Where a jury convicts a defendant on certain counts, and the court sentences the defendant to periods of imprisonment authorized by those convictions, the court simply has imposed a sentence that the legislature authorized and the jury's verdicts permitted. If the court considers conduct proven by a lesser standard of proof than the jury applied, it does not find facts contrary to any findings necessarily contained within the verdict. See *State* v. *Breckenridge*, 66 Conn. App. 490, 500, 784 A.2d 1034 (finding acquittal at criminal trial did not preclude finding violation of probation premised on same conduct because probation violation need only be proven by preponderance of evidence), cert. denied, 259 Conn. 904, 789 A.2d 991 (2001). Reading heightened protections into our state constitution, therefore, would not serve to protect the role of the jury.

Furthermore, and relatedly, in declining to require that information considered at sentencing meet the more rigorous standards and rules applicable to evidence at trial, our Supreme Court has observed that, were a heightened standard required, "most, if not all, of the benefit which can be had from a presentence investigation and report would be lost to the convicted offender and the state, and the legislative purpose of bringing our criminal procedure more completely in harmony with modern concepts of penology would be thwarted." *State* v. *Harmon*, 147 Conn. 125, 128-29, 157 A.2d 594 (1960); see also *United States* v. *Morgan*, 595 F.2d 1134, 1137 (9th Cir. 1979) (declining to find consideration of acquitted conduct

inappropriate; advising: "Nor do we wish to discourage sentencing judges from considering as much information as possible in arriving at a sentence designed to fit the particular person being sentenced"). Notably in this regard, General Statutes § 54-91a(c), requires that a probation officer compiling a PSI, inter alia, "promptly inquire into the circumstances of the offense…." This Court has found that this statute "recognize[s] the wide range of information which the sentencing court *should* consider." (Emphasis added.) *State* v. *Huey*, 1 Conn. App. at 734; see also *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55, 58 S. Ct. 59, 82 L. Ed. 43 (1937). The Second Circuit likewise has observed that "[t]he aim of [a] sentencing court is to acquire a thorough acquaintance with the character and history of the man before it. Its synopsis should include the unfavorable, as well as the favorable, data, and few things could be so relevant as other criminal activity of the defendant, particularly activity closely related to the crime at hand." *United States* v. *Doyle*, 348 F.2d at 721. The defendant's arguments, which would preclude a trial court from considering information highly probative of the defendant's circumstances, and the circumstances of the charged offense, would frustrate the broad inquiry that sentencing is supposed to entail and which is purposed to benefit both the State and the defendant.

Finally, the rule the defendant proposes would be unworkable. In cases in which a defendant's convictions and acquittals are conceptually distinct and premised on discrete conduct, it would not be difficult for a sentencing court to segregate what conduct it could consider and that which it must ignore. However, where, as is often the case, the multiple charges are premised on overlapping fact patterns or groupings of soluble conduct or repeated acts, a trial court will be left with little guidance to decipher what conduct it properly may consider and what conduct was not found by the jury's guilty

verdicts. For these reasons, adopting the defendant's rule would be imprudent.

6. This Court should not invoke its supervisory authority

Finally, resort to this Court's supervisory authority is unwarranted. "Historically, the exercise of this [C]ourt's supervisory powers has been limited to the adoption of judicial procedures required for the fair administration of justice." *State* v. *Smith*, 275 Conn. 205, 240, 881 A.2d 160 (2005). "Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole…. [This Court's] supervisory authority is not a form of free-floating justice, untethered to legal principle…. Rather, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of [this Court's] supervisory powers." Id. at 240-41.

> [This Court's] supervisory powers are not a last bastion of hope for every untenable appeal. They are an *extraordinary* remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole…. In this context, the supervisory powers serve a narrow purpose. In each case in which [this Court] ha[s] invoked [its] supervisory authority, [it] ha[s] acted to provide additional procedural safeguards for some salient aspect of the right to a trial before an impartial jury.

(Emphasis in original.) Id. at 241-42; see *State* v. *James K.*, 209 Conn. App. 441, 481, ___ A.3d ___ (2021).

First, in *State* v. *Pena*, our Supreme Court denied a defendant's request to invoke its supervisory authority and prohibit sentencing courts from considering conduct underlying charges on which a jury had acquitted a defendant. 301 Conn. at 683-84. In similar circumstances, in *State* v. *Harris*, 183 Conn. App. at 871, this Court also declined to invoke its supervisory authority. This Court should not now transgress these prior precedents, which concluded that resort to this Court's supervisory authority was unwarranted. The defendant has made no showing that permitting consideration of conduct underlying charges for which a jury has acquitted a defendant since *Pena* has led to abuse or any unconscionable results.

Moreover, as discussed above, were this Court to implement a rule forbidding sentencing courts from considering conduct underlying acquitted charges, it would both frustrate the ability of sentencing courts to conduct a broad inquiry designed to aid both the State and the defendant. Cf. General Statutes § 54-91a(c); Practice Book § 43-4(a). Further, such a rule would quickly prove confusing and unworkable. For all of these reasons, this Court should decline the defendant's request that it invoke its supervisory authority.

IV. Conclusion

For all of the foregoing reasons, the State of Connecticut-Appellee respectfully requests that this Court affirm the trial court's denial of the defendant's motion to correct.

Respectfully submitted,

By: /s/

Timothy F. Costello
Senior Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Tel: (860) 258-5807
Fax: (860) 258-5828
Juris No.: 427474
Email: timothy.costello@ct.gov

Sharmese L. Walcott
State's Attorney
Judicial District of Hartford

Vicki Melchiorre
Supervisory Assistant State's Attorney
Judicial District of Hartford

March 2022

SUPREME COURT

of the

State of Connecticut

Judicial District of Hartford

S.C. 20734

STATE OF CONNECTICUT

V.

RICHARD LANGSTON

Appendix

Table of contents

Statutory provisions

General Statutes § 53-202k. Commission of a class A, B or C felony with a firearm: Five-year nonsuspendable sentence.

Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in section 53a-3, except an assault weapon, as defined in section 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony.

General Statutes § 53a-28 (Rev. to 1997). Authorized sentences.

(a) Except as provided in section 17a-699 and chapter 420b, [FN1] to the extent that the provisions of said section and chapter are inconsistent herewith, every person convicted of an offense shall be sentenced in accordance with this title.

(b) Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences: (1) A term of imprisonment; or (2) a sentence authorized by section 18-65a or 18-73; or (3) a fine; or (4) a term of imprisonment and a fine; or (5) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a period of probation or a period of conditional discharge; or (6) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a fine and a period of probation or a period of conditional discharge; or (7) a fine and a sentence authorized by section 18-65a or 18-73; or (8) a sentence of unconditional discharge.

(c) In addition to any sentence imposed pursuant to subsection (b) of this section, if a person is convicted of an offense that resulted in injury

to another person or damage to or loss of property, the court shall order the offender to make financial restitution if it determines that financial restitution is appropriate. In determining whether financial restitution is appropriate, the court shall consider: (1) The financial resources of the offender and the burden restitution will place on other obligations of the offender; (2) the offender's ability to pay based on instalments or other conditions; (3) the rehabilitative effect on the offender of the payment of restitution and the method of payment; and (4) other circumstances that the court determines makes restitution appropriate or inappropriate. Restitution ordered by the court pursuant to this subsection shall be based on easily ascertainable damages for injury or loss of property, actual expenses incurred for treatment for injury to persons and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering or other intangible losses, but may include the costs of counseling reasonably related to the offense.

(d) A sentence to a period of probation or conditional discharge in accordance with sections 53a-29 to 53a-34, inclusive, shall be deemed a revocable disposition, in that such sentence shall be tentative to the extent that it may be altered or revoked in accordance with said sections but for all other purposes it shall be deemed to be a final judgment of conviction.

General Statutes § 53a-35a (Rev. to 1997). Imprisonment for any felony committed on or after July 1, 1981: Definite sentences; terms authorized.

For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and the term shall be fixed by the court as follows: (1) For a capital felony, a term of life imprisonment without the possibility of release unless a sentence of death is imposed in accordance with section 53a-46a; (2) for the class A

felony of murder, a term not less than twenty-five years nor more than life; (3) for a class A felony other than murder, a term not less than ten years nor more than twenty-five years; (4) for the class B felony of manslaughter in the first degree with a firearm under section 53a-55a, a term not less than five years nor more than forty years; (5) for a class B felony other than manslaughter in the first degree with a firearm under section 53a-55a, a term not less than one year nor more than twenty years, except that for a conviction under section 53a-59(a)(1), 53a-59a, 53a-70a, 53a-94a, 53a-101(a)(1) or 53a-134(a)(2), the term shall be not less than five years nor more than twenty years; (6) for a class C felony, a term not less than one year nor more than ten years, except that for a conviction under section 53a-56a, the term shall be not less than three years nor more than ten years; (7) for a class D felony, a term not less than one year nor more than five years, except that for a conviction under section 53a-60b or 53a-217, the term shall be not less than two years nor more than five years, for a conviction under section 53a-60c, the term shall be not less than three years nor more than five years, and for a conviction under section 53a-216, the term shall be five years; (8) for an unclassified felony, a term in accordance with the sentence specified in the section of the general statutes that defines the crime.

General Statutes § 53a-37 (Rev. to 1997). Multiple sentences: Concurrent or consecutive, minimum term.

