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Quit Using Acquittals: The Unconstitutionality and Immorality of Acquitted-Conduct Sentencing

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Quit Using Acquittals:

The Unconstitutionality and Immorality of Acquitted-Conduct Sentencing

ABSTRACT

This Comment examines the phenomenon of acquitted-conduct sentencing—a practice that allows a sentencing judge to enhance a criminal defendant's sentence due to conduct for which he has already been acquitted. Seventeen-year-old Dayonta McClinton is one of many criminal defendants who have unjustly suffered at the hands of this practice when he received a thirteen-year enhancement because of conduct for which he already received a verdict of not guilty from a jury.

This Comment argues that acquitted-conduct sentencing is unconstitutional, as it violates both the reasonable doubt standard required under the Due Process Clause of the Fifth Amendment and the jury trial right of the Sixth Amendment. This Comment additionally criticizes acquitted-conduct sentencing on policy grounds, specifically in the context of our entrenched guilty plea system. This Comment begins by briefly discussing the Sentencing Guidelines and its "relevant conduct" provision, as well as outlining the complications and contradictions inherent in the Supreme Court's sentencing jurisprudence, especially in the wake of United States v. Booker. *This Comment further explains that the only viable solution to this problem is through Supreme Court action, even though the Court denied certiorari in McClinton's case in the 2023 term. This Comment argues that the Supreme Court must conclusively declare the unconstitutionality of acquitted-conduct sentencing and overrule* United States v. Watts*, as this practice is not only wholly incompatible with the Constitution but also with how we perceive justice.*

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"'No, no!' said the Queen. 'Sentence first—verdict afterwards.' 'Stuff and nonsense!' said Alice loudly. 'The idea of having the sentence first!'"
Lewis Caroll, *Alice's Adventures in Wonderland*[1]

I. INTRODUCTION

The Queen of Hearts is culturally known as an emblem of a boisterously cruel tyrant, whose haste and arbitrary decisions regarding the ordering of executions represent a contorted perspective of justice.[2] Knowing what we know about the Queen, she might further elaborate on her convictions and command, "acquit first, punish later."[3] Although such a concept was absurd to Alice, it is unfortunately a sentiment that the American criminal justice system currently reflects.[4] As the law stands, a criminal defendant can receive an enhanced sentence because of conduct for which he has already been acquitted.[5]

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1. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1893), *available at* https://www.gutenberg.org/cache/epub/11/pg11-images.html.

2. *Id.*

3. *Id.*

4. *See* United States v. Frias, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (criticizing how the defendant was sentenced to 144 months imprisonment, which was a sentence that was about four times the amount he would have received if the court had only considered the charges for which the defendant was convicted).

5. For scholarly commentary regarding the current state of the law, see generally Matthew Mackinnon Shors, United States v. Watts*: Unanswered Questions, Acquittal Enhancements, and the Future of Due Process and the American Criminal Jury*, 50 STAN. L. REV. 1349 (1998); Erwin Chemerinsky, *Making Sense of* Apprendi *and Its Progeny*, 37 MCGEORGE L. REV. 531 (2006); Stephanie C. Slatkin, *The Standard of Proof at Sentencing Hearings Under the Federal Sentencing Guidelines: Why the Preponderance of the Evidence Standard Is Constitutionally Inadequate*, 1997 U. ILL. L. REV. 583 (1997); Eang L. Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235 (2009); Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153 (1996) [hereinafter Johnson, *If at First You Don't Succeed*]; Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1 (2016) [hereinafter Johnson, *The Puzzling Persistence of Acquitted Conduct*]; Jeff Nicodemus, Watts v. United States*: The Misguided Approval of a Sentencing Court's Authority to Consider Acquitted Conduct During Sentencing*, 25 AM. J. CRIM. L. 437 (1998); Peter Erlinder, *'Doing Time' . . . After the Jury Acquits: Resolving the Post-*Booker *'Acquitted Conduct' Sentencing Dilemma*, 18 S. CAL. REV. L. & SOC. JUST. 79 (2008); Orhun Hakan Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 SANTA CLARA L. REV. 676 (2014); Lucius T. Outlaw II, *Giving an Acquittal Its Due: Why a Quartet of Sixth Amendment Cases Means the End of* United States v. Watts *and Acquitted Conduct Sentencing*, 5 U. DENV. CRIM.

Not only is a sentencing judge permitted to account for acquitted conduct when formulating a sentence for a separate offense, but the judge need only be persuaded that the conduct for which the defendant had *already been acquitted* exists by a preponderance of the evidence.[6] In other words, the prosecution failed to prove a certain number of charges against the defendant beyond a reasonable doubt—the constitutionally required standard of proof[7] at criminal trials—causing the defendant to be acquitted of those charges.[8] Then, if the prosecutor is able to secure a conviction for just one charge, she will be able to introduce the other acquitted charges and any other acquittals the defendant may have received in his history at the defendant's sentencing hearing in order to increase the defendant's sentence for the one convicted charge.[9] This confusingly permissible practice has been criticized as being

L. REV. 189 (2015); Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367 (2010).

6. *See Preponderance of the Evidence Definition*, NOLO, https://www.nolo.com/dictionary/preponderance-of-the-evidence-term.html (last visited Feb. 8, 2024) ("The legal burden of proof required in most civil (non-criminal) trials. The plaintiff must prove to the judge or jury that the defendant is more likely than not liable for some harm the plaintiff has suffered. The term for the 'more likely than not' standard is 'preponderance of the evidence.'"); *Preponderance of the Evidence*, LAW.COM, https://dictionary.law.com/default.aspx?selected=1586 (last visited Feb. 8, 2023) ("Preponderance of the evidence is required in a civil case and is contrasted with 'beyond a reasonable doubt,' which is the more severe test of evidence required to convict in a criminal trial.").

7. *See* Steven M. Salky & Blair G. Brown, *The Preponderance of Evidence Standard at Sentencing*, 29 AM. CRIM. L. REV. 907, 912 (1992) ("The burden of proof is an integral element of any process of adjudication. The choice of an evidentiary standard of proof 'serves to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" (quoting Addington v. Texas, 441 U.S. 418, 423 (1978))).

8. *See* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 458 (1989) ("By placing a relatively high burden of persuasion on the government, the rule operates to ensure that even when significant evidence of guilt exists, the defendant will be acquitted if a reasonable doubt exists in the jury's mind."); *see also* Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) ("We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."); *In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.").

9. *See* Chemerinsky, *supra* note 5, at 537 ("A defendant can be acquitted of nine of ten counts—or for that matter ninety-nine of 100 counts—in an indictment and the judge can use the acquittals to increase the sentence so long as the judge finds, by a preponderance of the evidence, that the crime was committed.").

"Kafka-esque,"[10] "repugnant,"[11] "uniquely malevolent,"[12] and "pernicious,"[13] and it is undeniably an affront to the United States Constitution and Americans' internalized notions of what constitutes criminal justice.[14]

Unfortunately, seventeen-year-old Dayonta McClinton is just one of many defendants who have been victims of this practice.[15] In 2022, the Seventh Circuit affirmed a 228-month sentence for McClinton when he should have received a sentence between fifty-seven to seventy-one months.[16] McClinton received this substantially higher sentence because the judge calculated into his sentence conduct for which a jury had already returned a not-guilty verdict.[17] Had the judge solely considered the charges for which McClinton was actually convicted, he could have received a maximum sentence of only seventy-one months under the Federal Sentencing Guidelines.[18]

On October 15, 2015, McClinton and five accomplices robbed a CVS pharmacy at gunpoint.[19] Attempting to take pharmaceutical drugs, as well as cash from the register, one of the boys pointed a gun at a pharmacy technician, who told the robbers that most of the drugs were in a time-delay safe.[20] When the pharmacist tried inputting the passcode to open the safe, it would not open,

10. United States v. Ibanga, 454 F. Supp. 2d 536, 544 n.2 (E.D. Va. 2006) ("In his novel, *The Trial*, Franz Kafka described a totalitarian state in which the judicial system was used to suppress freedom. One of the techniques used by the state was non-final 'acquittals.' Kafka describes these 'acquittals' as follows: 'That is to say, when [the accused] is acquitted in this fashion the charge is lifted from [his] shoulders for the time being, but it continues to hover above [him] and can, as soon as an order comes from on high, be laid upon [him] again.'" (quoting FRANZ KAFKA, THE TRIAL 158 (Willa & Edwin Muir, trans., Alfred A. Knopf, rev. ed. 1992))).

11. United States v. Watts, 519 U.S. 148, 170 (1997) (Stevens, J., dissenting) (per curiam).

12. United States v. Canania, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring).

13. United States v. Papakee, 573 F.3d 569, 578 (8th Cir. 2009) (Bright, J., concurring).

14. Yalinçak, *supra* note 5, at 679–80; *see also* United States v. Pimental, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) (highlighting that the use of acquitted conduct "makes no sense—as a matter of law or logic"); United States v. Galloway, 976 F.2d 414, 437 (8th Cir. 1992) (Bright, J., dissenting) ("If the former Soviet Union or a third world country had permitted such a practice, human rights observers would condemn those countries.").

15. United States v. McClinton, 23 F.4th 732, 734–37 (7th Cir. 2022).

16. U.S. SENTENCING GUIDELINES MANUAL § 5A (U.S. SENTENCING COMM'N 2021) [hereinafter SENTENCING GUIDELINES MANUAL] (displaying and explaining the Sentencing Table, which calculates a defendant's sentencing range through judicial determination of the offense level and the defendant's criminal history).

17. *McClinton*, 23 F.4th at 732.

18. SENTENCING GUIDELINES MANUAL, *supra* note 16. The Guidelines range for McClinton's *convicted* charges in his case would have been fifty-seven to seventy-one months in prison. *Id.*

19. *McClinton*, 23 F.4th at 734.

20. *Id.*

agitating the group.[21] The pharmacist was able to appease them by giving them one bottle of hydrocodone, a drug that the pharmacy kept outside of the safe.[22] The group fled before the safe could be opened, while Malik Perry, one of McClinton's co-conspirators, carried the drugs that the men ended up acquiring.[23] After driving away from the pharmacy, McClinton allegedly shot Perry, killing him.[24]

At McClinton's trial, the jury found McClinton guilty of robbing the CVS and brandishing a firearm while executing the robbery.[25] However, the jury found him not guilty of robbing Perry and subsequently causing his death.[26] But at McClinton's sentencing for the robbery, the sentencing judge ultimately decided that McClinton *did* kill Perry, and was persuaded of this fact by merely a preponderance of the evidence, despite the jury returning a not-guilty verdict for this crime.[27] Because of this judicial determination, McClinton consequently received a nineteen-year sentence instead of around a six-year sentence had the judge not considered this acquitted conduct, more than *tripling* his sentence.[28] McClinton petitioned the Supreme Court for certiorari, which has since been denied.[29] His petition was supported by six amicus briefs, including one from seventeen retired federal judges which "emphasize[d] the unfairness of the sentence in this case [based on their combined experience of 300 years]. The district court relied upon acquitted conduct to essentially quadruple [McClinton's] sentencing range, and its decision reflects a more widespread problem in the criminal justice system."[30]

McClinton is not unique in his predicament.[31] Four cases pending review

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 736 ("There is no doubt that . . . the murder was relevant conduct that could be used to calculate McClinton's sentence.").
28. *Id.* at 734–35.
29. McClinton v. United States, 143 S. Ct. 2400, 2400–03 (2023) (denying McClinton's petition for certiorari).
30. Brief for 17 Former Federal Judges as Amici Curiae Supporting Petitioner at 1, *McClinton*, 143 S. Ct. 2400 (2023) (No. 21-1557) [hereinafter Brief for 17 Former Federal Judges]; *see also* John Elwood, *Acquitted-Conduct Sentencing and "Offended Observer" Standing*, SCOTUSBLOG (Jan. 19, 2023, 9:33 AM), https://www.scotusblog.com/2023/01/acquitted-conduct-sentencing-and-offended-observer-standing/ (discussing the other amicus curiae briefs filed in the matter).
31. *See* Elwood, *supra* note 30.

at the Supreme Court in 2023 involved the use of acquitted conduct at sentencing, all of whose petitions were denied: *Luczak v. United States*, *Shaw v. United States*, *Karr v. United States*, and *Bullock v. United States*.[32] It seems rather shocking that this practice is legal.[33] It goes against what society seems to know about the criminal justice system and what it means to be acquitted of a crime: an acquittal means that the defendant should not be exposed to any more consequences because of it.[34] He should be considered "legally innocent."[35] Much of the U.S. Constitution is predicated on providing a slew of protections for the criminal defendant, in order to shield him from "the hand of oppression"[36] of an encroaching government power attempting to seize his liberty through incarceration.[37] Particularly, the Sixth Amendment right of a criminal defendant to be tried by a jury of his peers (the jury trial right) provides him with "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[38] Crucially,

32. *See id.* (providing a summary of each of the cases pending review to grant certiorari); *see also* Stewart Bishop, *Justices Pass on Acquitted Conduct Review—For Now*, LAW360 (June 30, 2023, 10:08 PM), https://www.law360.com/articles/1695073/justices-pass-on-acquitted-conduct-review-for-now ("The U.S. Supreme Court . . . declined to take up several cases challenging the practice of acquitted conduct sentencing . . . ."). The facts of Bullock's case are also particularly egregious. Petition for Writ of Certiorari at 4–7, Bullock v. United States, 143 S. Ct. 2691 (2023) (No. 22-5828). Bullock pled guilty to Possession of a Firearm by a Drug User. *Id.* at 4. One year earlier, a jury acquitted Bullock with another charge of Reckless Use of a Firearm, based on a shooting of his friend. *Id.* At the sentencing of the possession charge, the prosecution introduced an enhancement based on the acquittal that Bullock had received a year earlier for a completely unrelated offense. *Id.* at 6. The prosecution sought this enhancement based on the belief that without the enhancement, the sentence would underrepresent the seriousness of Bullock's criminal history. United States v. Bullock, 35 F.4th 666, 669–70 (8th Cir. 2022). From an original Guidelines range of forty-six to fifty-seven months imprisonment, the sentencing court sentenced Bullock to sixty-three months in prison. *Id.*

33. *See* Chemerinsky, *supra* note 5, at 537 ("Non-lawyers are shocked when I tell them about this routine occurrence.").

34. *See* Ngov, *supra* note 5, at 242.

35. *Id.*

36. George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 177–78 (2001) (quoting NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS 438, 436 (1997)).

37. *See generally Sixth Amendment: Rights of Accused in Criminal Prosecutions*, https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-7.pdf (last visited Mar. 3, 2024) (explaining thoroughly the constitutionally protected rights that are afforded to defendants in criminal prosecutions, such as the Sixth Amendment rights to a speedy and public trial by an impartial jury, to confront one's accusers, and to be provided with defense counsel).

38. Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence

the defendant has access to these protections throughout his prosecution, which does not end before he is sentenced.[39] So using an acquittal to enhance a defendant's sentence for a completely different conviction seems to be giving the prosecution an exceptional advantage when the prosecution should bear every single hardship placed on it during the criminal process.[40]

In his petition to the Supreme Court, McClinton urged the Court to resolve this issue of utilizing acquitted conduct to increase sentences.[41] The petition mentioned how numerous federal judges have questioned the validity of this practice, how state courts are split on this issue, and how this practice is violative of the Due Process Clause of the Fifth Amendment and the jury trial right of the Sixth Amendment.[42] It then illustrated how McClinton's case provided the perfect vehicle for the Court to deal with the problem of acquitted-conduct sentencing—a problem that it essentially created.[43] Even the Seventh Circuit hearing McClinton's case, albeit affirming his sentence, displayed discomfort at how acquitted-conduct sentencing "is still the law."[44]

This Comment will argue that the use of acquitted conduct at sentencing should be completely discarded, ideally through Supreme Court action

upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.").

39. *See* United States v. Haymond, 139 S. Ct. 2369, 2379 (2019) ("[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed.").

40. *See* Thomas III, *supra* note 36, at 152 ("The Framers feared that the powerful federal government would seek to persecute its enemies through the use of federal law—that it would achieve persecution by prosecution. This is what the Bill of Rights criminal procedure provisions aimed to prevent.").

41. Petition for Writ of Certiorari at 4, McClinton v. United States, 143 S. Ct. 2400 (2023) (No. 21-1557) ("Unless this Court resolves this issue, tens of thousands of criminal defendants will continue to be sentenced using sentencing practices that are impossible to square with the Constitution.").

42. *Id.* at 18–22.

43. *Id.* at 31 ("This case thus presents a compelling illustration of how acquitted-conduct sentencing eliminates the jury's role 'as circuitbreaker in the State's machinery of justice' and instead 'relegate[s]' the jury to 'a mere preliminary' role of deciding which minor offense will serve as the predicate for 'the crime the State *actually* seeks to punish.'" (quoting Blakely v. Washington, 542 U.S. 296, 306–07 (2004))).

44. United States v. McClinton, 23 F.4th 732, 735 (7th Cir. 2022) ("Despite this clear precedent, McClinton's contention is *not frivolous*. It preserves for Supreme Court review an argument that has garnered increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations.") (emphasis added).

declaring its unconstitutionality.[45] This Comment will urge that this practice is not only antithetical to our society's basic notions of criminal justice but that it is also in contradiction to basic constitutional principles and continuously affirmed Supreme Court precedent.[46] This practice both breaches the due process requirement under the Fifth Amendment—i.e., that all elements of the offense(s) that a criminal defendant is charged with must be proven beyond a reasonable doubt—and materially undermines the criminal defendant's right to a jury trial.[47]

Part II of this Comment will detail a brief history of the Federal Sentencing Guidelines and its provision on "relevant conduct," the section of the Guidelines that is used to legitimize the use of acquitted conduct at sentencing.[48] Parts III provides an overview of Supreme Court case law related to acquitted-conduct sentencing, including the cases that initiated what is known as the "sentencing revolution" and an introduction to the problems that have arisen because of the Court's varying interpretations.[49] Part IV analyzes the plethora of infractions that acquitted-conduct sentencing has made, from those that have constitutional implications to those that have public policy implications, and Part V applies this principles to plea-bargaining.[50] Part VI summarizes the present landscape of acquitted-conduct sentencing, including its treatment in state criminal courts and potential solutions that could be pursued, with a strong preference toward Supreme Court action.[51] Finally, Part VII concludes.[52]

II. THE FEDERAL SENTENCING GUIDELINES AND "RELEVANT CONDUCT"

Prior to the implementation of the Federal Sentencing Guidelines, judges were afforded extreme discretion in their sentencing decisions for criminal defendants,[53] and appellate review of a lower court's sentencing decision was

45. *See infra* Sections IV.D, V.B.
46. *See infra* Part IV.
47. *See infra* Sections IV.A, IV.B.
48. *See infra* Part II.
49. *See infra* Part III.
50. *See infra* Parts IV, V.
51. *See infra* Part VI.
52. *See infra* Part VII.
53. *See* Williams v. New York, 337 U.S. 241, 247 (1949) (stating that the determination of a justifiable and appropriate sentence requires "possession of the fullest information possible concerning

rarely granted given that the district judge at sentencing "sees more and senses more"[54] than the appellate court.[55] Because of the unchecked and unfettered discretion that judges were provided, disparities in sentences unsurprisingly arose.[56] Congress, in bipartisan efforts to address and hopefully rectify these disparities, enacted the Sentencing Reform Act of 1984[57] which created the U.S. Sentencing Commission,[58] an independent federal agency to which

the defendant's life and characteristics," allowing the sentencing judge the discretion to "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").

54. Mistretta v. United States, 488 U.S. 361, 364 (1989).

55. *See* Shors, *supra* note 5, at 1354. Before the Guidelines were implemented, other than the prescribed limit of the statutory minimum or maximum for the offense, a judge was free to consider a multitude of factors when considering the length of a defendant's sentence. *Id.* at 1354–55; *see also* United States v. Tucker, 404 U.S. 443, 447 (1972) ("[A] sentence imposed by a federal judge, if within statutory limits, is generally not subject to review."); U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 2 (2006), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/200603-booker/Booker_Report.pdf [hereinafter *BOOKER* REPORT]; Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167, 1169 (2017).

56. *See* Newton & Sidhu, *supra* note 55, at 1179. Disparities among sentences for similar crimes were revealed in a 1974 study published by the Federal Judicial Center. ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FED. JUDICIAL CTR., THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 5 (1974). In this study, twenty presentence investigation reports (PSRs) were given to fifty judges sitting on the United States Court of Appeals for the Second Circuit. *Id.* These judges were asked to impose a hypothetical sentence for each of these twenty cases without the use of any prescribed guidelines by using only their traditional judicial sentencing discretion. *Id.* There were substantial differences in sentences based on similar information, signifying a notable likelihood for judicial variation and interdistrict disparities for actual cases. *Id.*; *see also* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 95 (2005) ("Federal sentencing reformers emphasized three things that, in their view, should not determine sentences—the identity of the sentencing judge, the region of the country in which an offender is sentenced, and the offender's race, ethnicity, or gender."); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 916 (1962) (remarking that the considerable discretion given to judges during sentencing is "the greatest degree of uncontrolled power over the liberty of human beings that one can find in the legal system").

57. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 28 U.S.C. §§ 991–998 (2008)); SENTENCING GUIDELINES MANUAL, *supra* note 16, at 2–3 ("The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing . . . . Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.").

58. 28 U.S.C. § 991(b)(1)(B) (2008). The Commission's purpose, as laid out by Congress, is to–

Congress delegated substantial legislative powers regarding federal sentencing.[59] The Commission's work accumulated to become the mandatory Federal Sentencing Guidelines (The Guidelines).[60]

The Act provides that the Guidelines have established ranges of sentences depending on the characteristics of the offense[61] and the characteristics[62] of

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(1) establish sentencing policies and practices for the Federal criminal justice system that
(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and
(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

Id. § 991(b)(1)–(2).

59. *See BOOKER* REPORT, *supra* note 55, at 2 ("[The Commission] sought to eliminate unwarranted disparity in sentencing and to address the inequalities created by sentencing indeterminacy."). Congress decided that the purpose of sentencing should be–

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2) (2018).

60. *See generally* Newton & Sidhu, *supra* note 55, at 1197–1209. The Guidelines were not fully implemented until the Supreme Court upheld its constitutionality in *Mistretta v. United States*. 488 U.S. 361, 391 (1989) ("Given the consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress, we find that the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this Court in establishing rules of procedure under the various enabling Acts."). The Court also explained that the Guidelines and the Commission's power as a whole are subject to the will of Congress. *Id.* at 384.

61. 28 U.S.C. § 994(c)(1)–(7). The Act directed the Commission to consider seven factors when forming its offense categories (when relevant): (1) "the grade of the offense;" (2) the aggravating and mitigating circumstances of the crime; (3) "the nature and degree of the harm caused" by the crime; (4) "the community view of the gravity of the offense;" (5) "the public concern generated by the crime;" (6) "the deterrent effect that a particular sentence may have" on others; and (7) "the current incidence of the offense." Id.

62. *Id.* § 994(d)(1)–(11). The Act further directed the Commission to consider eleven attributes when formulating categories of defendants (when relevant):

(1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the

the defendant.[63] These sentencing ranges must align with all pertinent provisions of Title 18 of the United States Code, must not include sentences that exceed the maximum sentence prescribed by statute, and must not have a maximum that exceeds the minimum of the range by more than 25% or six months, whichever is greater (except if the minimum of the range is thirty or more years, the maximum can be life imprisonment).[64]

In drafting the Guidelines, the Commission oscillated between adopting a "charge-based"[65] or a "real-offense"[66] sentencing regime. The Commission declined to adopt a solely charge-based sentencing system, concluding that this system would produce "overuniformity and inflexibility."[67] In sentencing under this system, district judges would not have been able to regard individual characteristics of the defendant or the conduct leading up to or

> extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood.

Id.

63. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5–6 (1988) ("The statute suggests (but does not require) that the Guidelines take the form of a grid that determines sentencing in light of characteristics of the offense and characteristics of the offender." (footnote omitted)).

64. 28 U.S.C. § 994(b)(2); *see also BOOKER* REPORT, *supra* note 55, at 4–5; Breyer, *supra* note 63, at 5–6.

65. *See* Shors, *supra* note 5, at 1355. A pure charge-based system is one where "the defendant's sentence is based on the crime of conviction, which is in turn set by statute." *Id.* This system "imposes sentences based on the offenses for which a conviction was obtained." Ngov, *supra* note 5, at 246. Under this system, the judge would simply look to the criminal statute of the offenses charged, and "read off the punishment provided in the sentencing guidelines." Breyer, *supra* note 63, at 9. This system would have two defendants convicted of violating the same statute receive the same sentence "without regard to any aggravating or mitigating factors." David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 407 (1993).

66. *See* Yellen *supra* note 65, at 408. A real-offense system would allow a court's consideration of "any sentencing factor not included in the definition of the offense of conviction [that was] either established at trial or admitted by the defendant as part of a guilty plea." *Id.*

67. *See* Shors, *supra* note 5, at 1355; Breyer, *supra* note 63, at 9 (noting a hypothetical scenario where a bank robber may or may not have used a gun; may or may not have taken a lot of money; or may or may not have injured the teller; and "the typical armed robbery statute . . . does not distinguish among these different ways of committing the crime."). A pure charge-based system was the approach used by many states, and the Commission rejected this approach because "[s]tate guidelines systems which use relatively few, simple categories and narrow imprisonment ranges . . . are ill suited to the breadth and diversity of federal crimes." U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON INITIAL SENTENCING GUIDELINES 14 (1987) [hereinafter SUPPLEMENTARY REPORT].

accompanying the offenses charged; they were *only* allowed to look to the offenses charged.[68] While the Commission's conception was aimed at encouraging uniformity in sentencing and eliminating an indeterminate sentencing regime that bred unreasonable disparity, the Commission reasoned that completely depriving a court of the ability to distinguish between defendants, whether looking at their age or the ways particular crimes were committed, was too limiting.[69] The Commission effectively concluded that stripping courts of at least some of their discretion was unacceptable.[70]

A pure real-offense sentencing regime, on the other hand, would take into account "all the circumstances underlying the defendant's offense, regardless of whether the additional conduct amounted to convictions or charges."[71] Under this system, district judges could consider any information that could be relevant to the offense and the offender when determining a sentence, purportedly allowing for a more accurate reflection of a defendant's culpability in committing the offense.[72] The difference between a pure real-offense sentencing regime and the pre-Guidelines federal regime is that under the latter, district judges were not *required* to take into account any real-offense behavior, as would be the case under mandatory guidelines incorporating a pure real-offense sentencing approach.[73]

68. *See* Shors, *supra* note 5, at 1356.

69. *See* SUPPLEMENTARY REPORT, *supra* note 67, at 13 (noting that a pure charged-based regime, with only single categories for specific offenses, such as a single category for robbery, "would have been far too simplistic to achieve just and effective sentences, especially given the narrowness of the permissible sentencing ranges"); Breyer, *supra* note 63, at 10 ("[U]nless the statutes are rewritten to make such distinctions, the sentencing court is asked to look, at least in part, at what *really* happened under the particular factual situation before it.").

70. *See* SUPPLEMENTARY REPORT, *supra* note 67, at 13 ("[H]aving only a few simple, general categories of crimes might make the guidelines uniform and easy to administer, but at the cost of lumping together offenses that are different in important respects."); *see also* Yellen, *supra* note 65, at 413–14 ("Charge-offense sentencing fails to account for the large variations in conduct and culpability possible among offenders who have violated the same statute. Legislators tend to draw criminal statutes broadly, without detailed categories or distinctions based on harm or culpability.").

71. Ngov, *supra* note 5, at 246.

72. *See* Breyer, *supra* note 63, at 10 ("The proponents of such a system, however, minimize the importance of the procedures that courts must use to determine the existence of the additional harms, since the relevant procedural elements are not contained in the typical criminal statute."); SUPPLEMENTARY REPORT, *supra* note 67, at 13 (addressing that the list of potentially relevant sentencing factors is lengthy, and the fact that that they can occur in "multiple combinations" means that the number of potential permutations is basically "endless").

73. *See* Yellen, *supra* note 65, at 418 (stating that a distinctive feature of the pre-Guidelines federal

The Commission ultimately eschewed both approaches in their purest forms and opted for a blend of the two systems.[74] This compromise, taking the form of a modified real-offense arrangement, looks to the offense charged to signify the "base offense level."[75] This base can then be adjusted depending on the consideration of several "real" aggravating or mitigating factors, which are typically not actual elements of the offense, so they are neither admitted under a guilty plea nor brought up by the prosecutor during trial to prove beyond a reasonable doubt.[76]

The finding of the existence of these sentencing factors occurs during a sentencing hearing, which does not provide the evidentiary safeguards that are applicable at trial, and at which the burden of proof to establish these factors is only by a preponderance of the evidence.[77] The existence of these facts that can substantially increase a sentence is established by a judge, rather than by a jury, at a hearing where the rules of evidence do not apply,[78] and is proven by the prosecutor by a standard of proof critically lower than the one that is notably afforded to criminal defendants during their trial, which is proof

sentencing structure was that "judges exercised largely unfettered discretion in selecting a punishment within broad statutory limits," and it was this discretion that allowed judges to decide "which, if any, real-offense elements would be considered").

74. *See* Breyer, *supra* note 63, at 11 ("A sentencing guideline system must have some real elements, but not so many that it becomes unwieldy or procedurally unfair.").

75. *BOOKER* REPORT, *supra* note 55, at 6. Specifically, the Commission created a "sentencing table," with one axis donning forty-three offense levels and the other donning six criminal history categories. *Id.* With regards to a defendant's criminal history, the Guidelines attempt to measure "the frequency, recency, and seriousness of past crimes." Breyer, *supra* note 63, at 20; *see also* SENTENCING GUIDELINES MANUAL, *supra* note 16, §§ 4a1.1, 4a1.2, 4a1.3.

76. Breyer, *supra* note 63, at 11–12; Yellen, *supra* note 65, at 424 ("Examples of offense characteristics include: the amount of money a defendant convicted of embezzlement received, whether that defendant engaged in more than minimal planning, whether a defendant convicted of a narcotics offense possessed a dangerous weapon, or whether a money launderer knew or believed that the funds laundered were the proceeds of specified unlawful activity.").

77. *See* Ngov, *supra* note 5, at 248 (highlighting that a sentencing judge can consider evidence at a criminal sentencing hearing without regarding its admissibility under the rules of evidence, and that the preponderance standard is a standard that is even less than the clear and convincing standard, which is sometimes applied in *civil* suits).

78. *Summary of Evidence Rules: Overview*, FINDLAW (June 4, 2020), https://practice.findlaw.com/practice-support/rules-of-evidence/summary-of-evidence-rules--overview.html. Irrelevant evidence, character evidence, and hearsay evidence are barred at trial, but are permissible at a sentencing hearing. *Id.*; *see* SENTENCING GUIDELINES MANUAL, *supra* note 16, § 6A1.3 ("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.").

beyond a reasonable doubt.[79]

These "real" sentencing factors are known as the consideration of "relevant conduct" during sentencing, and the addition of these factors can enhance a defendant's sentence significantly.[80] Through a broad reading of sections 1B1.3 and 1B1.4 of the Guidelines, enhancements based on a defendant's acquitted conduct[81] are permissible on the basis that the acquittal is a sentencing factor premised on the Guidelines' relevant conduct provision.[82] Because of

79. *See generally* Thomas V. Mulrine, *Reasonable Doubt: How in the World Is It Defined?*, 12 AM. U. J. INT'L L. & POL'Y 195, 198 (1997) (discussing the origins of the concept of "reasonable doubt," as well as contemporary problems regarding its application and attempts at defining it). "Beyond a reasonable doubt" has yet to receive a universal definition, and the concept's perplexity continues to be discussed among scholars and jurists. *Id.* at 210; *see infra* note 177 and accompanying text. However, the standard California instruction for "beyond a reasonable doubt" reads:

> I will now explain the presumption of innocence and the People's burden of proof. The defendant[s] (has/have) pleaded not guilty to the charge[s]. The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial. A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/ she/they) (is/are) entitled to an acquittal and you must find (him/her/ them) not guilty.

Judicial Council of California Criminal Jury Instructions (2021), https://www.courts.ca.gov/partners/documents/calcrim-2021.pdf.

80. SENTENCING GUIDELINES MANUAL, *supra* note 16, § 1B1.4 ("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."); *id.* § 1B1.3(a)(1)–(4) (listing the factors that can determine the sentencing range); *see also* 18 U.S.C. § 3661 (2018).

81. *See* Johnson, *If at First You Don't Succeed*, *supra* note 5, at 157. Acquitted conduct refers to acts for which the defendant was criminally charged at a prior date and was formally adjudicated not guilty by a jury at trial. *Id.*

82. *See* SENTENCING GUIDELINES MANUAL, *supra* note 16, §§ 1B1.3, 1B1.4. Section 1B1.3 of the Guidelines fails to specifically address acquittal enhancements, but the Supreme Court has held that these enhancements are lawful. Shors, *supra* note 5, at 1360. The Commission has acquiesced in this interpretation of the Guidelines instead of changing them to explicitly disallow courts from utilizing acquittal enhancements. *Id.* Because of the use of the word "all" in section 1B1.3 and the section's accompanying commentary, there is foundation that "the Commission intended some form of unconvicted offense conduct to be considered as relevant conduct under the Guidelines." Johnson, *If at First You Don't Succeed*, *supra* note 5, at 162.

the language and the commentary of sections 1B1.3 and 1B1.4, the lack of the Commission explicitly denying courts the power to use acquittal enhancements, and the pre-Guidelines practice of using real-offense sentencing—which included the consideration of prior acquittals—courts have consistently interpreted the relevant conduct provision of the Guidelines to embrace acquittal enhancements implicitly.[83]

To make sense of this practice, weaving through the Supreme Court authority about the constitutional contours of considering acquitted conduct during sentencing is integral in understanding both the reasoning behind the approval of this practice and its dire implications.[84]

III. THE SUPREME COURT'S SENTENCING: THE BEGINNING OF DISASTER

A. Watts*: The Start of It All When It Never Was Meant to Be*

One of the most consequential cases touching upon the systemic problem of considering prior acquitted conduct at sentencing is *United States v. Watts*.[85] In *Watts*, the Supreme Court explicitly condoned the consideration

83. *See* United States v. Boney, 977 F.2d 624, 636 (D.C. Cir. 1992) ("Admittedly, Holloman received the same sentence he would have had if he had been convicted of [the count for which he was acquitted]. That result is rather anomalous and is certainly unlucky from Holloman's perspective, but it is not unconstitutional."); *id.* at 635 (stating that the language of section 1B1.3's relevant conduct provision "is certainly broad enough to include acts underlying offenses of which the defendant has been acquitted. Indeed, the application notes make clear that conduct may be relevant for sentencing even if the defendant was not convicted on *any* count involving that conduct."); United States v. Juarez-Ortega, 866 F.2d 747, 748–49 (5th Cir. 1989) (giving defendant Juarez-Ortega the same sentence as his codefendant, even though he was convicted of only two out of three charges, while his codefendant was convicted of all three charges); United States v. Pineda, 981 F.2d 569, 571 (1st Cir. 1992) (sentencing the defendant to seventy months in prison after the judge increased his base offense level by two points because of conduct for which he was acquitted); United States v. Ryan, 866 F.2d 604, 610 (3d Cir. 1989) (departing from the applicable Guidelines range of zero-to-six months imprisonment, sentencing the defendant to ten months after considering conduct for which the defendant was acquitted).

84. *See infra* Part III.

85. United States v. Watts, 519 U.S. 148, 154–55 (1997) (per curiam) (affirming the Court's conclusions in *Witte v. United States*). In *Witte*, defendant Witte pleaded guilty to a federal marijuana charge. Witte v. United States, 515 U.S. 389, 389 (1995). His sentence for this charge was ultimately enhanced through the consideration of uncharged conduct based on Witte's involvement in past attempts to import cocaine. *Id.* at 393. Witte was then indicted based on the same past attempts to import cocaine that supported his enhancement. *Id.* at 394. The Supreme Court ruled that the consideration of the uncharged conduct (relevant conduct) to enhance his marijuana sentence, regardless of

of acquitted conduct during sentencing and reversed the Ninth Circuit's holdings that it was unconstitutional to do so.[86] *Watts* was a consolidation of two cases that came before the Ninth Circuit.[87] In these two cases, the Ninth Circuit held that a lower court may not consider acquitted conduct during sentencing, regardless of the standard of proof because "we would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted."[88] The Supreme Court disagreed, first emphasizing the sentencing court's historically held discretion when considering relevant conduct during sentencing,[89] then addressing the "broad"[90]

whether it formed the basis for a later indictment, did not violate the Fifth Amendment's Double Jeopardy Clause. *Id.* at 404.

86. *Watts*, 519 U.S. at 154 ("[W]e are convinced that a sentencing court may consider conduct of which a defendant has been acquitted."). The Supreme Court found the Ninth Circuit's decision that consideration of acquitted conduct during sentencing violated the Double Jeopardy Clause to be erroneous and oppositional to both the Guidelines and the Court's Double Jeopardy Clause jurisprudence (specifically *Witte*). *Id.* at 155.

87. *Watts*, 519 U.S. at 149; *see also* United States v. Watts, 67 F.3d 790 (9th Cir. 1995); United States v. Putra, 78 F.3d 1386 (9th Cir. 1996). In *Watts*, law enforcement discovered cocaine in Watts's kitchen cabinet and two loaded guns and ammunition hidden in his bedroom closet. *Watts*, 67 F.3d at 793. The jury eventually convicted Watts of cocaine possession, but acquitted him of using a firearm related to a drug offense. *Id.* The district court ignored the jury's acquittal and enhanced Watts's sentence by two points, finding that it was shown by a preponderance of the evidence that Watts possessed a firearm related to a drug offense. *Id.* at 796. The Ninth Circuit vacated the sentence. *Id.* at 796–97. In *Putra*, defendant Putra was indicted with one count of aiding and abetting possession of cocaine with intent to distribute on May 8, 1992, and a second count of aiding and abetting possession with intent to distribute of cocaine on May 9, 1992. *Putra*, 78 F.3d at 1388. The jury convicted Putra on the first count, but acquitted her on the second. *Id.* The district court ignored the jury's acquittal, and enhanced Putra's sentence, finding by a preponderance of the evidence the existence of the second count. *Id.* at 1389. The Ninth Circuit vacated the sentence as well, reasoning that the jury's acquittal of the second count was an explicit rejection of Putra's involvement in the May 9th transaction. *Id.*

88. *Watts*, 67 F.3d at 797 (quoting United States v. Brady*,* 928 F.2d 844, 851 (9th Cir. 1991)). The Ninth Circuit held that a district court cannot consider facts that have been explicitly rejected by a jury's verdict. *Putra*, 78 F.3d at 1389. To the Ninth Circuit, its holdings in both cases do not run afoul of the the consideration of relevant conduct during sentencing because the jury's verdict of acquittal is affirmation that there was no conduct to begin with *to even be* considered as relevant. *Id.* ("U.S.S.G. § 1B1.3 requires a finding that Putra was in someway involved in the May 9 transaction to include the offense as 'relevant conduct.' The jury's acquittal is a finding that Putra was not involved, did not commit, did not aid or abet, and was not engaged in the May 9, 1992 transaction.").

89. *Watts*, 519 U.S. at 152 (noting that before the Sentencing Guidelines were created, there was no "basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing" when 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").

90. *Id.*

language of 18 U.S.C. § 3661 and the "sweeping"[91] language of sections 1B1.3 and 1B1.4 of the Guidelines.[92]

The Court then concluded that considering acquitted conduct at sentencing does not violate the Double Jeopardy Clause and reiterated its holding in *Witte*, a case that was before the Court two years prior to *Watts*.[93] According to the Court, considering prior acquitted conduct during sentencing does not constitute any additional punishment for the conduct that underlies the acquittal.[94] Instead of interpreting this consideration as "punishment," the Court explains that the defendant is merely punished for the present offense of which he is convicted, but that the present offense was achieved in a way that deserves a higher sentence.[95]

The Court also advanced the argument that an acquittal is not a finding of fact and does not necessarily prove that the defendant is innocent.[96] An acquittal, to the Court, only means "that the government failed to prove an essential element of the offense beyond a reasonable doubt," and that without specific jury findings as to what buttressed the not guilty verdict, one cannot "logically or realistically draw any factual finding inferences."[97] The Court forwards its contradicting analysis that a jury's not-guilty verdict does not necessarily mean that the jury believed the defendant to be innocent, but it instead means that there was merely a reasonable doubt as to the defendant's guilt.[98] Additionally, because jury acquittals allegedly do not confirm a

91. *Id.* at 152–53 ("Section 1B1.3, in turn, describes in sweeping language the conduct that a sentencing court may consider in determining the applicable guideline range.").

92. *See* 18 U.S.C. § 3661 (2018); SENTENCING GUIDELINES MANUAL, *supra* note 16, §§ 1B1.3, 1B1.4. Given that *Watts* was a per curiam opinion, the case was decided without the benefit of full briefing and oral arguments. *See* Steven C. Sparling, *Cutting the Gordian Knot: Resolution of the Sentencing Dispute over Dismissed Charges after* United States v. Watts, 6 GEO. MASON L. REV. 1073, 1092 (1998). Typically, per curiam opinions cover "points of law the court feels are too obvious to merit elaboration or represent substantive issues the court does not want to treat at length," which is a categorization that simply should not describe the *Watts* decision. *Id.* at 1093 (quoting MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 25 n.14 (9th ed. 1989)).

93. *Watts*, 519 U.S. at 154–55.

94. *Id.* at 155 (quoting Witte v. United States, 515 U.S. 389, 401 (1995)) ("[C]onsideration of information about the 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.").

95. *Id.* (quoting *Witte*, 515 U.S. at 403).

96. *Id.*

97. *Id.* (quoting United States v. Putra, 78 F.3d 1386, 1394 (9th Cir. 1996) (Wallace, J., dissenting)).

98. Ngov, *supra* note 5, at 242. The Court's restricted analysis of the significance of the jury's

defendant's innocence, but only prove the existence of a reasonable doubt, a sentencing court relitigating the issue under the lower preponderance standard is permitted to reach different factual findings.[99]

Watts did not address any Sixth Amendment concerns and only answered the Double Jeopardy question.[100] *Watts* remains good law and has been used in many lower court decisions to enhance a defendant's sentence significantly longer than it would have been if the judge had not considered the prior acquitted conduct.[101] Prior to *Watts*, the Ninth Circuit was the only circuit to fully reject the use of acquitted-conduct evidence at sentencing.[102]

B. Apprendi, Blakely, *and* Booker*: The Sentencing Revolution Begins*

The landscape of sentencing law felt a momentous shift when the Court heard *Apprendi v. New Jersey*,[103] *Blakely v. Washington*,[104] and *United States*

not-guilty verdict effectively renders the jury's decision worthless. *Id.* ("[O]ther than protecting the defendant from the stigma of an additional conviction, acquittals are relatively meaningless because a defendant can be sentenced to the same length of imprisonment that would have been imposed had he actually been convicted of the offense.").

99. *Watts*, 519 U.S. at 156–57.

100. *Id.* at 157.