When multiple sentences of imprisonment are imposed on a person at the same time, or when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence or sentences imposed by the court shall run either concurrently or consecutively with respect to each other and to the undischarged term or terms in such manner as the court directs at the time of sentence.

The court shall state whether the respective maxima and minima shall run concurrently or consecutively with respect to each other, and shall state in conclusion the effective sentence imposed. When a person is sentenced for two or more counts each constituting a separate offense, the court may order that the term of imprisonment for the second and subsequent counts be for a fixed number of years each. The court in such cases shall not set any minimum term of imprisonment except under the first count, and the fixed number of years imposed for the second and subsequent counts shall be added to the maximum term imposed by the court on the first count.

General Statutes § 53a-59 (Rev. to 1997). Assault in the first degree: Class B felony: Nonsuspendable sentences.

(a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or (2) with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person; or (4) with intent to cause serious physical injury to another person and while aided by two or more other persons actually present, he causes such injury to such person or to a third person; or (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm.

(b) Assault in the first degree is a class B felony provided (1) any person found guilty under subdivision (1) of subsection (a) shall be sentenced to a term of imprisonment of which five years of the

sentence imposed may not be suspended or reduced by the court and (2) any person found guilty under subsection (a) shall be sentenced to a term of imprisonment of which ten years of the sentence imposed may not be suspended or reduced by the court if the victim of the offense is a person under ten years of age.

General Statutes § 53a-134. Robbery in the first degree: Class B felony.

(a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument; or (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

(b) Robbery in the first degree is a class B felony provided any person found guilty under subdivision (2) of subsection (a) shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court.

General Statutes § 53a-217 (Rev. to 1997). Criminal possession of a firearm or electronic defense weapon: Class D felony.

(a) A person is guilty of criminal possession of a firearm or electronic defense weapon when he possesses a firearm or electronic defense weapon and has been convicted of a capital felony, a class A felony,

except a conviction under section 53a-196a, a class B felony, except a conviction under section 53a-86, 53a-122 or 53a-196b, a class C felony, except a conviction under section 53a-87, 53a-152 or 53a-153, or a class D felony under sections 53a-60 to 53a-60c, inclusive, 53a-72a, 53a-72b, 53a-95, 53a-103, 53a-103a, 53a-114, 53a-136 or 53a-216. For the purposes of this section, "convicted" means having a judgment of conviction entered by a court of competent jurisdiction.

(b) Criminal possession of a firearm or electronic defense weapon is a class D felony, for which two years of the sentence imposed may not be suspended or reduced by the court.

General Statutes § 54-91a. Presentence investigation of defendant.

(a) No defendant convicted of a crime, other than a capital felony under the provisions of section 53a-54b in effect prior to April 25, 2012, or murder with special circumstances under the provisions of section 53a-54b in effect on or after April 25, 2012, the punishment for which may include imprisonment for more than one year, may be sentenced, or the defendant's case otherwise disposed of, until a written report of investigation by a probation officer has been presented to and considered by the court, if the defendant is so convicted for the first time in this state or upon any conviction of a felony involving family violence pursuant to section 46b-38a for which the punishment may include imprisonment; but any court may, in its discretion, order a presentence investigation for a defendant convicted of any crime or offense other than a capital felony under the provisions of section 53a-54b in effect prior to April 25, 2012, or murder with special circumstances under the provisions of section 53a-54b in effect on or after April 25, 2012.

(b) A defendant who is convicted of a crime and is not eligible for sentence review pursuant to section 51-195 may, with the consent of

the sentencing judge and the prosecuting official, waive the presentence investigation, except that the presentence investigation may not be waived when the defendant is convicted of a felony involving family violence pursuant to section 46b-38a and the punishment for which may include imprisonment.

(c) Whenever an investigation is required, the probation officer shall promptly inquire into the circumstances of the offense, the attitude of the complainant or victim, or of the immediate family where possible in cases of homicide, and the criminal record, social history and present condition of the defendant. Such investigation shall include an inquiry into any damages suffered by the victim, including medical expenses, loss of earnings and property loss. All local and state police agencies shall furnish to the probation officer such criminal records as the probation officer may request. When in the opinion of the court or the investigating authority it is desirable, such investigation shall include a physical and mental examination of the defendant. If the defendant is committed to any institution, the investigating agency shall send the reports of such investigation to the institution at the time of commitment.

(d) In lieu of ordering a full presentence investigation, the court may order an abridged version of such investigation, which (1) shall contain (A) identifying information about the defendant, (B) information about the pending case from the record of the court, (C) the circumstances of the offense, (D) the attitude of the complainant or victim, (E) any damages suffered by the victim, including medical expenses, loss of earnings and property loss, and (F) the criminal record of the defendant, and (2) may encompass one or more areas of the social history and present condition of the defendant, including family background, significant relationships or children, educational attainment or vocational training, employment history, financial

situation, housing situation, medical status, mental health status, substance abuse history, the results of any clinical evaluation conducted of the defendant or any other information required by the court that is consistent with the provisions of this section. If the court orders an abridged version of such investigation for a felony involving family violence, as defined in section 46b-38a, the abridged version of such investigation shall, in addition to the information set forth in subdivision (1) of this subsection, contain the following information concerning the defendant: (A) Family background, (B) significant relationships or children, (C) mental health status, and (D) substance abuse history.

(e) Any information contained in the files or report of an investigation pursuant to this section shall be available to the Court Support Services Division for the purpose of performing the duties contained in section 54-63d and to the Department of Mental Health and Addiction Services for purposes of diagnosis and treatment.

18 USC 3661. Use of information for sentencing.

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

USSC 1B1.1. Application Instructions.

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See § 1B1.2.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
(3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
(4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
(5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
(6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
(7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
(8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. See 18 U.S.C. § 3553(a)(5).
(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. See 18 U.S.C. § 3553(a).

USSG 1B1.2. Applicable Guidelines.

(a) Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which

the defendant was convicted). However, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two applicable to the stipulated offense. Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to § 2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. See § 2X5.1 (Other Offenses). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. See § 1B1.9 (Class B or C Misdemeanors and Infractions).

(b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct).

(c) A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

(d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

USSG 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range).

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline

specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were--

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

USSG 1B1.4 . Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines).

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

USSG 1B1.5. Interpretation of References to Other Offense Guidelines.

(a) A cross reference (an instruction to apply another offense guideline) refers to the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions).

(b)(1) An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions), except as provided in subdivision (2) below.

(2) An instruction to use a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline.

(c) If the offense level is determined by a reference to another guideline under subsection (a) or (b)(1) above, the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.

(d) A reference to another guideline under subsection (a) or (b)(1) above may direct that it be applied only if it results in the greater offense level. In such case, the greater offense level means the greater Chapter Two offense level, except as otherwise expressly provided.

USSG § 6A1.3. Resolution of Disputed Factors (Policy Statement).

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

Rules of court

Practice Book § 43-4. --Scope of Investigation or Assessment.

(a) Whenever an investigation is required or an assessment is ordered or both, the probation officer shall promptly inquire into the attitude of the complainant or the victim, or of the immediate family where possible in cases of homicide, and the criminal record, social history and present condition of the defendant. Such investigation shall include an inquiry into the circumstances of the offense and any damages suffered by the victim, including medical expenses, loss of earnings and property loss. Such assessment shall include an inquiry into the defendant's prior participation in any release programs and the defendant's attitude about participation in an alternate incarceration program. When it is desirable in the opinion of the judicial authority or the investigating authority, such investigation or assessment shall include a physical and mental examination of the defendant.

(b) If an assessment includes a recommendation for placement in an alternate incarceration program, it shall include, as an attachment, a

proposed alternate incarceration plan. A current or updated presentence investigation report may be used in lieu of an alternate incarceration assessment report provided attached thereto is a statement by the investigating authority recommending whether or not the defendant should participate in an alternate incarceration program and any recommendation that the defendant participate includes a proposed alternate incarceration plan.

Practice Book § 43-22. Correction of Illegal Sentence.

The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner.

Constitutional provisions

Article first, § 8 of the Connecticut constitution. Rights of accused in criminal prosecutions. What cases bailable. Speedy trial. Due process. Excessive bail or fines. Probable cause shown at hearing, when necessary. Rights of victims of crime.

Sec. 8. [As amended] a. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed

forces, or in the militia when in actual service in time of war or public danger.

b. In all criminal prosecutions, a victim, as the General Assembly may define by law, shall have the following rights: (1) the right to be treated with fairness and respect throughout the criminal justice process; (2) the right to timely disposition of the case following arrest of the accused, provided no right of the accused is abridged; (3) the right to be reasonably protected from the accused throughout the criminal justice process; (4) the right to notification of court proceedings; (5) the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony; (6) the right to communicate with the prosecution; (7) the right to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused; (8) the right to make a statement to the court at sentencing; (9) the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law; and (10) the right to information about the arrest, conviction, sentence, imprisonment and release of the accused. The General Assembly shall provide by law for the enforcement of this subsection. Nothing in this subsection or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case.

Article first, § 19. Trial by jury. Challenging of jurors.

The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve

jurors without his consent. In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate.

The Fifth Amendment to the United States constitution provides:

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

The Sixth Amendment to the United States constitution provides:

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

The Fourteenth Amendment to the United States constitution 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 law.