101. *See* United States v. Thomas, 294 F.3d 899, 903–04 (7th Cir. 2002) (sentencing defendant to 102 months in prison after the judge increased Thomas's base offense level by two points because of conduct for which he was acquitted); United States v. Mankowski, 111 F.3d 130 (4th Cir. 1997) (relying on acquitted conduct to determine the defendant's base offense level through the use of the Guidelines' relevant conduct provisions); United States v. Meade, 110 F.3d 190, 203 (1st Cir. 1997) (relying on *Watts* to increase the defendant's base offense level by four levels based on acquitted charges); United States v. Walsh, 119 F.3d 115, 120 (2d Cir. 1997) ("[I]t has been definitively established that Walsh's jury acquittals on those other charges do not preclude the sentencing judge's consideration of the same conduct for Guideline purposes, in part because of the difference in the applicable standards of proof: preponderance of the evidence for sentencing purposes as against proof beyond a reasonable doubt for purposes of conviction."); United States v. Wilkerson, 124 F.3d 201, 2–4 (6th Cir. 1997) (imposing a two-level enhancement based on the defendant using and carrying a firearm during a drug trafficking offense, even though the jury acquitted him of this charge).

102. United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991), *abrogated by Watts*, 519 U.S. at 148; *see also* Erica K. Beutler, *Supreme Court Review: A Look at the Use of Acquitted Conduct in Sentencing*, 88 J. CRIM. L. & CRIMINOLOGY 809, 821 (1998) ("In subsequent cases addressing the issue of the use of acquitted conduct in sentencing, the Ninth Circuit followed its reasoning in *Brady* to reach the same conclusion that use of acquitted conduct in sentencing is improper. Every other circuit, in contrast, has continued to reach the opposite result[.]").

103. Apprendi v. New Jersey, 530 U.S. 466 (2000).

104. Blakely v. Washington, 542 U.S. 296 (2004).

v. Booker,[105] which initiated what is known as the "sentencing revolution."[106]

In *Apprendi*,[107] the Court held that the Due Process Clause of the Fifth and Fourteenth Amendments, as well as the jury trial right of the Sixth Amendment, necessitate that any fact,[108] other than a prior conviction, that increases the punishment for a crime beyond the statutory maximum must be proven to a jury beyond a reasonable doubt.[109]

Four years later in *Blakely*, the Court reiterated what it had found in *Apprendi*: any fact that increases the penalty for a crime to one that exceeds the prescribed statutory maximum must be proven to the jury beyond a reasonable doubt.[110] But *Blakely* expanded *Apprendi*'s holding and found that the Sixth

105. United States v. Booker, 543 U.S. 220 (2005).

106. *See* Erlinder, *supra* note 5, at 80.

107. *Apprendi*, 530 U.S. at 466. Defendant Apprendi was charged under a New Jersey state statute for second-degree possession of a firearm for an unlawful purpose, which carries a prison term of five-to-ten years. *Id.* at 468. Under a different state statute, described as the state's hate-crime law, this sentence can be enhanced by an "extended term" if the judge finds by a preponderance of the evidence that the crime was hate-motivated, specifically in this case, if the defendant committed the crime with "a purpose to intimidate" an individual or group of individuals "on account of, *inter alia,* race." *Id.* at 492. Once the defendant pleaded guilty (none of the charges against Apprendi included the hate-crime statute), the prosecution moved to enhance the sentence based on the hate-crime statute. *Id.* at 470. The trial court initially sentenced Apprendi to the maximum sentence of ten years for possession of a firearm for an unlawful purpose. *Id.* Concluding by a preponderance of the evidence that the crime was racially motivated, the district court enhanced Apprendi's sentence and sentenced him to an additional two years, making the entire sentence twelve years of imprisonment. *Id.* Because the twelve-year sentence was above the ten-year maximum statutorily prescribed for that offense, it was held to be an unconstitutional deprivation of Apprendi's due process and Sixth Amendment rights. *Id.* at 496.

108. The Court also has affirmed that the classification of a fact as either an element of the offense or a sentencing factor was irrelevant to an *Apprendi* analysis. Ring v. Arizona, 536 U.S. 584, 588–89 (2002). A lower court must look at the fact's effect, and if that fact increases a defendant's punishment beyond the set statutory maximum, it must be found by a jury beyond a reasonable doubt, regardless of what it is called. *Id.* at 602.

109. *Apprendi*, 530 U.S. at 490. The *Apprendi* Court notably emphasized the traditional role of a sentencing judge to utilize her discretion when considering multiple factors to determine a sentencing that was *within* the statutory range. *Id.* at 481 ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case."). The *Booker* Court also made abundantly clear that a judge enjoys "broad discretion" when imposing a sentence within the jury-authorized range. *See Booker*, 543 U.S. at 233 ("For 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.").

110. Blakely v. Washington, 542 U.S. 296, 301 (2004). Defendant Blakely was charged with

Amendment necessitates that any fact that increases a crime's penalty to exceed the amount that the defendant pled guilty to, or that the jury convicted for, must be proven to the jury beyond a reasonable doubt.[111] After *Blakely*, to be compliant with *Apprendi*, the maximum sentence that a judge can impose is one that is based solely on the facts reflected in the jury verdict or admitted by the defendant, *not* the maximum the judge may decide *after* making additional findings of fact.[112] In a post-*Blakely* sentencing system, the maximum sentence does not necessarily mean a sentence that exceeds the maximum prescribed by statute, but rather a sentence that surpasses the established jury-authorized sentencing range.[113]

One question that arose among federal circuits following the *Apprendi* and *Blakely* decisions was the decisions' effect on the Sentencing Guidelines.[114] In 2005, the Supreme Court heard *United States v. Booker*, which reaffirmed its holdings in *Apprendi* and *Blakely* that any fact, other than a prior conviction, which is necessary to justify a sentence exceeding the maximum authorized by the facts established by either a guilty plea or a jury's verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.[115] *Booker* was a consolidation of two cases, where both lower

second-degree kidnapping of his wife with a firearm in Washington State. *Id.* The fact that Blakely admitted to in his plea agreement would have supported a maximum sentence of fifty-three months, as the prosecution suggested a sentence within the "standard range" of forty-nine-to-fifty-three months, given that Washington's Sentencing Reform Act specifies this range for second-degree kidnapping with a firearm. *Id.* at 299. The district court rejected the prosecution's proposal and sentenced Blakely to ninety months of imprisonment because it found, by the preponderance standard, that Blakely had acted with "deliberate cruelty," a finding that was neither admitted by Blakely nor found by a jury. *Id.* at 300. Ninety months was still within the "statutory maximum" of ten years that the state imposes for class B felonies, but it was above the maximum that Blakely had admitted to in his plea deal. *Id.*

111. *Id.* at 303.

112. *Id.* at 303–04.

113. *Id.*; *see also* Chemerinsky, *supra* note 5, at 535 ("The significance of *Blakely*, of course, is that the Supreme Court extended *Apprendi* to sentences *within* the statutory maximum.").

114. *See* BOOKER REPORT, *supra* note 55, at 12–13 ("Following the *Blakely* decision, district and circuit courts voiced varying opinions on the implications of the decision for federal sentencing and no longer uniformly applied the sentencing guidelines. [The Seventh and the Ninth Circuits] immediately declared that the operation of the federal sentencing guidelines violated the Sixth Amendment.").

115. United States v. Booker, 543 U.S. 220, 245 (2005). The *Booker* decision had two majority opinions. There were the merits majority, which discussed the constitutional question, and the remedial majority, which discussed the remedy to the constitutional dilemma. *Id.* at 226, 244. The remedial majority consisted of the Justices who dissented in the merits majority. *Id*. Justices Stevens, Scalia,

courts concluded that the Sixth Amendment right to a jury trial as interpreted in *Blakely* does apply to the Sentencing Guidelines.[116] Not only did the *Booker* Court affirm that the Sixth Amendment applied to the Guidelines, but it also held that the mandatory nature[117] of the Guidelines contradicted the

Scouter, Thomas, and Ginsburg joined the merits majority while Justices Breyer, Rehnquist, O'Conner, Kennedy, and Ginsburg formed the remedial majority. *Id*.

116. *Id.* at 227–28; *see also* United States v. Booker, 375 F.3d 508 (7th Cir. 2004); Fanfan v. United States, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004). In *Booker*, defendant Booker was charged with possession with intent to distribute crack cocaine. *Booker*, 543 U.S. at 227. Once the jury heard evidence that he had 92.5 grams in his bag, the jury found him guilty. *Id.* The statute at issue prescribes a minimum sentence of ten years and a maximum sentence of life imprisonment. *Id.* However, based on Booker's criminal history and the amount of drugs found by the jury, the Sentencing Guidelines *required* the judge to select a minimum sentence of 210 months (seventeen years and six months), and no more than 262 months (twenty-one years and ten months) in prison. *Id.* At Booker's sentencing hearing, the judge concluded by a preponderance of the evidence (the standard of proof during sentencing that was upheld in *Watts*) that Booker actually possessed an additional 566 grams of crack cocaine. *Id.* Based on these findings, the Guidelines mandated that the judge select a sentence with a minimum of 360 months (thirty years) in prison, and a maximum of life imprisonment. *Id.* The judge gave Booker a thirty-year sentence, which was supported by facts that were not proven to the jury beyond a reasonable doubt. *Id.* On appeal, the Seventh Circuit held that this sentence was repugnant to the Supreme Court's holdings in *Apprendi* and *Blakely*, and remanded with instructions to the district court to establish a sentence within the range supported by the jury's findings. *Id.* at 228.

In *Fanfan*, defendant Fanfan was charged with conspiracy to distribute and to possess with intent to distribute cocaine. *Id.* Under the Guidelines, without additional findings by the judge, the range authorized by the jury's verdict was to be between a minimum of sixty-three months (five years and three months) and a maximum of seventy-eight months (six years and six months) in prison. *Id.* The sentencing judge, by a preponderance of the evidence, found not only that Fanfan was responsible for 2.5 kilograms of cocaine powder and 261.6 grams of crack cocaine, but that he was "an organizer, leader, manager, or supervisor in the criminal activity." *Id.* Under the Guidelines, these post-trial findings of facts would have required an enhanced sentence of fifteen or sixteen years. *Id.* The sentencing judge concluded that he cannot allow for these enhancements under the Guidelines without running afoul of *Blakely* and afforded Fanfan the maximum sentence of seventy-eight months. *Id.* at 229.

117. *Booker*, 543 U.S. at 234. The Court pointed to the language in 18 U.S.C. § 3553(b) (2018) to demonstrate the binding force the Guidelines has on judges, as this section instructs sentencing courts that they "'*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases." *Id.* (quoting 18 U.S.C. § 3553(b) (emphasis added)). While § 3553(b)(1) makes space for judges to potentially depart from a Guidelines-compliant sentencing range, only to be restricted by the statutory set maximum, this space is highly limited. 18 U.S.C. § 3553(b)(1) ("[T]he court shall impose a sentence of the kind, and within the range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."). But the *Booker* Court noted that in the majority of cases, "as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range." *Booker*, 543 U.S. at 234.

holdings of *Apprendi* and *Blakely* and violated the Sixth Amendment.[118] The Guidelines' requirement of certain enhancements based on fact-finding by a judge at a sentencing hearing, where the burden of proof is significantly lower than that of a jury trial, considerably strips the power of a jury and its verdict.[119] The merits majority emphasized the defendant's constitutional protection of his jury trial right,[120] just as the Court did in *Apprendi* and *Blakely*, as well as the defendant's right to have the prosecution prove all elements of the charged offense beyond a reasonable doubt.[121]

Within the *Booker* decision, the Court issued a remedial opinion with its own majority, where the Justices held that the remedy to the Sixth Amendment violation is that the Guidelines can no longer possess the power of law and be binding on sentencing judges.[122] Instead, the Guidelines will remain only advisory in nature.[123] While the Court proposed this remedy, it concluded that even though the Guidelines may now only be advisory, judges are still required under the Sentencing Reform Act to *consider* the Guidelines when imposing a defendant's sentencing range and ultimately, their sentence.[124] The Court thus affirmed the intrinsic role of judicial discretion, and consequently relevant conduct, in a court's sentencing analysis, a seemingly

118. *Booker*, 543 U.S. at 233.

119. *Id.* at 236 ("The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance.").

120. *Id.* at 230 (quoting United States v. Gaudin, 515 U.S. 506, 511 (1995)) ("It is equally clear that the 'Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.'").

121. *Id.* (quoting *In re* Winship, 397 U.S. 358, 364 (1970)) ("It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'").

122. *Id.* at 245. The Court declared that the mandatory provisions of 18 U.S.C. §§ 3553(b)(1) and § 3742(e), which directed appellate courts to apply a de novo standard of review when reviewing sentences on appeal, are contradictory to the Court's suggested remedy, and must be severed and excised. *Id.* To further justify the excision of § 3742(e), the Court noted that § 3553(a), which lists the factors that judges should consider when determining a sentence, remains applicable. *Id.* at 261. A reviewing court will regard these factors, and then determine whether the sentence is unreasonable. *Id.* at 261–62; *see also BOOKER* REPORT, *supra* note 55, at 15–17.

123. *Booker*, 543 U.S. at 246.

124. *Id.* at 259–60; 18 U.S.C. § 3553(a) (2018) (requiring judges to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant").

contradicting conclusion to that maintained in the merits majority.[125]

*C. Post-*Booker *Confusion*

After the Court decided *Booker*, lower courts differed in their interpretations on how to apply the new advisory Guidelines in their sentencing determinations, especially the extent of deference courts should give to the Guidelines.[126] All circuit courts eventually reached the consensus that sentencing post-*Booker* must begin with calculating the applicable sentencing range under the Guidelines.[127] The Supreme Court affirmed this in *Gall v. United States*.[128] Once the sentencing judge calculates the applicable Guidelines range, the court must consider the factors set out in 18 U.S.C. § 3553(a),[129] and make an "individualized assessment" as to what the proper sentence should be.[130] If after this individualized assessment, the judge decides that the appropriate sentence is not within the now-advisory Guidelines range, the judge has the authority to depart from the range, but must adequately explain this digression.[131] Because of this ability permitted by *Booker*, sentences pre-

125. *Booker*, 543 U.S. at 246 (explaining that the new advisory Guidelines scheme will "maintain[] a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve").

126. *See* BOOKER REPORT, *supra* note 55, at 17 n.136 (providing a list of lower court cases that contemplate the weight courts should give to the sentencing guidelines—either courts should give great deference to the Guidelines and that the Guidelines are presumptively reasonable, or courts should treat the Guidelines as merely one sentencing factor when determining a sentence range).