2021 WL 4582162
Only the Westlaw citation
is currently available.
United States District Court, W.D.
Michigan, Southern Division.

Joseph Jerome GRAHAM, Petitioner,
v.
Gregory SKIPPER, Respondent.

Case No. 1:21-cv-755
|
Signed 10/06/2021

Attorneys and Law Firms

Joseph Jerome Graham, Ionia, MI, Pro Se.

OPINION

ROBERT J. JONKER, CHIEF UNITED STATES DISTRICT JUDGE

*1 This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing § 2254 Cases; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to "screen out" petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436–37 (6th Cir. 1999). After undertaking the review required by Rule 4, the Court concludes that the petition must be dismissed because it fails to raise a meritorious federal claim.

Discussion

I. Factual allegations

Petitioner Joseph Jerome Graham is incarcerated with the Michigan Department of Corrections at the Michigan Reformatory (RMI) in Ionia, Ionia County, Michigan. Following a one-day bench trial in the Wayne County Circuit Court, Petitioner was convicted of armed robbery, in violation of Mich. Comp. Laws § 750.529. On August 29, 2017, the court sentenced Petitioner to a prison term of 15 to 30 years.

The Michigan Court of Appeals described the facts underlying Petitioner's conviction as follows:

> This case arises out of defendant's commission of armed robbery at a Rite Aid store on September 23, 2016. Bessie Watkins, a Rite Aid employee, testified at the preliminary examination that defendant came into the store and used a box cutter to try to remove antitheft devices from some razor packages in the store. Watkins tried to push the razors away from defendant. Defendant pointed the box cutter toward Watkins's chest area and stated that she could not stop him and that he was going to get

what he came for. Watkins testified that she felt threatened. Defendant then grabbed four packages of razors off the shelf and left the store without paying for them. Watkins later identified defendant in a photographic array and at the preliminary examination as the person who committed the crime.

At trial, the trial court admitted Watkins's preliminary examination testimony into evidence after determining that she was unavailable at the time of trial due to a physical illness. The trial court also admitted into evidence Rite Aid video surveillance footage of the incident and two letters defendant had written to the trial court. Defendant chose not to testify and did not present any evidence or witnesses. In closing argument, defense counsel conceded that defendant had stolen the razors and had used the box cutter to bypass antitheft devices but disputed that defendant had threatened Watkins with the box cutter. The trial court found defendant guilty of armed robbery and sentenced him, as a second habitual offender, to 15 to 30 years' imprisonment.

*2 (Mich. Ct. App. Op., ECF No. 2-1, PageID.43–44.)

Petitioner, with the assistance of counsel, appealed his conviction and sentence to the Michigan Court of Appeals raising the same issues he raises in his habeas corpus petition. By opinion issued October 22, 2019, the court of appeal denied relief and affirmed the trial court. (Mich. Ct. App. Op., ECF No. 2-1, PageID.43–52.) Petitioner then filed a *pro per* application for leave to appeal to the Michigan Supreme Court. That court denied leave initially by order entered September 8, 2020, (Mich. Order, ECF No. 2-2, PageID.87), and upon reconsideration by order entered November 24, 2020, (Mich. Order, ECF No. 2-3, PageID.89).

During August of 2021, Petitioner timely filed his habeas corpus petition raising four grounds for relief, as follows:

I. The state court decisions were contrary to, or involved an objectionably unreasonable application of clearly established federal law, and/or an objectionably unreasonable determination of the facts in light of the evidence presented in the trial court, when it denied that Mr. Graham's trial lawyers denied Mr. Graham Sixth Amendment right to the effective assistance of counsel when both of his trial lawyers failed to investigate if he had any prior non-threatening contacts with the complaining witness.

II. The state court decisions were contrary to, or involved an objectionably unreasonable application of clearly established federal law, and/or an objectionably unreasonable determination of the facts in light of the evidence presented in the trial court, when it denied that, the trial court erred by finding that an uncharged alleged crime counted as a felony and as a crime against a person for purposes of scoring OV 13 at 25 points.

III. The state court decisions were contrary to, or involved an objectionably unreasonable application of clearly established federal law, and/or an objectionably unreasonable determination of the facts in light of the evidence

presented in the trial court, when it denied that, the trial court erred in sentencing Mr. Graham to 15 to 30 years in the MDOC, a minimum sentence of 15 years is not [a] reasonable or proportionate sentence.

IV. The state court decisions were contrary to, or involved an objectionably unreasonable application of clearly established federal law, and/or an objectionably unreasonable determination of the facts in light of the evidence presented in the trial court, when it denied that, the trial court erred and violated Mr. Graham's Sixth amendment right to confront witnesses against him in finding that the complaining witness was an unavailable witness pursuant to MRE 804(a)(4) on the day of trial and erred in allowing the complaining witness's testimony from the preliminary exam to be admitted into evidence at trial.

(Pet., ECF No. 1, PageID.4–7.)

II. AEDPA standard

The AEDPA "prevent[s] federal habeas 'retrials' " and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693– 94 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). "Under these rules, [a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Stermer v. Warren*, 959 F.3d 704, 721 (6th Cir. 2020) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)) (internal quotation marks omitted)). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (internal quotation omitted).

*3 The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Williams v. Taylor*, 529 U.S. 362, 381–82 (2000); *Miller v. Straub*, 299 F.3d 570, 578–79 (6th Cir. 2002). Moreover, "clearly established Federal law" does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 565 U.S. 34, 37–38 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 565 U.S. at 38).

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in the Supreme Court's cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405–06). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' " *Woods*, 575 U.S. at 316 (quoting *Harrington*, 562 U.S. at 103).

Determining whether a rule application was unreasonable depends on the rule's specificity. *Stermer*, 959 F.3d at 721. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough*, 541 U.S. at 664. "[W]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. 415, 424 (2014) (internal quotations omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011) (en banc); *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003); *Bailey v. Mitchell*, 271 F.3d 652, 656 (6th Cir. 2001). This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546–547 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

Section 2254(d) limits the facts a court may consider on habeas review. The federal court is not free to consider any possible factual source. The reviewing court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011). "If a review of the state court record shows that additional fact-finding was required under clearly established federal law or that the state court's factual determination was unreasonable, the requirements of § 2254(d) are satisfied and the federal court can review the underlying claim on its merits. *Stermer*, 959 F.3d at 721 (citing, *inter alia*, *Brumfield v. Cain*, 576 U.S. 305 (2015), and *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007)).

If the petitioner "satisfies the heightened requirements of § 2254(d), or if the petitioner's claim was never 'adjudicated on the merits' by a state court, 28 U.S.C. § 2254(d),"— for example, if he procedurally defaulted the claim—"AEDPA deference no longer applies." *Stermer*, 959 F.3d at 721. Then, the petitioner's claim is reviewed *de novo*. *Id.* (citing *Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003)).

III. Discussion

A. Ineffective assistance of counsel-failure to investigate (habeas ground I)

*4 Petitioner argues that his defense counsel rendered ineffective assistance because they failed to investigate his prior thefts from Rite Aid stores where Rite Aid employee Watkins was present. According to Petitioner, if counsel had investigated those thefts, they would have found that he had never threatened Watkins before and that Watkins did not likely feel threatened when Petitioner wielded the box cutter in her presence during the September 23, 2016, robbery.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, the petitioner must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. *Id.* at 687. A court considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see also* *Nagi v. United States*, 90 F.3d 130, 135 (6th Cir. 1996) (holding that counsel's strategic decisions were hard to attack). The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Even if a court determines that counsel's performance was outside that range, the defendant is not entitled to relief if counsel's error had no effect on the judgment. *Id.* at 691.

Moreover, as the Supreme Court repeatedly has recognized, when a federal court reviews a state court's application of *Strickland* under § 2254(d), the deferential standard of *Strickland* is "doubly" deferential. *Harrington*, 562 U.S. at 105 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)); *see also* *Burt v. Titlow*, 571 U.S. 12, 15 (2013); *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011); *Premo v. Moore*, 562 U.S. 115, 122 (2011). In those circumstances, the question before the habeas court is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*; *Jackson v. Houk*, 687 F.3d 723, 740–41 (6th Cir. 2012) (stating that the "Supreme Court has recently again underlined the difficulty of prevailing on a *Strickland* claim in the context of habeas and AEDPA...") (citing *Harrington*, 562 U.S. at 102).

The Michigan Court of Appeals applied the following standard to resolve Petitioner's ineffective assistance of counsel claim:

> "To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below

an objective standard of reasonableness and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant." *People v Lane*, 308 Mich App 38, 68; 862 NW2d 446 (2014). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018) (quotation marks, brackets, and citation omitted). To establish prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018) (quotation marks and citation omitted). "The defendant has the burden of establishing the factual predicate of his ineffective assistance claim." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014).

***5** Defense counsel is afforded wide discretion on matters of trial strategy, *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013), and the defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The fact that a strategy may have failed does not establish ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

(Mich. Ct. App. Op., ECF No. 2-1, PageID.44–45.) Although the Michigan Court of Appeals cited state authority as the source of the standard, that authority relies on *Strickland*. *People v. Lane*, 862 N.W.2d 446, 465 n. 65 (Mich. Ct. App. 2014). Thus, it cannot be said that the state court applied the wrong standard.