127. *See id.* at 20; *see also* United States v. White, 405 F.3d 208, 219 (4th Cir. 2005) ("In any given case after *Booker*, a district court will calculate, consult, and take into account *the exact same guideline range* that it would have applied under the pre-*Booker* mandatory guidelines regime. This guideline range remains the starting point for the sentencing decision. And, if the district court decides to impose a sentence outside that range, it should explain its reasons for doing so."); United States v. Vaughn, 430 F.3d 518, 526–27 (2d Cir. 2005) ("[D]istrict courts remain statutorily obliged to calculate Guidelines ranges in the same manner as before *Booker* and to find facts relevant to sentencing by a preponderance of the evidence.").

128. Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."); *see also* Rita v. United States, 551 U.S. 338, 347–48 (2007) (holding that sentences that fall into the Guidelines' applicable range are presumptively reasonable, but that this holding does not prohibit sentencing judges to choose a sentence outside of this range).

129. 18 U.S.C. § 3553(a) (2018).

130. *Gall*, 552 U.S. at 50.

131. *Id.* at 51 (holding that the sentencing court must "adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range").

Booker and post-*Booker* remain "substantively similar," except that in the post-*Booker* regime, a criminal defendant has minimal certainty that a sentencing judge will stay within the applicable Guidelines range.[132]

In sum, *Booker* and the advisory Guidelines have not eliminated all judicial fact-finding during sentencing as long as the fact-finding does not run afoul of *Apprendi* and its progeny.[133] This unfortunately has included the consideration of past acquitted conduct as a "fact" to be determined at sentencing by a preponderance of the evidence.[134] The *Booker* Court supposedly affirmed its holdings in *Witte* and *Watts*, stating there was not "any contention that the sentencing enhancement [in *Witte* or *Watts*] had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment," signifying that acquittal enhancements do not constitute any constitutional violation as long as they do not exceed the jury-authorized maximum.[135]

Sentences, even after *Apprendi* and its progeny, continue to become

132. *See* David C. Holman, *Death by a Thousand Cases: After* Booker*,* Rita*, and* Gall*, the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 277–78 (2008) ("One study found that district courts sentence below the Guidelines range only about seven to eight percent more often than before *Booker*.").

133. *See BOOKER* REPORT, *supra* note 55, at 21–22.

134. *See* United States v. Vaughn, 430 F.3d 518, 527 (2d Cir. 2005) (rejecting the claim that "district courts may no longer consider acquitted conduct when sentencing within the statutory range authorized by the jury's verdict"); United States v. Price, 418 F.3d 771, 787–88 (7th Cir. 2005) (joining "all the other courts" to establish that considering past acquitted conduct is admissible under *Watts* and *Booker*); United States v. Magallanez, 408 F.3d 672, 684–85 (10th Cir. 2005) (allowing the consideration of acquitted conduct at sentencing, and explaining that *Watts* does not contradict *Booker*); United States v. Duncan, 400 F.3d 1297, 1304–05 (11th Cir. 2005) ("Thus, nothing in *Booker* erodes our binding precedent. *Booker* suggests that sentencing judges can continue to consider relevant acquitted conduct when applying the Guidelines in an advisory manner[.]"); United States v. Faust, 456 F.3d 1342, 1348 (11th Cir. 2006) (holding that the use of acquitted conduct during sentencing remains in tact after *Booker*); United States v. Gobbi, 471 F.3d 302, 314 (1st Cir. 2006) ("Post-*Booker,* the law has not changed in this regard; acquitted conduct, if proved by a preponderance of the evidence, still may form the basis for a sentencing enhancement."); United States v. Dorcely, 454 F.3d 366, 371 (D.C. Cir. 2006) ("Under *Booker,* consideration of acquitted conduct violates the Sixth Amendment only if the judge imposes a sentence that exceeds what the jury verdict authorizes."); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2006) ("Even post-*Booker*, for purposes of calculating the advisory guidelines range, the district court may find by a preponderance of the evidence facts regarding conduct for which the defendant was acquitted."); United States v. Lynch, 437 F.3d 902, 916 (9th Cir. 2006) (holding that an acquittal can be used as a basis for a sentence enhancement); United States v. Farias, 469 F.3d 393, 399 (5th Cir. 2006) (stating that "*Watts* survives *Booker*, and district courts must still determine sentencing facts by a preponderance of the evidence, even facts contradicting jury findings."); United States v. Mercado, 474 F.3d 654, 661 (9th Cir. 2007) ("We hold that *Booker* has not abrogated the previously prevailing constitutional jurisprudence that allowed sentencing courts to consider conduct underlying acquitted criminal charges.").

135. United States v. Booker, 543 U.S. 220, 240 (2005).

incredibly enhanced, *especially* because the Guidelines and its applicable ranges have become advisory.[136] Because § 3553(a) (the provision that provides the statutory justification for considering relevant conduct) was not excised in the *Booker* decision, judges consider prior acquittals just as they would have when the Guidelines were mandatory, but only now, they are able to stray from whatever the Guidelines range become.[137] Although sentencing courts still must consider the Guidelines as a starting point, the *Booker* opinion ended up placing more discretion in the hands of judges,[138] whose discretion is only limited to the jury-authorized maximum.[139] However, ranges can be incredibly large, with a defendant's sentence increasing exponentially because of the consideration of acquitted conduct.[140]

136. *See* Outlaw II, *supra* note 5, at 207 ("To look at it another way, it makes no logical or constitutional sense, that the max-min quartet [*Apprendi*, *Blakely*, *Booker*, and *Alleyne*] prohibits a judge from using a fact rejected by a jury to impose a mandatory minimum sentence, but permits a judge to use a jury rejected fact to impose a sentence that is *multiple times* what the defendant would otherwise receive under the Guidelines if not for that fact.").

137. *See* Yalinçak, *supra* note 5, at 692–95.

138. Kimbrough v. United States, 522 U.S. 85, 91 (2007). In *Kimbrough*, the advisory Guidelines actually came to the defendant's advantage. *Id.* The defendant's plea subjected him to a minimum term of fifteen years and a maximum of life. *Id*. At sentencing, the district court calculated an advisory Guidelines range of 228-to-270 months (nineteen-to-twenty-two-and-a-half years). *Id.* at 92. If the defendant dealt with powder cocaine rather than crack cocaine, the Guidelines range would have been 97-to-106 months because of the Guidelines' 100-to-1 ratio for powder to crack cocaine. *Id.* at 93. The District Court concluded that the advisory Guidelines range was "'greater than necessary' to accomplish the purposes set forth in 18 U.S.C. § 3553(a)," and ended up sentencing the defendant to 180 months in prison. *Id.* at 92–93. The question before the Supreme Court was whether a sentence that did not comply with the advisory Guidelines, due to the disagreement of the Guidelines' cocaine ratio, was reasonable. *Id.* at 111. The Supreme Court held that "[a] district judge must include the Guidelines range in the array of factors warranting consideration. The judge may determine that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing." *Id.* at 91. The Guidelines are now advisory, and digressions from the Guidelines range can be reviewed on appeal to determine if they are reasonable. *Id.* at 108–09; *see also* Gall v. United States, 552 U.S. 38, 51 (2007) ("Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard.").

139. *See Dorcely*, 454 F.3d at 375–76 ("In the post-*Booker* world, the court must calculate and consider the applicable Guidelines range but is not bound by it. . . . Not only may the sentencing court consider acquitted conduct in calculating the appropriate Guidelines range but it may also consider that conduct in determining the sentence within the range.").

140. *See* United States v. Faust, 456 F.3d 1342, 1345 (11th Cir. 2006) (increasing the defendant's base offense level from twenty-to-thirty-four, and then tacking on enhancements, including acquittal enhancements, resulting in the defendant getting 210 months (seventeen years and six months), which was below the jury-authorized thirty-year maximum); *Dorcely*, 454 F.3d at 372–77 (sentencing the

The judge also now has the power to simply use the acquitted conduct to enhance a defendant's sentence from one advisory Guideline range to the next, seemingly in contradiction to the constitutional conclusions in *Apprendi* and *Blakely*.[141] For example, in McClinton's case, the considered acquitted conduct was for the murder of Perry, a charge that carries a maximum of life imprisonment.[142] And because McClinton's 228-month sentence was significantly below this maximum, the sentence seems permissible, even potentially lenient because of the presumed downward variance.[143] The tension produced following such a result is made clear, given that in *Blakely*, the Court found it unconstitutional to impose an enhancement that exceeded the maximum of the standard range for the offense to which Blakely pleaded guilty.[144] Similarly, the maximum of the Guidelines range that McClinton should have received for his convicted offense was seventy-one months, but because of the now-advisory nature of the Guidelines combined with a judge's ability to consider acquitted conduct, the judge was able to impose an enhancement that far exceeded the maximum of the Guidelines range for McClinton's convicted offense.[145]

Courts have even gone so far as to interpret *Booker* to mean that making the Guidelines advisory translates to the jury-authorized maximum being the statutory maximum, rather than the Guidelines' applicable maximum sentence, which counters the crux of the holding in *Blakely*.[146] Because the

defendant to twenty-four months, which was within the jury-authorized maximum, but was still four times the Guidelines applicable maximum).

141. *See* Ngov, *supra* note 5, at 263–64.

142. *See* SENTENCING GUIDELINES MANUAL, *supra* note 16, §§ 2A1.1 & 2A1.2 (delineating the guidelines for first-degree murder, felony murder, and second-degree murder); United States v. McClinton, 23 F.4th 732, 734–35 (7th Cir. 2022).

143. *McClinton*, 23 F.4th at 734–35.

144. Blakely v. Washington, 542 U.S. 296, 298–300 (2004). Recall that Blakely pleaded guilty to second-degree kidnapping with a firearm. *Id.* at 298–99. Second-degree kidnapping is a class B felony in Washington where he was sentenced, which carries a maximum sentence of ten years. *Id.* at 299. Washington had an Act that for second-degree kidnapping with a firearm, a standard range of forty-nine-to-fifty-three months apply. *Id.* The judge consequently gave Blakely ninety months, which is above the height of the range imposed by the state's law. *Id.* at 300. Although a ninety month sentence was within the statutory maximum of ten years, it was above the state's range, which the defendant expected pursuant to his plea agreement, making the sentence unconstitutional in the eyes of the Court. *Id.*

145. *McClinton*, 23 F.4th at 736.

146. *Blakely*, 542 U.S. at 303–04 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

Guidelines are not mandatory following *Booker*, the maximum as reflected by the top of the advisory Guidelines range is no longer binding, so the jury-authorized maximum likely translates to the legislatively-imposed maximum by statute.[147] The "absurd result" described in *Blakely* can now be, and is now, in existence.[148]

For example in *United States v. Duncan*, at defendant Duncan's trial, the jury attributed and convicted Duncan of a conspiracy involving five or more kilograms of cocaine, but acquitted him of conspiracy involving fifty or more grams of cocaine.[149] The district court set the base offense level at thirty-eight under the Guidelines, which was dependent on the court's finding that the offense involved 12.24 kilograms of cocaine, a finding for which the jury declined to convict Duncan.[150] His base offense level would have been thirty-two had the court calculated it by only looking at the jury's verdict.[151] The district court sentenced Duncan to life imprisonment.[152] The Eleventh Circuit upheld the sentence, interpreting *Booker* to mean that "the various top ranges of the Guidelines are no longer binding," leaving "as the only maximum sentence the one set out in the United States Code."[153] Because the U.S. Code authorizes a life sentence based on the jury's finding of five kilograms of cocaine, and the consideration of acquitted conduct is permitted under *Watts*, Duncan's sentence was valid.[154]

Similarly in *United States v. Price*, defendant Davison was found by a jury to be guilty on two counts of distributing cocaine base, but was acquitted of one count of conspiracy to distribute fifty or more grams of cocaine base.[155]

147. *See* Johnson, *The Puzzling Persistence of Acquitted Conduct*, *supra* note 5, at 24. For an example of a judge describing how he arrived at a particular sentence in the post-*Booker* regime, see United States v. Gray, 362 F. Supp. 2d 714, 724 (S.D. W. Va. 2005), *aff'd*, 491 F.3d 138 (4th Cir. 2007).

148. *Blakely*, 542 U.S. at 306 ("This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result.").

149. United States v. Duncan, 400 F.3d 1297, 1300 (11th Cir. 2005).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1303 ("Justice Breyer's opinion [in *Booker*] making the Guidelines advisory essentially changes what sentence is authorized by a jury verdict-from the sentence that was authorized by mandatory Guidelines to the sentence that is authorized by the U.S. Code.").

154. *Id.* at 1303–04.

155. United States v. Price, 418 F.3d 771, 776 (7th Cir. 2005).

Davison received a sentence of 360 months (thirty years) in prison partly based on the district court's finding, by a preponderance of the evidence, that Davison *had* been a member of the conspiracy and that more than 1.5 kilograms of cocaine base were involved.[156] The Seventh Circuit upheld the sentence even though it plainly acknowledged the error that the district court made when it established a sentence based on facts neither admitted by Davison in a plea deal nor proven to the jury beyond a reasonable doubt.[157] The Seventh Circuit justified this error because judges at sentencing can utilize acquittal enhancements due to *Watts*, but unsurprisingly did not address the supposed *Apprendi* and *Blakely* violations.[158]

D. The Recent Cases: Alleyne *and* Haymond

Another question that flowed from the results of both *Apprendi* and *Blakely* is whether their holdings also applied to the increase of statutory minimums.[159] It seems that there is a lack of any fundamental distinction between a judge using an enhancement to increase a sentencing range beyond the prescribed maximum versus beyond the prescribed minimum.[160] Intuitively, if

156. *Id.* at 787.

157. *Id.* The Court also found error in the district court sentencing Davison while believing the Guidelines were mandatory when they were held advisory in the *Booker* decision. *Id.*

158. *Id.*; *see, e.g.*, United States v. Magallanez, 408 F.3d 672 (10th Cir. 2005). In *Magallanez*, the jury attributed between 50-to-500 grams of methamphetamine to the defendant. *Id.* at 676. At sentencing, the judge, through judicial fact-finding by a preponderance of the evidence, attributed 1,200 grams to the defendant and increased his sentence accordingly under the Guidelines. *Id.* Like in *Price*, the Tenth Circuit acknowledged error to increase the defendant's sentence beyond the jury-authorized maximum, but upheld the sentence anyway. *Id.* at 685. The Tenth Circuit refused to require the sentencing court to "accept the jury's special verdict of drug quantity for purposes of sentencing, rather than calculating the amount for itself." *Id.* at 683. It held that *Watts* when applied in a post-*Booker* sentencing regime allows the sentencing court to "make[] a determination of sentencing facts by a preponderance test under the now-advisory Guidelines," having the sentencing courts "not bound by jury determinations reached through application of the more onerous reasonable doubt standard." *Id.* at 685; *see also* Outlaw II, *supra* note 5, at 207–08 ("On one hand the Tenth Circuit chided the sentencing court for increasing a sentence beyond facts found by a jury under the then-mandatory-Guideline scheme, but in the same breath said the trial court was permitted to do the exact same thing under the 'advisory' Guidelines. We are now in a tail-wags-the-dog situation where the force of a jury verdict under the Sixth Amendment is dictated and limited by the force of the Guidelines, and not the other way around.").