The Michigan Court of Appeals rejected the claim for multiple reasons. This Court will focus on two of them:

> Aside from the self-serving affidavit of defendant's appellate counsel,[1] the record is bereft of factual support for defendant's contention that he committed prior nonthreatening larcenies at Rite Aid stores and that Watkins was present during those larcenies. And there is no evidence that Watkins fabricated her testimony that defendant threatened her with the box cutter because she was "tired" of defendant constantly stealing items from Rite Aid; this comprises mere speculation. Defendant's argument thus fails because he has not established the factual predicate for his claim. *Douglas*, 496 Mich at 592.
>
> * * *
>
> Moreover, defense counsel pursued a reasonable trial strategy of conceding that defendant stole razors from the Rite Aid store but arguing that he did not use the box cutter to threaten Watkins, such that, according to the defense theory, defendant was not guilty of armed robbery. In her closing argument, defense counsel argued that Watkins's behavior as shown on the surveillance video and as reflected in her

> own testimony was not that of someone who felt threatened or fearful, given that she attempted to push the razor packages away from defendant and walked with him to the door as he was leaving. Although the strategy ultimately failed, this does not establish that counsel was ineffective. *Stewart*, 219 Mich App at 42. This strategy had the advantage of not presenting at trial evidence that defendant was an admitted habitual larcenist, which could have potentially exposed him to further criminal liability and undermined his credibility. And if defendant had argued at trial that he had a policy of being nonthreatening when committing larcenies of convenience stores, the prosecutor could have presented evidence to rebut this claim, given that the parole violation report indicates that defendant engaged in assaultive conduct when attempting to commit a similar larceny at a CVS store on November 20, 2016. Therefore, defendant's ineffective assistance claim fails because it cannot be concluded that the purported failure to investigate this matter undermines confidence in the trial's outcome.

(Mich. Ct. App. Op., ECF No. 2-1, PageID.45–46.)

[1] The facts supporting Petitioner's contention regarding his prior contacts with Ms. Watkins were provided by an affidavit from his appellate counsel:

> As part of investigating Mr. Graham's appeal, undersigned interviewed Mr. Graham who indicated to undersigned that Ms. Watkins made up the allegation of feeling threatened because she could never stop him. (See Affidavit and Offer of Proof of Ian Kierpaul) (Attached as Exhibit C). Undersigned asked follow up questions, to wit, what do you mean by could never stop you. (*Id.*). Mr. Graham informed undersigned that Ms. Watkins knew who he was because he went into the Rite Aid before to steal some items. (*Id.*). She also knew him from another Rite Aid store located at Livernois and Ewald Circle because he would also go there to steal items. (*Id.*)
>
> Neither of Mr. Graham's trial lawyers asked him if he had any prior contacts with Ms. Watkins. (*Id.*). Mr. Graham insists that all his prior contacts with Ms. Watkins were non-threatening because he just wanted to steal some items and get out of the store. (*Id.*). Ms. Watkins was unable to ever stop Mr. Graham from stealing. (*Id.*). Mr. Graham did admit to undersigned that he never informed his lawyers of his prior contacts with Ms. Watkins. (*Id.*). (Pet'r's Appeal Br., ECF No. 2-1, PageID.66–67.) The affidavit is clearly not based on firsthand knowledge.

***6** The Michigan Court of Appeals found that there was no record support for Petitioner's contention that, in fact, he had previously robbed Rite Aid stores in Ms. Watkins presence without acting in a threatening manner. Thus, there is nothing in the record to support the claim that the investigation counsel failed to perform would have borne fruit.

As noted above, a determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and

convincing evidence. 28 U.S.C. § 2254(e)(1); *Davis*, 658 F.3d at 531; *Lancaster*, 324 F.3d at 429; *Bailey*, 271 F.3d at 656. In response, Petitioner claims that his case file was provided to his trial attorneys and that the file included "multiple parole violations, police reports, and witness statements of the petitioner[']s nonthreatening and numerous larcenies against the same Rite Aid location, which all involved the witness (Watkins) from which this case occurred." (Pet'r's Br., ECF No. 2, PageID.27.) Petitioner's unsworn statement, however, is not clear and convincing evidence of any of those factual averments. Moreover, he offers no proof that his "case file," even if it included those materials, was part of the trial court record that was before the court of appeals. The Court, therefore, presumes that the appellate court's determination that the record does not factually support Petitioner's claim is correct. Absent evidence that there was any evidence for Petitioner's counsel to exploit, or any evidence to support further investigation, Petitioner has failed to show that his counsel's performance was objectively unreasonable or that Petitioner was prejudiced as a result. Absent any factual foundation for his claim, Petitioner is not entitled to habeas relief.

Even if the record were replete with evidence of Petitioner's prior larcenies from the Rite Aid stores, and even if it were apparent that Ms. Watkins was present and in contact with Petitioner during each theft, Petitioner has still not met his burden of demonstrating ineffective assistance of counsel. The court of appeals concluded that it was a reasonable trial strategy to focus on the inconsistency between Ms. Watkins's claim that she felt threatened and her continued confrontation with Petitioner after the threat. Setting aside that (1) it is generally not a beneficial strategy to present evidence to the factfinder that a defendant has committed a string of prior crimes, and (2) inquiry into those crimes would necessarily open the door to the prosecutor's exploration of Petitioner's subsequent assaultive larceny from a CVS store, the inference upon which Petitioner's proposed strategy depends—that if Ms. Watkins had been present during Petitioner's prior larcenies she would not feel threatened by his wielding of a box cutter during this larceny—is hardly compelling.

Moreover, to show that there might be some other strategy is not enough, to prevail under *Strickland*'s doubly deferential standard, Petitioner must demonstrate that the court of appeals' identified strategy was unreasonable. He has not and he cannot. Therefore, even if Petitioner's failure to investigate claim was supported by facts of record, he would not be entitled to habeas relief because it would not be unreasonable for counsel to forego Petitioner's proposed approach in favor of focusing on the surveillance video of this larceny.

B. Offense variable scoring (habeas ground II)

*7 Petitioner next complains that the trial court erred when it relied on facts taken from a parole violation report in scoring 25 points for offense variable 13 regarding a continuing pattern of criminal behavior. Petitioner does not appear to dispute the facts stated in the report regarding a subsequent assaultive larceny from a CVS store; he simply contends that the court should not have considered it because a parole violation report "is akin to a slip of paper containing incidents unproven, hollow, and in

essence: a degree much lower than the authority that the [presentence investigation report] is legislated." (Pet'r's Br., ECF No. 2, PageID.32.) Therefore, Petitioner claims, "[t]he prosecutor failed to establish by a preponderance of the evidence that [Petitioner] committed a larceny." (*Id.*, PageID.33.) The court of appeals disagreed: "The trial court did not err in relying on information contained in the parole violation report given that the rules of evidence did not apply and the parole violation report was akin to a presentence investigation report." (Mich. Ct. App. Op., ECF No. 2-1, PageID.47.)

"[A] federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.' " *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (quoting 28 U.S.C. § 2254(a)). A habeas petition must "state facts that point to a 'real possibility of constitutional error.' " *Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977) (quoting Advisory Committee Note to Rule 4, Rules Governing Habeas Corpus Cases). The federal courts have no power to intervene on the basis of a perceived error of state law. *Wilson*, 562 U.S. at 5; *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 62, 67– 68 (1991); *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Claims concerning the improper application of, or departures from, sentencing guidelines are state-law claims and typically are not cognizable in habeas corpus proceedings. *See Hutto v. Davis*, 454 U.S. 370, 373–74 (1982) (federal courts normally do not review a sentence for a term of years that falls within the limits prescribed by the state legislature); *Austin v. Jackson*, 213 F.3d 298, 301–02 (6th Cir. 2000) (alleged violation of state law with respect to sentencing is not subject to federal habeas relief).

Nonetheless, a sentence may violate due process if it is based upon material "misinformation of constitutional magnitude." *Roberts v. United States*, 445 U.S. 552, 556 (1980; *see also United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948). To prevail on such a claim, the petitioner must show (1) that the information before the sentencing court was materially false, and (2) that the court relied on the false information in imposing the sentence. *Tucker*, 404 U.S. at 447; *United States v. Stevens*, 851 F.2d 140, 143 (6th Cir. 1988); *United States v. Polselli*, 747 F.2d 356, 358 (6th Cir. 1984). A sentencing court demonstrates actual reliance on misinformation when the court gives "explicit attention" to it, "found[s]" its sentence "at least in part" on it, or gives "specific consideration" to the information before imposing sentence. *Tucker*, 404 U.S. at 444, 447.

Petitioner does not identify any facts found by the court at sentencing that were either materially false or based on false information. He therefore fails to demonstrate that his sentence violated due process. *Tucker*, 404 U.S. at 447; *United States v. Lanning*, 633 F.3d 469, 477 (6th Cir. 2011) (rejecting due process claim where the petitioner failed to point to specific inaccurate information relied upon by the court).