159. Harris v. United States, 536 U.S. 545, 555 (2002), *overruled by* Alleyne v. United States, 570 U.S. 99 (2013).

160. *Id.* at 579 (Thomas, J., dissenting) ("Looking to the principles that animated the decision in

one is required to be submitted to the jury beyond a reasonable doubt, as per *Apprendi*, then the other should as well, especially because a mandatory minimum sentence carries far greater weight because it "binds a sentencing judge [and] a statutory maximum does not."[161] But for a while, the Court did not recognize this distinction.[162] Justice Thomas in his dissenting opinion in *Harris* recognized that *Harris* and *Apprendi* are directly in conflict.[163] He reiterated his statements in *Apprendi*, reaffirming that when "the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] the core crime and the aggravating fact together constitute an aggravated crime . . . . The aggravating fact is an

Apprendi and the bases for the historical practice upon which *Apprendi* rested (rather than to the historical pedigree of mandatory minimums), there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum.").

161. Chemerinsky, *supra* note 5, at 541 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 244 (1998)).

162. *Harris*, 536 U.S. at 545 (reaffirming McMillan v. Pennsylvania, 477 U.S. 79 (1986)). In *Harris*, the defendant was charged under a drug trafficking statute, which contains an additional penalty for someone who in relation to the drug trafficking crime, used or carried a firearm. *Id.* The punishment is a minimum sentence of five years; if the firearm is brandished, the minimum is bumped up to seven years; and if the firearm was eventually discharged, the minimum is bumped up to ten years. *Id.* The charge did not mention the brandishing of the weapon because the prosecution went forward on the assumption that brandishing was a sentencing factor of a single offense, which could be found by the judge post-trial, rather than an element of the offense, which must be submitted to the jury and found beyond a reasonable doubt. *Id.* The defendant argued that the crime's three additional penalties were actually three different crimes. *Id.* at 552–53. Although the charge did not contain any mention of whether or not the defendant had brandished the weapon, the prosecution proposed a minimum sentence of seven years. *Id.* at 545. Over the defendant's objection, at sentencing, the district court did find by a preponderance of evidence that the defendant had brandished the weapon and accepted the prosecution's proposal of a minimum of seven years. *Id.* According to the *Harris* Court, the provisions of brandishing or discharging the firearm "have an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate; the required findings constrain, rather than extend, the sentencing judge's discretion." *Id.* at 554. And "[s]ince the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm." *Id.* Given that *Harris* affirmed *McMillan*, the question for the Court was whether *McMillan* can be reconciled with *Apprendi*. *Id.* at 557. To the Court, the difference between an increase of the mandatory minimum and the statutory maximum is that "the jury's verdict has authorized the judge to impose the minimum with or without the finding." *Id.* at 547; *see Alleyne*, 570 U.S. at 115 ("It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.").

163. *Harris*, 536 U.S. at 572–73 (Thomas J., dissenting).

element of the aggravated crime."[164]

The Court eventually realized the irreconcilability of *Harris* with *Apprendi*, and outright overruled *Harris* in *Alleyne v. United States*.[165] In *Alleyne*, Justice Thomas, who wrote the dissent in *Harris*, wrote for the majority and held that under the Sixth Amendment, any fact that increases the mandatory minimum of an offense is considered an element of that offense and must be submitted to the jury to be proven beyond a reasonable doubt.[166] The *Alleyne* Court revisited the central inquiry in *Harris* about whether a certain fact is an element of the offense, or a sentencing factor that could be found by a preponderance of the evidence by the sentencing judge.[167]

The *Alleyne* Court recognized that facts that increase above the ceiling fixed to a certain crime (the statutory maximum) do not share a legal difference to facts "that increase the floor," and both should be considered as "elements" of the offense, as distinguished in *Apprendi*.[168] The difference is further extinguished given that criminal statutes typically specify both the mandatory maximum and minimum, "which is evidence that both define the

164. *Id.* at 575 (Thomas, J., dissenting) (quoting Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J., concurring)); Chemerinsky, *supra* note 5, at 541 ("*Harris* involved a criminal defendant who received a mandatory minimum sentence of seven years for brandishing a weapon while engaged in drug trafficking. The Court said that since it was a mandatory minimum scheme, the factor did not have to be proven beyond a reasonable doubt. But imagine that the defendant had been convicted under a system that used sentencing guidelines and brandishing a weapon during a drug crime led to an increase in the sentence by seven years. Then brandishing would have to be proven beyond a reasonable doubt. There is no imaginable basis for this distinction.").

165. *Alleyne*, 570 U.S. at 103. *Alleyne*'s facts bear a striking resemblance to those of *Harris*. *Id.* Defendant Alleyne was charged with robbery affecting interstate commerce and using or carrying a firearm in relation to a violent crime, among many other federal offenses. *Id*. Another statute provides an additional penalty to whomever "uses or carries a firearm" in relation to a "crime of violence." *Id.* at 103–04 (quoting 18 U.S.C. § 924(c)(1)(A)). Like in *Harris*, the punishment is a minimum sentence of five years; if the firearm is brandished, the minimum is bumped up to seven years; and if the firearm was eventually discharged, the minimum is bumped up to ten years. *Id.* The jury convicted Alleyne of using the firearm in relation to a violent crime, but did not indicate a finding that the firearm was brandished. *Id.* at 104. Again like in *Harris*, the prosecution proposed a minimum sentence of seven years; over the defendant's objection, at sentencing, the district court found by a preponderance of evidence that the defendant had brandished the firearm and accepted the prosecution's proposal of a minimum of seven years. *Id.*

166. *Id.* at 100–01; *see also* Gall v. United States, 552 U.S. 38, 64 (2007) (Alito, J., dissenting) (arguing that this distinction "cannot be defended as a matter of principle. It would be a coherent principle to hold that any fact that increases a defendant's sentence beyond the minimum required by the jury's verdict of guilt must be found by a jury.").

167. *Alleyne*, 570 U.S. at 106–08.

168. *Id.* at 108.

legally prescribed penalty."[169] In both factual instances, the Court seemingly endorsed the perspective that any facts that increase punishment are considered elements of the offense, are essential to the punishment, and must be submitted to a jury and proven beyond a reasonable doubt.[170] But *Alleyne*, like its sentencing predecessors, affirmed a sentencing judge's discretion to select a sentence that is contained within the statutory range.[171]

A more recent case that touches upon the boundaries of permissible sentencing is *United States v. Haymond*.[172] *Haymond* again reiterated the Court's holdings in *Apprendi*, *Blakely*, and *Alleyne*—that "any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise."[173] The Court affirmed the immeasurable significance of the Sixth Amendment right to a jury trial and the Fifth Amendment due process right on the prosecution's burden to prove all elements of the

169. *Id.* at 112.

170. *Id.* at 109–10 ("From these widely recognized principles followed a well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment.").

171. *Id.* at 116, 134 n.2 ("While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.").

172. United States v. Haymond, 139 S. Ct. 2369 (2019). The facts of this case are as follows: Defendant Haymond was convicted of possessing child pornography. *Id.* at 2373. The statute authorized the sentencing judge to impose a prison term between zero and ten years, a period of supervised release between five years and life. *Id.* The judge sentenced him to thirty-eight months imprisonment, followed by ten years of supervised release. *Id.* Once Haymond completed his prison term, and while he was on supervised release, the government discovered fifty-nine images of child pornography on his personal devices. *Id.* at 2374. Because of this, the government sought to revoke his supervised release. *Id.* A hearing ensued where the judge, not a jury, found that Haymond "knowingly downloaded and possessed" thirteen of the fifty-nine images by a preponderance of the evidence. *Id.* Under 18 U.S.C. § 3583(k):

> [I]f a judge finds by a preponderance of the evidence that a defendant on supervised release committed one of several enumerated offenses, including the possession of child pornography, the judge *must* impose an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for the defendant's initial crime of conviction.

Id.; *see also* 18 U.S.C. § 3583(k) (2018). The statute imposed a new mandatory minimum of five years, even though the new minimum was within the range authorized by the defendant's original conviction. *Haymond*, 139 S. Ct. at 2375. The Court declared this statute unconstitutional. *Id.* at 2379.

173. *Haymond*, 139 S. Ct. at 2379 (quoting Ring v. Arizona, 536 U.S. 584, 602 (2002)).

charged offense beyond a reasonable doubt.[174] The Court compared *Haymond* to *Alleyne*: in both cases, increasing the mandatory minimum through judicial fact-finding at sentencing by a preponderance of the evidence, rather than jury fact-finding at trial beyond a reasonable doubt, usurped the "jury's traditional supervisory role"[175] and exemplified the "Framers' fears that the jury right could be lost not only by gross denial, but by erosion."[176]

IV. THE IMPERMISSIBILITY OF ACQUITTED-CONDUCT SENTENCING: THE CONSTITUTIONAL PERSPECTIVE

A. Acquittal Enhancements Violate the Due Process Clause of the Fifth Amendment

1. The Reasonable Doubt Constitutional Protection

In alignment with the accused's right to a jury trial is the requirement that a jury verdict in a criminal trial be proven beyond a reasonable doubt by the prosecution.[177] Our criminal justice system is predicated on the presumption

174. *Id.* at 2376 (quoting Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) ("Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has 'extend[ed] down centuries.'")).

175. *Id.* at 2381.

176. *Id.* (quoting *Apprendi*, 530 U.S. at 483); *see also* Robert McClendon, *Supervising Supervised Release: Where the Courts Went Wrong on Revocation and How* United States v. Haymond *Finally Got It Right*, 54 TULSA L. REV. 175, 198 (2018) ("A judge can make factual findings that influence her discretion to choose a sentence within the range, but those findings cannot serve to narrow the range itself.").

177. *See* Victor v. Nebraska, 511 U.S. 1, 26–27 (1994) (Ginsburg, J., concurring). Regarding jury instructions needed to convey to the jury what exactly "beyond a reasonable doubt" means, Justice Ginsburg in her concurring opinion states that the instruction the Federal Judicial Center has proposed is "clear, straightforward, and accurate." *Id.* This instruction reads:

> [T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think

of innocence for the accused, meaning that the law recognizes that it is preferable for a guilty person to go free, rather than an innocent person to be wrongfully convicted.[178] The harm of potentially convicting an innocent person would be too substantial to lower such an immense burden on the prosecution.[179]

Based on this foundational concept, the Supreme Court has firmly established that in accordance with the Due Process Clause, the State in prosecuting the accused *must* prove every fact necessary to constitute the offense for which he is charged beyond a reasonable doubt.[180] The reasonable doubt standard is the most restrictive legal standard of proof, and must be used in all criminal cases because "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."[181] Necessarily then, once a reasonable doubt has been raised regarding any of the elements that are prescribed within

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> there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

FED. JUDICIAL CTR, PATTERN CRIMINAL JURY INSTRUCTIONS 27 (1982).

There is still great contention in the dissimilarities of the wording in jury instructions attempting to define "beyond a reasonable doubt." *See* Jon O. Newman, *Beyond "Reasonable Doubt*," 68 N.Y.U. L. REV. 979, 984 (1993) (finding "it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it").

178. *In re* Winship, 397 U.S. 358, 361 (1970). The *Winship* Court emphasized the grave importance of the reasonable doubt standard. *Id.* The Court not only addressed the historical common law connections to mandating this standard but also the exigent interests of the accused. *Id.* at 361–62. This standard exists to ensure that one who is charged with an offense retains a presumption of innocence as to all the offense's material elements, preventing him from any wrongful deprivation of liberty. *Id.* at 362–63. In addition, the Court stressed that requiring this standard is fundamentally necessary "because of the certainty that he would be stigmatized by the conviction." *Id.* at 363. The Constitution compels that "no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt." *Id.* at 364 (quoting Speiser v. Randall, 357 U.S. 513, 525–26 (1958)).

179. *See* Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

180. *In re Winship*, 397 U.S. at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime* with which he is charged.") (emphasis added); *see also* Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) (finding that the requirement that the jury find the accused guilty beyond a reasonable doubt is necessary to be in accordance not only with the Due Process Clause but also the accused's right to a jury trial under the Sixth Amendment). The question inevitably becomes *what facts* are considered constitutionally necessary for the prosecution to prove beyond a reasonable doubt. Sundby, *supra* note 8, at 459.

181. Addington v. Texas, 441 U.S. 418, 423 (1979).

the offense, the prosecution has not met its burden of proof, and the defendant should be acquitted.[182] The standard demonstrates the value in assuring that "even when significant evidence of guilt exists, the defendant will be acquitted if a reasonable doubt exists in the jury's mind," and is sewn within the fabric that comprises U.S. criminal law.[183]

2. The Incompatibility of Acquitted-Conduct Sentencing

The use of an acquittal enhancement violates the Due Process Clause of the Fifth Amendment[184] in that the prosecution need only prove the enhancement (the acquittal) by a preponderance of the evidence, rather than beyond a reasonable doubt, which is constitutionally attached to criminal trials.[185] The preponderance standard, that colloquially translates to "more likely than not,"[186] is one that is typically used during civil trials because "society has a minimal concern with the outcome of such private suits."[187] The Supreme Court justifies the use of the preponderance standard during sentencing through categorizing sentence enhancements, including all relevant conduct enhancements,[188] as not being facts that are necessary to constitute the offense

182. *See* Cage v. Louisiana, 498 U.S. 39, 41 (1990) (holding that jury instructions defining a reasonable doubt as "an actual substantial doubt" that "would give rise to a grave uncertainty" are not permissible and are grounds for overturning a conviction, as this specific instruction requires a higher standard of proof than what the reasonable doubt standard requires); Victor v. Nebraska, 511 U.S. 1, 16–18, 31 (1994) (holding that jury instructions defining a reasonable doubt as "an actual and substantial doubt reasonably arising from the evidence," or referring to moral certainty when the instructions also included directions that required the jury to apply the standard properly are permissible and not grounds for overturning a conviction (emphasis omitted) (citation omitted)).

183. *See* Sundby, *supra* note 8, at 458.

184. U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law[.]").

185. *See* Shors, *supra* note 5, at 1351–52 ("Acquittal enhancement, however, are unlike any other relevant conduct sentence enhancements because they allow the government to relitigate conduct of which the defendant has been acquitted.").

186. *Evidentiary Standards and Burdens of Proof in Legal Proceedings*, JUSTIA, https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/ (last reviewed Oct. 2023).