Additionally, Petitioner's suggestion that the source of the facts was not reliable such that the

evidence did not preponderate does not raise a federal constitutional issue. The Sixth Circuit described the scope of constitutional protection at sentencing as follows:

> But the Due Process Clause does not offer convicted defendants at sentencing the same "constitutional protections afforded defendants at a criminal trial." *United States v. Silverman*, 976 F.2d 1502, 1511 (6th Cir. 1992) (en banc). "[B]oth before and since the American colonies became a nation," *Williams v. New York* explains, "courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." 337 U.S. 241, 246 (1949). That tradition has become more settled over time, because "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant— if not essential—to [the judge's] selection of an appropriate sentence." *Id.* at 247. An imperative of "evidentiary inclusiveness"—"a frame of reference as likely to facilitate leniency as to impede it," *United States v. Graham–Wright*, 715 F.3d 598, 601 (6th Cir.2013)—explains why the Evidence Rules, the Confrontation Clause, and the beyond-a-reasonable-doubt standard of proof do not apply at sentencing. *See United States v. O'Brien*, 560 U.S. 218, 224 (2010) (beyond a reasonable doubt); *Williams v. New York*, 337 U.S. at 246–47, 252 (Evidence Rules); *United States v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir. 2006) (Confrontation Clause); *see generally United States v. Tucker*, 404 U.S. 443, 446 (1972).

***8** *United States v. Alsante*, 812 F.3d 544, 547 (6th Cir. 2016). In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986),[2] the Supreme Court acknowledged that "sentencing courts have always operated without constitutionally imposed burdens of proof...." *Id.* at 92 n.8.[3]

2 *McMillan* was overruled in *Alleyne v. United States*, 570 U.S. 99 (2013). *See United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) ("Finding no basis in the original understanding of the Fifth and Sixth Amendments for *McMillan* and *Harris* [*v. United States*, 536 U.S. 545 (2002)], the [*Alleyne*] Court expressly overruled those decisions...."). The *McMillan* holding that was overruled, however, was the principle that factors implicating mandatory minimum sentences did not require proof beyond a reasonable doubt. The underlying premise from *McMillan* quoted above — that there is no constitutionally required standard of proof to support discretionary sentencing decisions—survived *Alleyne* and, indeed, was effectively highlighted by *Alleyne* when the *Alleyne* Court distinguished mandatory from discretionary sentencing decisions. None of the cases in the line of authority that culminated in *Alleyne*— *Apprendi v. New Jersey*,

530 U.S. 466 (2000), *Ring v. Arizona*, 53 U.S. 584 (2002), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005)—suggest that the constitutionally required burden of proof that applies to facts found in support of mandatory maximum or minimum sentences applies to discretionary sentences.

3 Even the term "burden of proof" can be misleading. As the Supreme Court noted in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), "[c]ontemporary writers divide the general notion of 'burden of proof' into a burden of producing some probative evidence on a particular issue and a burden of persuading the factfinder with respect to that issue by a standard such as proof beyond a reasonable doubt or by a fair preponderance of the evidence." *Id.* at 695 n.20. Generally, the constitution places the burden of production and persuasion on the prosecutor to prove the elements of a charged offense and the standard of persuasion is "beyond a reasonable doubt." There are times, however, where the constitution permits the placement of the burden of production and persuasion on the defendant, for example, with regard to affirmative defenses. It might be less confusing to refer to the required persuasive impact of the evidence as the standard of persuasion rather than the burden of proof.

Petitioner's argument suggests that the federal constitution requires that, at the very least, facts in support of Offense Variable scoring must be proved by a preponderance of the evidence. There is clearly established federal law that supports the conclusion that proof at sentencing by a preponderance of the evidence would satisfy due process. *See, e.g.*, *United States v. Watts*, 519 U.S. 148, 156 (1997). *Watts* notes that proof by a preponderance of the evidence would satisfy due process, but the Court did not say that due process requires it. Rather, in *Watts*, it was the federal sentencing guidelines that required proof by a preponderance of the evidence and the Court only considered whether a higher standard—such as clear and convincing evidence—was constitutionally required. Thus, *Watts* was not an attempt to establish the bottom limit of constitutional propriety, it merely held that a preponderance of the evidence standard of persuasion was constitutionally acceptable, even for acquitted conduct. [4]

4 As a practical matter, the preponderance of the evidence standard might be the lowest acceptable standard of persuasion, not because of the due process clause, but because anything lower than "more likely than not" is not really persuasive at all.

***9** Even though the State of Michigan may require that facts supporting a sentence be proven by a preponderance of the evidence, that requirement is a matter of state law, not the constitution. Therefore, a sufficiency-of-the-evidence claim for sentencing, at least for a non-capital offense, is not cognizable on habeas review.

C. Unreasonable or disproportionate sentence (habeas ground III)

Petitioner next contends that his sentence was unreasonable and disproportionate. Petitioner refers the Court to his court of appeals brief. His argument there is founded upon *People v. Milbourn*, 461 N.W.2d. 1 (Mich. 1990), regarding proportionate sentences, and *People v. Steanhouse*, 902 N.W.2d 327 (Mich. 2017), regarding reasonable sentences.

In *Milbourn*, the Michigan Supreme Court held that a sentencing court must exercise its discretion within the bounds of Michigan's legislatively prescribed sentence range and pursuant to the intent of Michigan's legislative scheme of dispensing punishment according to the nature of the offense and the background of the offender. *Milbourn*, 461 N.W.2d at 9–11; *People v. Babcock*, 666 N.W.2d 231, 236 (Mich. 2003). Nearly three decades later, in *Steanhouse*, the Michigan Supreme Court held that a sentencing court's departure from the sentencing guidelines is unreasonable if the court abused its discretion. *Steanhouse*, 902 N.W.2d at 335. The proper test for determining whether the sentencing court abused its discretion, it held, is found in *Milbourn*'s proportionality analysis. *Id.* at 335–37. In other words, a sentence departing from the guidelines is unreasonable if it is disproportionate. Clarifying its holding, the *Steanhouse* court expressly rejected adopting factors used by the federal courts. *Id.*

It is plain that *Milbourn*, and thus *Steanhouse*, were decided under state, not federal, principles. *See Lunsford v. Hofbauer*, No. 94-2128, 1995 WL 236677, at *2 (6th Cir. Apr. 21, 1995) ("[Petitioner] argues that the trial court improperly exceeded the state sentencing guidelines and violated the principles of proportionality set forth in [*Milbourn*,] essentially asking the court to rule on a matter of state law which rarely serves as a basis for habeas corpus relief."); *Clarmont v. Chapman*, No. 20-1205, 2020 WL 5126476, at *1 (6th Cir. Jul. 13, 2020) ("[A]ny state law challenge to the reasonableness of [petitioner's] sentence or argument that his sentence is disproportionate under state law is also not cognizable on habeas review."); *Atkins v. Overton*, 843 F. Supp. 258, 260 (E.D. Mich. 1994) ("Petitioner's claim that his sentence violates the proportionality principle of *People v. Milbourn* does not state a claim cognizable in federal habeas corpus."). Because this Court has no power to intervene on the basis of a perceived error of state law, *see Wilson*, 562 U.S. at 5; *Bradshaw*, 546 U.S. at 76; *Pulley*, 465 U.S. at 41, Petitioner's claims based on *Milbourn* and *Steanhouse* are not cognizable in a habeas corpus action.

There are federal constitutional limits on the scope of punishment. The Eighth Amendment forbids punishment that is cruel and unusual. But the Eighth Amendment does not require strict proportionality between a crime and its punishment. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991); *United States v. Marks*, 209 F.3d 577, 583 (6th Cir. 2000). "Consequently, only an extreme disparity between crime and sentence offends the Eighth Amendment." *Marks*, 209 F.3d at 583; *see also Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (gross

disproportionality principle applies only in the extraordinary case); *Ewing v. California*, 538 U.S. 11, 36 (2003) (principle applies only in " 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality' ") (quoting *Rummel v. Estelle*, 445 U.S. 263, 285 (1980)). A sentence that falls within the maximum penalty authorized by statute "generally does not constitute 'cruel and unusual punishment.' " *Austin v. Jackson*, 213 F.3d 298, 302 (6th Cir. 2000) (quoting *United States v. Organek*, 65 F.3d 60, 62 (6th Cir. 1995)). Ordinarily, "[f]ederal courts will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without possibility of parole." *United States v. Thomas*, 49 F.3d 253, 261 (6th Cir. 1995). Petitioner was not sentenced to death or life in prison without the possibility of parole, and his sentence falls within the maximum penalty under state law. Petitioner's sentence does not present the extraordinary case that warrants deeper inquiry into reasonableness and proportionality or that runs afoul of the Eighth Amendment's ban of cruel and unusual punishment.

D. Confrontation Clause violation (habeas ground IV)

***10** Finally, Petitioner contends that the trial court's consideration of Ms. Watkins's preliminary examination testimony in lieu of her live testimony violated his rights under the Confrontation Clause. The Confrontation Clause of the Sixth Amendment gives the accused the right "to be confronted with the witnesses against him." U.S. Const., Am. VI; *Pointer v. Texas*, 380 U.S. 400, 403–05 (1965) (applying the guarantee to the states through the Fourteenth Amendment). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The Confrontation Clause therefore prohibits the admission of an out-of-court testimonial statement at a criminal trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). The State of Michigan has incorporated those principles into the Michigan Rules of Evidence as an exception to the hearsay rule. *See* Mich. R. Evid. 804(b)(1).

The Michigan Court of Appeals concluded that both *Crawford* conditions to admissibility were met. Petitioner attacks both determinations. He claims that the prosecutor's showing that Ms. Watkins was hospitalized on the date of trial did not suffice to establish her unavailability. He claims further that the preliminary examination should not count as a prior opportunity for cross-examination.

1. Unavailability

With regard to unavailability, the appellate court concluded that Petitioner was barred from contesting Ms. Watkins's unavailability on appeal:

> As an initial matter, we conclude that defendant has waived the issue of whether the prosecution presented sufficient evidence

> of Watkins's unavailability for trial by conceding at trial that she was unavailable. *See* *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (noting that "waiver" is "the intentional relinquishment or abandonment of a known right[ ]" and that "[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error[ ]") (quotation marks and citations omitted). Even if he had not waived the issue, he would not be entitled to relief because "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *People v Siterlet*, 299 Mich App 180, 191; 829 NW2d 285 (2012) (quotation marks and citation omitted), judgment affirmed in part, vacated in part on other grounds *People v Siterlet*, 495 Mich 919 (2013). At trial, defense counsel conceded that Watkins was unavailable on the date of trial but argued that she was "not indefinitely unavailable. We know her whereabouts." It appears from this comment that that defense counsel was in effect asking for a continuance (albeit not by name). However, because defense counsel conceded that Watkins was unavailable at that time, defendant is precluded from seeking relief on appeal premised on the contrary position that Watkins was not unavailable at the time of trial.

(Mich. Ct. App. Op., ECF No. 2-1, PageID.50) (footnote omitted). The Michigan Court of Appeals would not address the "unavailability" issue on the merits because Petitioner conceded the issue at trial. Petitioner's concession, or waiver, therefore, is a form of procedural default.

When a state-law default prevents further state consideration of a federal issue, the federal courts ordinarily are precluded from considering that issue on habeas corpus review. *See* *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991); *Engle v. Isaac*, 456 U.S. 107 (1982). To determine whether a petitioner procedurally defaulted a federal claim in state court, the Court must consider whether (1) the petitioner failed to comply with an applicable state procedural rule, (2) the state court enforced the rule so as to bar the claim, and (3) the state procedural default is an "independent and adequate" state ground properly foreclosing federal habeas review of the federal constitutional claim. *See* *Hicks v. Straub,* 377 F.3d 538, 551 (6th Cir. 2004); *accord* *Lancaster*, 324 F.3d at 436– 37; *Greer v. Mitchell*, 264 F.3d 663, 672 (6th Cir. 2001); *Buell v. Mitchell*, 274 F.3d 337, 348 (6th Cir. 2001). In determining whether a state procedural rule was applied to bar a claim, a reviewing court looks to the last reasoned state-court decision disposing of the claim. *See* *Ylst*, 501 U.S. at 803; *Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010).

***11** The court of appeals explained that it would not consider Petitioner's "unavailability" arguments on appeal because "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." (Mich. Ct. App. Op., ECF No. 2-1, PageID.50) (internal quotes omitted).

The Michigan appellate courts have regularly applied that rule for decades. *See, e.g.*, *Living Alternatives for Developmentally Disabled Inc. v. Dep't of Mental Health*, 525 N.W.2d 466, 467 (Mich. Ct. App. 1994), and cases citing *Living Waters*.

Because Petitioner procedurally defaulted his "unavailability" challenge in state court, he must demonstrate either (1) cause for his failure to comply with the state procedural rule and actual prejudice flowing from the violation of federal law alleged in his claim, or (2) that a lack of federal habeas review of the claim will result in a fundamental miscarriage of justice. *See* *House v. Bell*, 547 U.S. 518, 536 (2006); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Murray v. Carrier*, 477 U.S. 478, 495 (1986); *Hicks*, 377 F.3d at 551–52. The miscarriage-of-justice exception only can be met in an "extraordinary" case where a prisoner asserts a claim of actual innocence based upon new reliable evidence. *House*, 547 U.S. at 536. A habeas petitioner asserting a claim of actual innocence must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Petitioner has not attempted to make that showing.

Petitioner has also not offered cause for his failure to comply with the rule. He does not claim counsel's performance regarding this issue was objectively unreasonable; instead he claims that counsel's words and actions did not constitute a waiver or were not inconsistent with a subsequent challenge to Ms. Watkins's availability. On that state law question, however, the Court is bound by the court of appeals' determination to the contrary. *See* *Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *see also* *Bradshaw*, 546 U.S. at 76 ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."). Accordingly, this Court's review of Petitioner's challenge to Ms. Watkins's "unavailability" is barred by his procedural default.

Even if review were not barred by Petitioner's procedural default, he would not succeed on the merits. The court of appeals noted that "[t]he only relevant reference point for determining physical or mental illness or infirmity [as a ground for unavailability] is the point when the witness would be called to testify." (Mich. Ct. App. Op., ECF No. 2-1, PageID.50 n.6.) It was undisputed that Ms. Watkins was hospitalized on the date of Petitioner's trial. He offers no clearly established federal law that is contrary to the appellate court's statement nor does he show that the statement represents an unreasonable application of clearly established federal law. Therefore, Petitioner has not established entitlement to habeas relief on the merits either.

2. Prior opportunity for cross-examination

The Michigan Court of Appeals rejected on the merits Petitioner's claim that he did not have a prior opportunity to cross-examine Ms. Watkins:

*12 Defendant also argues that, even if Watkins was unavailable, the trial court erred in admitting her preliminary examination testimony under MRE 804(b)(1) because the defense attorney who conducted the preliminary examination was not the same defense attorney who represented defendant at trial. Defendant concedes that he had an opportunity to cross-examine Watkins at the preliminary examination, but contends that he did not have a similar motive because the issues at the preliminary examination differed from those at trial. We disagree. The admissibility of the prior testimony of a witness "is within the proper exercise of discretion by the trial court[,]" and this Court will not reverse the trial court's decision absent an abuse of discretion. *People v Morris*, 139 Mich App 550, 555; 362 NW2d 830 (1984). A trial court has not abused its discretion if its decision results in an outcome within the range of reasoned and principled outcomes. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

Michigan's rules of evidence provide in relevant part that if a witness is unavailable, testimony given by the witness at another hearing is admissible "if the party against whom the testimony is now offered...had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1). "Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony was presented at each proceeding." *People v Farquharson*, 274 Mich App 268, 275; 731 NW2d 797 (2007).

The record demonstrates that Watkins's preliminary examination testimony was relevant to the issue presented at trial: whether defendant made Watkins feel threatened while using a box cutter to steal razors from a Rite Aid. The primary purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime has been committed and whether there is probable cause to believe that the accused committed it. MCR 6.110(E); see *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). The purpose of the trial was to determine whether defendant was guilty or innocent of the crime associated with the actions Watkins described. See *People v Barbara*, 400 Mich 352, 411; 255 NW2d 171 (1977) ("The purpose of a trial is to determine the guilt or innocence of the defendant."). In both instances, Watkins's testimony was used to establish the occurrence of a crime; thus, in both instances, defendant had a similar motive to discredit her testimony. *Farquharson*, 274 Mich App at 275.

Additionally, defense counsel actually cross-examined Watkins at the preliminary examination. The essence of defendant's argument is that he, through counsel, did not cross-examine Watkins on the right issues. Whereas his focus at the preliminary examination was on discrediting Watkins's identification of him, his focus at trial was on discrediting her claim that he threatened her with a box cutter. However, Watkins testified at the preliminary examination that defendant made her feel threatened; this was not new information at the

time of trial. Defendant's decision not to probe her testimony regarding feeling threatened and to change emphasis for purposes of the trial does not negate the fact that he had an opportunity to submit all of Watkins's preliminary examination testimony, including her testimony that she felt threatened when defendant turned to her with a box cutter, to a thorough cross-examination. Defendant notes that a preliminary examination differs from a trial in various respects, but that is true in every case, and this Court has upheld the admission of preliminary examination testimony at trial when a witness was unavailable at trial and ample opportunity for cross-examination was afforded at the preliminary examination. See *People v Wood*, 307 Mich App 485, 518; 862 NW2d 7 (2014), vacated in part on other grounds 498 Mich 914 (2015).

***13** (Mich. Ct. App. Op., ECF No. 2-1, PageID.50–51.) The appellate court's analysis is focused on the requirements of the Michigan Rule of Evidence. Those requirements, however, are in no way inconsistent with clearly established federal law regarding the Confrontation Clause.

The Supreme Court has clearly established that out-of-court testimonial statements may be admitted at a criminal trial where the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 59. The trial court concluded that Watkins was unavailable to testify at Petitioner's trial and, despite Petitioner's contention that the preliminary examination cross-examination was not adequate, Petitioner had a prior opportunity for cross-examination.