187. Addington v. Texas, 441 U.S. 418, 423 (1979); *see also In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) ("Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.").

188. Slatkin, *supra* note 5, at 593 n.76. Relevant conduct enhancements unfortunately also include

underlying the charge against the defendant, and thus not needed to be proven beyond a reasonable doubt to survive a Due Process challenge.[189] But this is seemingly a distinction without a difference,[190] given the Court's resolute holding in *In re Winship* that "adjudging someone guilty and imprisoning her for years on the same strength of evidence as would suffice in a civil case would amount to a lack of fundamental fairness."[191] Yet, the same outcome results when the sentencing judge considers prior acquitted conduct—the defendant is imprisoned for a number of years based on a preponderance of the evidence, the lowest standard of proof used in civil trials.[192]

The prosecution, having failed their constitutionally mandated burden of proving the charges beyond a reasonable doubt in front of a jury, now has the ability under a significantly lowered standard of proof to prove that charge again in front of the sentencing judge, which can substantially increase the defendant's sentence.[193] Not only does the prosecution have a lower standard of proof, but the evidentiary safeguards that apply during trial do not apply during sentencing, so the prosecution can admit evidence that would typically be barred during trial.[194] Additionally, the defendant loses his right to confront his witnesses or accusers during his sentencing hearing, another

uncharged conduct. *Id.* at 595. The prosecutor has the discretion of what charges to pursue when prosecuting a criminal defendant. *Id.* at 598. Instead of choosing to charge, for example four charges, the prosecutor could only choose to include only one of those charges in the indictment. *Id.* The other three alleged offenses are not in the indictment, and are not introduced at the defendant's trial to be proven beyond a reasonable doubt. *Id.* If the prosecutor obtains a conviction for that one charge, she can introduce the other three uncharged offenses at the sentencing hearing as a "relevant conduct" enhancement. *Id.* Because sentencing enhancements can be proven by a preponderance of the evidence, the prosecutor is functionally able to obtain convictions for offenses under a lower standard of proof out of the presence of a jury. *Id.* at 599; *see also* United States v. Kikumura, 918 F.2d 1084, 1089, 1119 (3d Cir. 1990) (vacating a district court judgment where the Sentencing Guidelines range for the charged and convicted offenses was twenty-seven-to-thirty-three months, but where the defendant ended up receiving thirty years imprisonment on the basis of uncharged conduct).

189. *See* United States v. Watts, 519 U.S. 148, 152, 157 (1997) (per curiam) (stating the Guidelines provide "that facts relevant to sentencing be proved by a preponderance of the evidence"); United States v. O'Brien, 560 U.S. 218, 224 (2010) (affirming that sentencing factors can be proven by a preponderance of the evidence).

190. Beutler, *supra* note 102, at 838 ("While it has been held that proof by a preponderance of the evidence is enough to satisfy the requirements of due process for sentencing purposes, elements of an offense should not be before the sentencing judge in the first instance.").

191. *Id.* (citing *In re Winship*, 397 U.S. at 363).

192. *See id.*

193. *See* Johnson, *If at First You Don't Succeed*, *supra* note 5, at 182–83.

194. Ngov, *supra* note 5, at 288.

constitutionally protected right that is afforded to him at trial.[195] The prosecution can also improve its presentation of the case after experiencing its failure at trial.[196]

Although the Supreme Court has affirmatively concluded that the preponderance standard at sentencing is allowable when considering enhancements, an acquittal enhancement is intrinsically different from other facts that justify enhancements, such as "the presence of a gun or the vulnerability of the victim."[197] An acquittal enhancement is a "fact[] comprising different crimes," meaning that this fact has already been litigated, and *failed* to overcome the reasonable doubt standard.[198] An acquittal, thus, is a "fact" that constitutes an element of an offense, which must be proven beyond a reasonable doubt.[199] According to Lucius T. Outlaw II, "[a]n element is not stripped of its character, weight, and significance, once a jury is released following the verdict."[200]

Through acquittal enhancements, the prosecution manipulates the system to its benefit by litigating conduct that should have received finality by using these procedural advantages,[201] a practice which completely bypasses the spirit of *Winship* and our Constitution.[202]

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195. *Id.* The Confrontation Clause of the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI; *see also Right to Confront Witness*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/right_to_confront_witness (last visited Feb. 17, 2024).

196. *See* Johnson, *If at First You Don't Succeed*, *supra* note 5, at 183; Nicodemus, *supra* note 5, at 463–64 ("What is reprehensible is that the state is essentially given a 'do over' in which it may perfect the presentation of its case and enjoy the lower burden of proof.").

197. United States v. Pimental, 367 F. Supp. 2d 143, 153 (D. Mass. 2005).

198. Outlaw II, *supra* note 5, at 208; *see Pimental*, 367 F. Supp. 2d at 153 ("Rather, they are facts comprising different crimes, each in a different count. And the jury acquitted of those counts.").

199. *See In re* Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Apprendi v. New Jersey, 530 U.S. 466, 466 (2000) ("The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.").

200. Outlaw II, *supra* note 5, at 208; *see also* McMillan v. Pennsylvania, 477 U.S. 79, 103 (1986) (Stevens, J., dissenting) ("[I]f a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*.").

201. *See* Farnaz Farkish, *Docking the Tail That Wags the Dog: Why Congress Should Abolish the Use of Acquitted Conduct at Sentencing and How Courts Should Treat Acquitted Conduct after* United States v. Booker, 20 REGENT U. L. REV. 101, 114 (2007) ("A jury acquittal leaves no doubt that the jury has rejected the sentence-enhancing fact by a reasonable doubt.").

202. *See* Ngov, *supra* note 5, at 290.

B. Acquittal Enhancements Violate the Sixth Amendment Right to a Jury Trial

As delineated above, even after the cases that comprised the sentencing revolution, lower courts have declined to hold that consideration of past acquittals during a criminal defendant's sentencing violates the right to a jury trial under the Sixth Amendment.[203] Because of the Supreme Court's decision in *Watts*, the use of acquitted conduct during sentencing is seemingly constitutionally sound—as long as the established sentence does not run afoul of the *Apprendi* line of cases—which has come to mean that the acquittal enhancement cannot increase the sentence statutory minimum, per *Alleyne* and *Haymond*, or maximum, per *Apprendi*, *Blakely*, and *Booker*.[204]

But considering past acquittals to enhance a defendant's sentence which would have been lower but for the consideration of the acquitted conduct, is a direct rejection of a jury's verdict to acquit and completely ignores the understood finality of an acquittal.[205] An acquittal carries extreme significance in that it comforts the defendant that his liability for the offense(s) charged terminates with a jury's not-guilty verdict.[206] The defendant can presumably rest knowing that in the eyes of the law, the criminal justice system, and

203. U.S. CONST. amend. VI ("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[.]"); Erlinder, *supra* note 5, at 20–21 (discussing lower courts' reliance on *Watts* to justify considering prior acquittals).

204. *See* cases cited *supra* note 134 and accompanying text.

205. *See* Harvey A. Bilang, *Safeguarding the Right of Repose: A Call for Consistency in the Application of the Finality-of-Acquittal Doctrine and the Exceptions Therefrom*, 64 ATENEO L.J. 1849, 1852–53 (2020) (stating the "finality of an acquittal" is a concept that is woven into the fabric of our Constitution through the Double Jeopardy Clause of the Fifth Amendment). The prosecution cannot appeal an acquittal because an acquittal is meant to signify the ending of a criminal defendant's jeopardy, relieving him of the possibility that the prosecution will attempt to secure a conviction even when the jury has already returned a not guilty verdict. *Id.* at 1853.

206. Green v. United States, 355 U.S. 184, 187–88 (1957) ("The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State[,] with all its resources and power[,] should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that[,] even though innocent[,] he may be found guilty."); United States v. Scott, 437 U.S. 82, 91 (1978) ("To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.'") (quoting *Green*, 355 U.S. at 188)).

society at large he is not guilty of the charges for which he was acquitted.[207]

Although use of acquitted conduct during sentencing superficially does not violate the Fifth or Sixth Amendments according to the Supreme Court,[208] its use runs in unequivocal contradiction to the basic notion of an acquittal: it eliminates a defendant's anxiety from the government's continuous pursuit of a punishment on the basis of the offense(s) once-charged.[209] The ability for the prosecution to pursue an enhancement based on a prior acquittal serves no functional difference to a defendant than the prosecution pursuing an appeal or second trial after an acquittal has been rendered, which are both explicitly prohibited under the Double Jeopardy Clause.[210] The defendant is receiving additional time for the underlying conduct either way.[211] In many instances, an enhancement based on an acquittal can actually give a defendant the same sentence received by another defendant convicted of the same crime.[212]

This manufactured loophole, which carries severe constitutional implications, essentially provides the prosecution a "second bite of the apple," one that blatantly discounts the finality of a not-guilty jury verdict, and basically allows the sentencing judge to issue her own verdict upon which the sentence can be established.[213] The sentencing judge is replacing the jury's verdict with her own determination of the facts, given that she is reconsidering underlying conduct that was supposed to already have been resolved.[214] This is an arrant

207. Evans v. Michigan, 568 U.S. 313, 319 (2013) ("[A]n 'acquittal' includes 'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability,' and any other 'rulin[g] which relate[s] to the ultimate question of guilt or innocence.'") (quoting *Scott*, 437 U.S. at 91, 98, n.11)).

208. United States v. Booker, 543 U.S. 220, 240 (2005). *Watts* does not take up the issue of whether considering prior acquittals violates the Sixth Amendment right to a jury trial. *Id.* at 240 n.4.

209. *See* United States v. Watts, 519 U.S. 148, 170 (1997) (Kennedy, J., dissenting) (per curiam) ("At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal[.]").

210. *See* Nicodemus, *supra* note 5, at 461–63.

211. *Id.* at 463.

212. *See* Ngov, *supra* note 5, at 243.

213. United States v. Bell, 808 F.3d 926, 932 (D.C. Cir. 2015); *see* Johnson, *If at First You Don't Succeed*, *supra* note 5, at 180 ("Permitting sentencing judges to enhance sentences on the basis of acquitted conduct . . . undermines the defendant's fundamental interest in verdict finality, exposing the defendant to a second mini-trial on conduct underlying the count of acquittal in contravention of principles underlying the Fifth and Sixth Amendments, [and] . . . denigrates the role of the jury, diminishing the jury's ability to function as a source of community participation in the justice system and possibly reducing the effectiveness of the norm-reinforcing function of the criminal law.").

214. *See* Nicodemus, *supra* note 5, at 466 ("Effectively the judge has entered a judgment

violation of the jury trial right, and a complete abuse of the judge's power.[215] Though the Supreme Court has avowed the crucial effect that an acquittal carries, its continued apathy in allowing for acquitted-conduct sentencing to continue is slowly disfiguring any semblance of the defendant's right to a jury trial.[216]

Additionally, because of her rejection of the jury's acquittal, the sentencing judge undermines the jury's role in the criminal justice system and completely minimizes the jury's significance.[217] The jury's duty of oversight in the criminal process to "guard against a spirit of oppression and tyranny on the part of rulers"[218] essentially becomes "obsolete."[219]

The role of the jury decreases in force, the jury trial right reduced to mere pandering, and the jury's confidence in the seeming weight of their verdict diminishes once the sentencing judge considers the prior acquittal to increase, oftentimes substantially,[220] a criminal defendant's sentence.[221]

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notwithstanding the jury verdict, something that the judge would normally be precluded from doing. The effect is that the defendant is deprived of the benefit of the jury acquittal.").

215. *See* United States v. Haymond, 139 S. Ct. 2369, 2376 (2019) ("Consistent with these understandings, juries in our constitutional order exercise supervisory authority over the judicial function by *limiting* the judge's power to punish. A judge's authority to issue a sentence *derives from*, and is *limited by*, the jury's factual findings of criminal conduct." (emphasis added)).

216. *See* Burks v. United States, 437 U.S. 1, 16 (1978) ("[W]e necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision[.]").

217. *See* Johnson, *The Puzzling Persistence of Acquitted Conduct*, *supra* note 5, at 26–27.

218. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting JOSEPH STORY & THOMAS COOLEY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

219. Farkish, *supra* note 201, at 118.

220. *See* United States v. Lombard, 72 F.3d 170, 179 (1st Cir. 1995). Defendant Lombard received a life sentence that resulted from the district court's finding that the defendant committed murder, when the jury acquitted him of that charge. *Id*. at 172. Lombard received the same sentence, if not a *worse* sentence, than he would have received had he actually been convicted of murder. *Id.* at 179 ("Through the post-trial adjudication of the murders under a lesser standard of proof, the federal prosecution obtained precisely the result that the Maine state prosecutors attempted, but failed, to obtain. *The federal prosecution may well have done better.* The net effect of the Guidelines attribution of the murders to Lombard as understood by the district court was to *mandate* imposition of a life sentence. This was the *maximum* that Lombard could have received had he been convicted of murder in the Maine state court." (emphasis added)).

221. *See* Nicodemus, *supra* note 5, at 466 ("The jury trial essentially is more than a trial for one particular case; it is a tool by which members of a jury and the larger community participate in the democratic process. Abrogating this function by taking the power away from the jury after they have rendered a decision can only hurt the system.").

C. Acquittal Enhancements Strip the Meaning of Innocence

Not only is the significance of the jury's acquittal substantially eroded when a sentencing judge utilizes a prior acquittal but also the significance attached to a jury's not-guilty verdict is stripped of *any* meaning of innocence.[222] In *Watts*, the majority argued that the use of sentencing enhancements survives constitutional muster because a not-guilty verdict is "not a finding of any fact," and only means the government failed to overcome proof beyond a reasonable doubt on an essential element of the offense.[223] But it could very well be the case that the jury *did* acquit because its members believed the defendant to be wholly innocent.[224] Allowing the sentencing judge to ignore a jury's determination of fact, which could have possibly been an indication of innocence, removes all significance that our criminal justice system attaches to the meaning of criminal innocence.[225] What is innocence in the eyes of the system, if not a verdict of not guilty?[226]

As the majority argued in *Watts*, a not-guilty verdict cannot represent any determinate factual findings, lending itself to the explanation that actual innocence can buttress a not-guilty verdict just as much as any other explanation.[227] The *Watts* Court does not give any credence to this possibility, suggesting that defendants who have been acquitted are *actually* guilty, and the prosecution just was not able to persuade the jury beyond a reasonable doubt.[228] However, the burden of proof beyond a reasonable doubt is the strictest legal standard for a reason: it is "an indispensable precondition to

222. *See* Johnson, *The Puzzling Persistence of Acquitted Conduct*, *supra* note 5, at 25 ("[Using acquittal enhancements] eliminates an important procedural check in the criminal justice system, replacing fact-finding from a jury of the defendant's peers with the decision of a single judge. Use of acquitted conduct undermines the significance of jury-determined legal innocence.").