The Sixth Circuit has noted that there exists "some question whether a preliminary hearing necessarily offers an adequate prior opportunity for cross-examination for Confrontation Clause purposes." *Al-Timimi v. Jackson*, 379 F. App'x 435, 437–38 (6th Cir. 2010) (citing, *inter alia*, *Vasquez v. Jones*, 496 F.3d 564, 577 (6th Cir. 2007) (doubting whether "the opportunity to question a witness at a preliminary examination hearing satisfies the pre-*Crawford* understanding of the Confrontation Clause's guarantee of an opportunity for effective cross-examination") (internal quotation marks omitted)). Thus, Petitioner's challenge is certainly colorable. But the Supreme Court has never held that a defendant is denied his rights under the Confrontation Clause when a witness is unavailable at trial and the court admits the witness's preliminary examination testimony. *Id.*, 379 F. App'x at 438. As a result, in the context of a federal court sitting on habeas review, the Sixth Circuit has concluded that a state court's determination that testimony from the preliminary examination was properly admitted was not an unreasonable application of clearly established Supreme Court precedent. *Id.*, 379 F. App'x at 438–40; *see also* *Williams v. Bauman*, 759 F.3d 630, 636 (6th Cir. 2014) (citing *Al-Timimi* with approval and upholding on habeas review the admission of testimony from the petitioner's own preliminary examination). Therefore, Petitioner has failed to show that the state court's determination that he had a prior opportunity to cross-examine Ms. Watkins sufficient to overcome any Confrontation Clause concern is contrary to,

or an unreasonable application of, clearly established federal law. Petitioner is not entitled to habeas relief.

IV. Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Petitioner's claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that...jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

***14** The Court finds that reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims was debatable or wrong. Therefore, the Court will deny Petitioner a certificate of appealability. Moreover, although Petitioner has failed to demonstrate that he is in custody in violation of the Constitution and has failed to make a substantial showing of the denial of a constitutional right, the Court does not conclude that any issue Petitioner might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

Conclusion

The Court will enter a judgment dismissing the petition and an order denying a certificate of appealability.

All Citations

Slip Copy, 2021 WL 4582162

End of Document

769 Fed.Appx. 12

United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Jose MARTINEZ, aka Noelle, Defendant-Appellant. [1]

[1] The Clerk of the Court is directed to amend the caption as above.

16-3142-cr
|
April 25, 2019

Synopsis

Background: Defendant was convicted in the United States District Court for the Western District of New York, Skretny, J., of conspiracy to possess with intent to distribute, and to distribute 500 grams or more of cocaine, and 28 grams or more of mixture containing cocaine base, and he appealed.

Holdings: The Court of Appeals held that:

there was sufficient evidence to support defendant's conviction;

denial of defendant's requested buyer-seller jury instruction was not reversible error;

district court's comments in overruling defense counsel's motions to strike improper questions and answers were not so prejudicial as to deny defendant fair trial;

alleged prosecutorial error was not of sufficient significance to result in denial of defendant's right to fair trial; and

district court did not violate defendant's rights when it considered acquitted conduct in imposing his sentence.

Affirmed.

Pooler, Circuit Judge, concurred and filed opinion.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection; Sentencing or Penalty Phase Motion or Objection.

*13 Appeal from an order of the United States District Court for the Western District of New York (Skretny, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of said District Court be and it hereby is **AFFIRMED**.

Attorneys and Law Firms

Appearing for Appellant: Jillian S. Harrington, Monroe Township, N.J.

Appearing for Appellee: Mary C. Baumgarten, Assistant United States Attorney for James P. Kennedy, Jr., United States Attorney, Buffalo, N.Y.

Present: ROSEMARY S. POOLER, REENA RAGGI, DEBRA ANN LIVINGSTON, Circuit Judges.

SUMMARY ORDER

Appellant Jose Martinez appeals from a judgment, entered on August 29, 2016, in the United States District Court for the Western District of New York (Skretny, *J.*), sentencing Martinez to life imprisonment for conspiracy to possess with intent to distribute, and to distribute 500 grams or more of cocaine, and 28 grams or more of a mixture containing cocaine base. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Martinez primarily argues that: (1) his conviction was not supported by sufficient evidence; (2) the district court erred in denying his request to provide the jury with a buyer-seller instruction; (3) the district court erred in repeatedly advising defense counsel in front of the jury that his objections and requests were denied but that he would have the opportunity to cross-examine the government's witness; (4) the cumulative effect of prosecutorial errors requires reversal; (5) the district court violated his constitutional rights by using acquitted conduct in imposing a sentence of life imprisonment. We address each argument in turn.

1. Sufficiency of the Evidence

Although this Court reviews sufficiency of the evidence claims de novo, *see* *14 *United States v. Sabhnani*, 599 F.3d 215, 241 (2d Cir. 2010), a defendant mounting such a challenge "bears a heavy burden," *United States v. Heras*, 609 F.3d 101, 105 (2d Cir. 2010) (internal quotation marks omitted). This is because, in assessing whether the evidence was sufficient to sustain a conviction, " 'we view the evidence in the light most favorable to the government, drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility.' " *Sabhnani*, 599 F.3d at 241 (quoting *United States v. Parkes*, 497 F.3d 220, 225 (2d Cir. 2007)). "If the court concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000) (internal alterations and quotation marks omitted). Following this review, this Court "must affirm the conviction if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' "

United States v. Kozeny, 667 F.3d 122, 139 (2d Cir. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

Martinez argues that this Court must reverse Martinez's conviction with an order to enter a judgment of acquittal because the government failed to prove beyond a reasonable doubt that Martinez became a member of the conspiracy (the scope of which, Martinez argues, is unclear). Martinez asserts that the evidence demonstrates only, if anything, that "Martinez was just a seller and Turner was just his buyer." Appellant's Br. at 43. To prove Martinez's narcotics conspiracy conviction, the government was required to show at trial that (1) "two or more persons agreed to participate in a joint venture intended to commit an unlawful act," *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997), and (2) that Martinez "knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it," *United States v. Snow*, 462 F.3d 55, 68 (2d Cir. 2006). Martinez concedes that "the first prong ... was met in this case as there was clearly an agreement between Turner, Quentin Leeper and others." (Appellant's Br. at 22.) Accordingly, at issue before this Court is whether any rational trier of fact could have found beyond a reasonable doubt that Martinez knowingly became a member of the conspiracy.

The government presented evidence to the jury that Martinez knowingly participated with Turner and others in a narcotics distribution conspiracy and that he conspired with Turner as to "other transfers either by the seller or by the buyer[.]" *United States v. Parker*, 554 F.3d 230, 232 (2d Cir. 2009). In particular, the jury was presented with evidence that Martinez sold wholesale quantities, that he "fronted" kilos of cocaine to Turner, that he had approached Turner and offered to sell him better quality cocaine than he was currently receiving at a lower price, and that he would receive cash payments from Turner in which Turner and Leeper had pooled money. This evidence, taken together, suffices to establish that Martinez was not "genuinely indifferent to the possibility of retransfer," but rather there was a "shared intention between the transferor and transferee that further transfers occur." *Parker*, 554 F.3d at 236; *see also United States v. Hawkins*, 547 F.3d 66, 69-70 (2nd Cir. 2008) ("[O]ur sufficiency of the evidence test must consider the government's case in its totality rather than in its parts, and may be satisfied by circumstantial evidence alone.") (internal alterations and quotation marks omitted).

2. Denial of Requested Buyer-Seller Jury Instruction

A trial court's decision not to include a requested jury instruction may be overturned ***15** "only if the instruction that was sought accurately represented the law in every respect and only if viewing as a whole the charge actually given, the defendant was prejudiced." *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005) (internal alteration and quotation marks omitted). Prejudice may result where a requested instruction "represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006) (internal quotation marks omitted).

Here, there was ample evidence that Martinez had a stake in additional transfers of drugs beyond the transfers to Turner. Accordingly, the buyer-seller theory of defense did not have a "basis in the record that would lead to acquittal." *Quattrone*, 441 F.3d 153; *see also* *Hawkins*, 547 F.3d at 72 ("Where, for example, there is advanced planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use ... the participants in the transaction may be presumed to know that they are part of a broader conspiracy."(internal alterations and quotation marks omitted)).

3. District Court's Responses to Defense Counsel's Objections and Requests to Voir Dire

Martinez argues that his conviction should be reversed and a new trial ordered because, when defense counsel objected and moved to strike improper questions and answers, the district court repeatedly made comments to the effect of "overruled, you can cross-examine if you choose to do that." *See, e.g.*, Gov't App'x at 1448. Martinez argues that these "burden-shifting comments" violated Martinez's Fifth Amendment right to sit back and put the government to its proof. (Appellant's Br. at 61.) Martinez does not challenge the admission or rejection of evidence; rather, he argues that the judge's comments in response to his objections violated his constitutional rights.

Pursuant to Federal Rule of Evidence 103(c), "[t]he court may make any statement about the character or form of the evidence, the objection made, and the ruling." Fed. R. Evid. 103(c). "Even if the court's commentary was inappropriate, the relevant inquiry on appeal is whether the judge's behavior was so prejudicial that it denied the defendant a fair, as opposed to a perfect, trial, and the defendant's burden on that question is substantial." *United States v. Tracy*, 12 F.3d 1186, 1201 (2d Cir. 1993) (internal alterations and quotation marks omitted); *see also United States v. Amiel*, 95 F.3d 135, 146 (2d Cir. 1996) ("The court's role is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid." (internal quotation marks omitted)). When analyzing the prejudicial effect of a trial judge's comments, the reviewing court must not judge such comments in isolation but must instead make "an examination of the entire record, in order to determine whether the defendant received a fair trial." *United States v. Mickens*, 926 F.2d 1323, 1327 (2d Cir. 1991) (internal quotation marks omitted). "[T]he overriding consideration is whether the judge saw to it that the jury had all the admissible evidence and knew it was free to find the facts as it thought the evidence showed them to be." *United States v. Filani*, 74 F.3d 378, 386 (2d Cir. 1996).

Viewing the 5,793-page transcript as a whole, the district court's explanatory comments regarding cross examination were not so prejudicial as to deny Martinez a fair trial, as opposed to a perfect ***16** one. Any prejudicial effect of the comments was mitigated by the district court's repeated instructions to the jury throughout the trial that the burden of proof remained on the government at all times and that the defendants were presumed innocent.

Any prejudicial effect was also mitigated by the district court's final instruction to the jury regarding the burden of proof and presumption of innocence.

4. Cumulative Prosecutorial Errors

When prosecutorial misconduct is alleged, "a new trial is only warranted if the misconduct is 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' " *United States v. McCarthy*, 54 F.3d 51, 55 (2d Cir. 1995) (quoting *Blissett v. Lefevre*, 924 F.2d 434, 440 (2d Cir. 1991)). In determining if a defendant's right to a fair trial was denied, we consider "[t]he severity of the misconduct, curative measures, and the certainty of conviction." *Blissett*, 924 F.2d at 440. And this Court has stated that "the cumulative effect of a trial court's errors, even if they are harmless when considered singly, may amount to a violation of due process requiring reversal of a conviction." *United States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008). But we refuse to aggregate things that are "not, in fact, errors." *See In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 147 (2d Cir. 2008).

Martinez argues that several instances of alleged prosecutorial error, even if not individually prejudicial, when considered cumulatively violated his right to due process, and thus warrant a new trial. The alleged prosecutorial error includes late disclosure of some documents, inadequate preparation of certain witnesses, and inappropriate trial behavior. We disagree with Martinez's characterization of some of this conduct as "prosecutorial error." But even assuming it was misconduct, it was not "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Blissett*, 924 F.2d at 440. Moreover, the district court consistently issued curative instructions, *cf. United States v. Binday*, 804 F.3d 558, 592 (2d Cir. 2015) (declining to overturn conviction where "the district court's curative instruction guarded against precisely the prejudice that [defendant] alleges"), and conviction was certain even absent the alleged misconduct. A new trial is not warranted.

5. Constitutional Challenges to the Sentence

Martinez finally contends that the district court violated his Fifth Amendment right to due process, as well as his Sixth Amendment right to trial by jury, when it considered acquitted conduct—his alleged involvement in the murder of Quincy Turner—in imposing his sentence. His arguments are defeated by controlling precedent.

As Martinez's counsel acknowledged at oral argument, the law in this respect is well established. Even when a jury finds that the defendant has not been proved guilty of a charged offense beyond a reasonable doubt, a "district court may treat acquitted conduct as relevant conduct at sentencing, provided that it finds by a preponderance of the evidence that the defendant committed the conduct." *United States v. Pica*, 692 F.3d 79, 88 (2d Cir. 2012) (internal citations and quotation marks omitted). This is because "[n]o limitation shall be placed on the information [a district court] may receive and consider" in imposing a sentence. 18 U.S.C. § 3661. Precedent

dictates that use of "the preponderance standard [by a sentencing judge] satisfies due process," *McMillan v. Pennsylvania*, 477 U.S. 79, 91, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), is "consistent with ***17** the Double Jeopardy Clause," *United States v. Watts*, 519 U.S. 148, 154, 117 S.Ct. 633, 636, 136 L.Ed.2d 554 (1997), and, under non-mandatory guidelines, does not violates the Sixth Amendment requirement for trial by jury, *see United States v. Booker*, 543 U.S. 220, 258, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (rejecting the concept of "a sentencing guidelines system in which sentencing judges were free to consider facts or circumstances not found by a jury or admitted in a plea agreement for the purpose of adjusting a base-offense level *down*, but not *up*, within the applicable guidelines range").

A district court's "[f]indings of relevant conduct are reviewed for clear error." *Pica*, 692 F.3d at 88. We identify no such error in the district court's determination that Martinez was "directly responsible for the death of Quincy Turner." GA 2077. In the era of post-Booker non-mandatory guidelines, this Court has affirmed the continued validity of a judge's use of acquitted conduct in sentencing. *See United States v. Vaughn*, 430 F.3d 518, 526-27 (2d Cir. 2005); *United States v. Martinez*, 525 F.3d 211, 215 (2d Cir. 2008). Accordingly, we reject Martinez's challenge here today.

We have considered the remainder of Martinez's arguments and find them to be without merit. The order of the district court hereby is AFFIRMED.

POOLER, Circuit Judge, concurring:
While I concur with the outcome in this case, I believe that the district court's practice of using acquitted conduct to enhance a defendant's sentence—here, to life imprisonment—is fundamentally unfair. I agree with Justice Scalia that such a practice "disregard[s] the Sixth Amendment," *Jones v. United States*, —— U.S. ——, 135 S.Ct. 8, 9, 190 L.Ed.2d 279 (2014) (Scalia, J., dissenting from denial of certiorari), and with then-Judge Gorsuch that "[i]t is far from certain whether the Constitution allows" a district court in this way to "increase a defendant's sentence ... based on facts the judge finds without the aid of a jury or the defendant's consent," *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014). The jury heard all the evidence and acquitted Martinez of the murder of Quincy Turner. That the court then used such acquitted conduct, which it found by a mere preponderance of the evidence, to enhance Martinez's sentence is deeply troubling.

All Citations

769 Fed.Appx. 12

End of Document

State of Connecticut
DIVISION OF CRIMINAL JUSTICE
OFFICE OF THE CHIEF STATE'S ATTORNEY
APPELLATE BUREAU

RICHARD J. COLANGELO, JR.
CHIEF STATE'S ATTORNEY

300 CORPORATE PLACE
ROCKY HILL, CT 06067
TEL: (860) 258-5807
FAX: (860) 258-5828

February 17, 2022

Carl D. Cicchetti, Chief Clerk
Appellate Clerk's Office
231 Capitol Avenue
Hartford, CT 06106

Re: State v. Langston, A.C. 44724

Pursuant to Practice Book § 67-3A, the State of Connecticut-Appellee, herein requests 2000 additional words for its appellee's brief in the above-captioned appeal in order to respond to a state constitutional claim.

By order dated December 3, 2021, the Court previously granted the defendant-appellant's request for five additional pages for his appellant's brief to address a state constitutional claim. He since has filed a 40-page brief.

Under the amended rules of appellate procedure, an appellant's brief is limited to 13,500 words. Practice Book § 67-3A. Upon request, however, the clerk shall grant an additional 2000 words to permit response to such a state constitutional claim. The State hereby requests an additional 2000 words.

The State's brief currently is due on February 23, 2022.

Sincerely,

/s/
Timothy F. Costello
Senior Assistant State's Attorney
Appellate Bureau

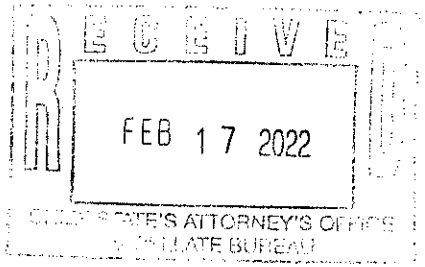
CERTIFICATION

I hereby certify that this document complies with Practice Book §§ 62-7 and 66-3 and all applicable rules of appellate procedure; that it has been redacted and/or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and that it has been electronically delivered, this 17th day of February, 2022, to: John R. Weikart, Esq.; Sexton & Company, LLC; 363 Main St., Third Floor; Hartford, CT 06106; Tel: (860) 325-0073; Fax: (860) 838-6801; Email: jweikart@sextoncolaw.com.

/s/
Timothy F. Costello
Senior Assistant State's Attorney

Order On Request for Additional Pages/Words in Motion, Petition or Brief AC 213207

AC44724 STATE OF CONNECTICUT v. RICHARD LANGSTON



Notice Issued: **2/17/2022 9:01:52 AM**

Court Address:
Office of the Appellate Clerk
231 Capitol Avenue
Hartford, CT 06106

Notice Content:

Motion Filed: 2/17/2022
Motion Filed By: Chief State's Attorney-Appellate
Order Date: 02/17/2022

Order: Granted

By the Court
Robertson, Rene L.

Notice sent to Counsel of Record

Certification

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2A, that on March 3, 2022:

(1) the electronically submitted e-brief and appendix have been delivered electronically to John R. Weikart, Assigned Counsel, Emily Graner Sexton, Assigned Counsel, Sexton & Company, LLC, 363 Main Street, Third Floor, Hartford, CT 06106, Tel: (860) 325-0073 / Fax (860) 838-6801, Email: jweikart@sextoncolaw.com;

(2) the electronically submitted e-brief and appendix and the filed paper e-brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statue, court order or case law;

(3) a copy of the e-brief and appendix have been sent to each counsel of record in compliance with Section 62-7, by Brescia's Printing Services of East Hartford, Connecticut, on March 3, 2022;

(4) the e-brief and appendix being filed with the appellate clerk are true copies of the e-brief and appendix that were submitted electronically;

(5) the e-brief and appendix are filed in compliance with the optional e-briefing guidelines and a 2,000 word deviation was requested and granted pursuant to Practice Book § 67-3A; and

(6) the e-brief contains **15,443** words; and

(7) the e-brief and appendix comply with all provisions of this rule.

/s/

Timothy F. Costello
Senior Assistant State's Attorney