223. United States v. Watts, 519 U.S. 148, 155 (1997) (per curiam) (quoting United States v. Putra, 78 F.3d 1386, 1394 (9th Cir. 1996)).

224. *See* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN L. REV. 523, 551–52 (1993) ("When a jury acquits, we do not know why; it may be that the panel was fully confident of the defendant's innocence . . . . It is fallacious to assume in every case that an acquittal reflects minimal reasonable doubt.").

225. *See* Ngov, *supra* note 5, at 291–92 ("[I]f an acquittal is not a sufficient indicator of innocence to relieve a defendant of sentencing repercussions, then why not permit the jury to acquit only when its verdict is 100% certain of innocence?").

226. *See* Yeager v. United States, 557 U.S. 110, 122 (2009) ("A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it.").

227. *See* Ngov, *supra* note 5, at 292–94.

228. *Id.* at 293 ("Yet, the *Watts* Court never acknowledges the corollary—that a defendant may actually be innocent—and by failing to do so, it sanctions imprisoning the potentially innocent.").

depriving an individual of liberty for the alleged conduct."[229] Allowing the prosecution to dispense of this fully ingrained requirement would undercut all meaning that is attached to an acquittal and any link that an acquittal could have to the meaning of innocence.[230] To put it bluntly, "it is absurd that an acquittal looses the effect of withholding sentencing authority just because it is in the company of a guilty verdict."[231]

D. Acquittal Enhancements Contradict Supreme Court Precedent: Watts *Must Be Overruled*

The consideration of acquittals during sentencing is both repugnant to our Constitution and in opposition to the conclusions and fundamental principles iterated in *Apprendi*, *Blakely*, *Alleyne*, *Haymond*, and the merits majority in *Booker*.[232] As the law currently stands, any fact that increases the statutory minimum sentence[233] or the statutory maximum sentence[234] must be admitted to by the defendant or submitted to the jury to be proven beyond a reasonable doubt.[235] These cases underscore the grave importance and check on government power that the constitutional protections of the reasonable doubt standard and jury trial are meant to serve to the criminal defendant.[236]

Consequently, when a sentencing judge unambiguously rejects a jury's

229. United States v. Bell, 808 F.3d 926, 930 (D.C. Cir. 2015) (order denying petition for rehearing en banc) (Millett, J., concurring).

230. *See* Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1198 (2005) ("Actual innocence provides at least as powerful explanation for an acquittal as any of the other reasons, and a more powerful explanation than most[.] . . . Requiring that the defendant secure a finding of actual innocence in order to preclude collateral consequences will necessarily mean that innocent defendants will continue to be punished because it once seemed likely that they were guilty.").

231. Outlaw II, *supra* note 5, at 210.

232. Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005); United States v. Haymond, 139 S. Ct. 2369 (2019); Alleyne v. United States, 570 U.S. 99 (2013).

233. *Alleyne*, 570 U.S. at 113 ("Elevating the low end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's 'expected punishment has increased as a result of the narrowed range.'" (quoting *Apprendi*, 530 U.S. at 522)); *Haymond*, 139 S. Ct. at 2378 ("So just like the facts the judge found at the defendant's sentencing hearing in *Alleyne*, the facts the judge found here increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments." (quoting *Alleyne*, 570 U.S. at 100)).

234. *Apprendi*, 530 U.S. at 468–69; *Blakely*, 542 U.S. at 298; *Booker*, 543 U.S. at 221–22.

235. *Booker*, 543 U.S. at 230.

236. *See* Chemerinsky, *supra* note 5, at 537.

acquittal to find that the alleged conduct underlying the acquittal actually does exist by a preponderance of the evidence, the foundational principles bolstering the *Apprendi* line of cases diminish.[237] It makes no intuitive sense that an enhancement that increases the mandatory floor or ceiling of an offense invokes a constitutional violation, but an enhancement that substantially increases the defendant's punishment is acceptable, so long as it is between that mandatory floor and ceiling.[238] What functional difference does it make whether the sentencing judge, through the finding of an enhancement, increases the mandatory minimum from five to seven years, or whether the judge increases a defendant's punishment from the mandatory minimum of five years to a sentence of seven years?[239] The defendant serves the same amount of time in both scenarios, yet one is repugnant to our Constitution while the other is not.[240]

The proposed argument follows that increasing the mandatory minimum or maximum sentence through a sentence enhancement[241] exposes the defendant "to a punishment greater than that otherwise [was] legally prescribed,"[242] so the defendant will not be able to predict the legally applicable range of his sentence.[243] But this foundational concept does not seem to be applicable in

237. *Id.*

238. *See id.*; *see also Apprendi*, 530 U.S. at 495 ("But it can hardly be said that the potential doubling of one's sentence—from 10 years to 20—has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance.").

239. *See* Nicodemus, *supra* note 5, at 460 ("The result is the same; the defendant is incarcerated. The anomalous result occurs when a defendant is sentenced and receives a sentence enhancement, serves the sentence that is based on the conviction, and then is stuck in jail serving his enhancement for the conduct that was acquitted.").

240. *Id.*

241. *See* Alleyne v. United States, 570 U.S. 99, 107 (2013). In scenarios where the enhancement increases the mandatory minimum or maximum sentence, the enhancement is not classified as an enhancement at all. *Id.* It would be considered an element of the offense to be placed in the indictment, requiring the jury to find it proven beyond a reasonable doubt. *Id.* The Court clarified this distinguishing terminology because enhancements, rather than actual elements of the offense, can be proven in front of a sentencing judge by a preponderance of the evidence. *Id.* ("The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." (citing United States v. O'Brien, 560 U.S. 218, 235 (2010))).

242. *Apprendi*, 530 U.S. at 566 n.10.

243. *See Alleyne*, 570 U.S. at 100 ("Defining facts that increase a mandatory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment . . . and preserves the jury's historic role as an intermediary between the State and criminal defendants.").

the post-*Booker* regime of the advisory Guidelines.[244] Under the advisory Guidelines, while the applicable Guidelines must first be calculated, the remedy in *Booker* provided more discretion to sentencing judges,[245] allowing them to depart from the calculated range.[246] The maximum set by the calculated Guidelines range "no longer operates as a maximum sentence that the judge can legally impose," but rather "[t]he 'statutory maximum' is once again (as before *Blakely*) the maximum sentence set out by Congress in the statute that defines the offense of conviction."[247] Because of the way courts have interpreted *Booker*, defendants cannot predict their potential punishment with any degree of certainty given how large the discrepancy could be between the statutory minimum and maximum—which oftentimes could be life imprisonment—and because of sentencing judges' ability to simply enhance the applicable Guidelines range in the new advisory regime.[248] This outcome undermines the fundamental constitutional protections that the defendant possesses, which the Court has consistently vouched for in its jurisprudence.[249]

Even though *Watts* only focused on the Double Jeopardy issue, courts have consistently relied on *Watts* to allow for the consideration of acquitted

244. *See* Ngov, *supra* note 5, at 264–65.

245. *See* Gall v. United States, 552 U.S. 38, 66 (2007) (Alito, J., dissenting) ("A sentencing system that gives trial judges the discretion to sentence within a specified range not only permits judicial factfinding that may increase a sentence, such a system also gives individual judges discretion to implement their own sentencing policies.").

246. *See* M.K.B. Darmer, *The Federal Sentencing Guidelines After* Blakely *and* Booker*: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 560–61 (2004).

247. *See* Johnson, *The Puzzling Persistence of Acquitted Conduct*, *supra* note 5, at 21. The *Booker* solution is also in clear conflict with the holding of *Blakely*, which clarified the holding in *Apprendi*. *Id.* at 19 ("Writing for the majority in *Blakely*, Justice Scalia rejected this settled understanding of 'statutory maximum,' and embraced the view that the top end of a binding sentencing guidelines range was the maximum sentence a judge could impose, for *Apprendi* purposes." (citing Blakely v. Washington, 542 U.S. 296, 303–05 (2004))).

248. *See* Outlaw II, *supra* note 5, at 208–09 ("It is directly counter to *Booker*'s intent for judges to use acquitted conduct to extend the sentence range authorized by the Guidelines. It is of no constitutional importance to *a defendant* that the Guidelines are 'advisory' as opposed to 'mandatory' if the trial judge enhances the defendant's guideline range based on jury rejected 'facts' that constitute elements of an acquitted offense, *and then impose a sentence within that enhanced range*."); *see also* United States v. White, 551 F.3d 381, 385, 392 (6th Cir. 2008) (en banc) (stating that the "maximum," as per *Booker*, is the statutorily imposed maximum, and that *Booker* "free[d] a district court to impose a non-guidelines sentence").

249. *See* Apprendi v. New Jersey, 530 U.S. 466, 478 (2000) ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime.").

conduct at sentencing.[250] The only conclusion that is drawn, and one of the few plausible solutions, is that *Watts* must be overruled.[251] *Watts* is in flagrant contradiction to the conclusions and reiteration of constitutional protections afforded to the criminal defendant described in the *Apprendi* line of cases.[252] Without a full repudiation of *Watts*, using acquitted conduct to enhance a sentence will continue to be commonplace, imprisoning defendants for conduct of which that they were acquitted, in violation of their constitutional rights.[253]

V. THE IMPERMISSIBILITY OF ACQUITTED-CONDUCT SENTENCING: CONCERNS WITH GUILTY PLEAS

As explained above, the constitutional and precedential concerns stemming from a sentencing judge considering prior acquittals are of vast magnitude.[254] While there is firm basis to attack acquitted-conduct sentencing in that it *explicitly* negates the right of a defendant to a jury a trial guaranteed by the Sixth Amendment, the practice also *implicitly* negates the right to jury trial because of our plea bargaining system.[255] To fully explain how the use of

250. *See* United States v. Thomas, 294 F.3d 899, 903–04 (7th Cir. 2002) (sentencing the defendant to 102 months in prison after the judge increased Thomas's base offense level by two points because of conduct for which he was acquitted); United States v. Mankowski, Nos. 96-4383, 96-4410, 1997 WL 182758, at *1 (4th Cir. April 16, 1997) (per curiam) (relying on acquitted conduct to determine the defendant's base offense level through the use of the Guidelines' relevant conduct provisions); United States v. Meade, 110 F.3d 190, 203 (1st Cir. 1997) (relying on *Watts* to increase the defendant's base offense level by four levels based on acquitted charges); United States v. Walsh, 119 F.3d 115, 120 (2d Cir. 1997) ("[I]t has been definitively established that Walsh's jury acquittals on those other charges do not preclude the sentencing judge's consideration of the same conduct for Guideline purposes, in part because of the difference in the applicable standards of proof: preponderance of the evidence for sentencing purposes as against proof beyond a reasonable doubt for purposes of conviction."); United States v. Wilkerson, No. 96-5640, 1997 WL 560016, at *2–4 (6th Cir. Sept. 8, 1997) (imposing a two-level enhancement based on the defendant using and carrying a firearm during a drug-trafficking offense, even though the jury acquitted him of this charge).

251. *See* Chemerinsky, *supra* note 5, at 537–38.

252. *See* Outlaw II, *supra* note 5, at 212–13 (concluding that the *Apprendi* line of cases "has fortified the line between judge and jury, and re-invigorated the role of the Sixth Amendment in sentencing" making *Watts* a "monumental breach of the Sixth Amendment").

253. *See* Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1564 (1981) (using acquitted conduct "undermines the importance of the substantive criminal law, nullifies the law of evidence, and is irreconcilable with the notion that punishment can be imposed only in respect to offenses admitted or proven").

254. *See supra* Part IV.

255. *See generally* Stephanos Bibas, Apprendi*'s Perverse Effects on Guilty Pleas Under the*

acquittal enhancements intersects with the plea bargaining system to create a latent violation of the Sixth Amendment jury trial right, understanding how integrated plea bargaining is within our criminal justice system is necessary.[256]

In 2001, 91% of adjudicated felony defendants plead guilty, while only 4% proceed to trial.[257] As of April 2022, 97% of all criminal cases are resolved through guilty pleas.[258] Pleading guilty is undoubtedly the primary mode for prosecutors to gain a conviction.[259] Although there is great emphasis on the importance of the jury in the criminal justice system,[260] when it comes to criminal trials, the reality is that an overwhelming majority of criminal defendants never present their case in front of a jury.[261] The majority in *Blakely* even affirmed that the current plea bargaining structure would likely not be changed following the case's holding, signifying how indispensable plea

Guidelines, 13 FED. SEN'G REP. 333, 333–34 (2001) ("This article . . . focuses on the most perverse effect *Apprendi* will have on defendants who plead guilty: The elements rule in effect deprives many defendants of sentencing hearings, the only hearings they were likely to have.").

256. *See generally* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435 (2020) (describing the history of plea bargaining in the United States); CARRISA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (Abrams Press, 2021) (arguing that plea bargaining has undermined the constitutional right to a jury trial).

257. Bibas, *supra* note 255, at 333. The remainder of defendants have bench trials. *Id.*

258. Isidoro Rodriguez, *'Outrageous Outcomes': Plea Bargaining and the Justice System*, THE CRIME REP. (Apr. 8, 2022), https://thecrimereport.org/2022/04/08/outrageous-outcomes-plea-bargaining-and-the-justice-system/#:~:text=Today%2097%20percent%20of%20all,and%20that%20number%20is%20rising.

259. *See* Bibas, *supra* note 255, at 333; Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 47 (2006) ("Whatever due process protections might otherwise come into play at trial, these benefits will not be enjoyed by the vast majority of defendants. Nor could the criminal justice system possibly function if a greater proportion of defendants insisted on exercising their trial rights. The efficient operation of criminal justice is heavily dependent on encouraging a large proportion of defendants to forgo their trial rights and plead guilty.").

260. *See* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769) ("[T]rial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendants] equals and neighbours.'"); Blakely v. Washington, 542 U.S. 296, 305–06 (2004) ("[The right to jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."); Alleyne v. United States, 570 U.S. 99 (2013) (acclaiming the "historic role of the jury as an intermediary between the State and criminal defendants").

261. *See* Bibas, *supra* note 255, at 333.

bargaining is in our criminal system.[262]

Acquitted-conduct sentencing "empowers and emboldens" the prosecution to bring additional charges "with the intent of establishing 'guilt' at sentencing."[263] Especially because the current sentencing scheme mandates that sentencing judges consider all "relevant conduct," which includes an acquittal, when imposing sentences, the prosecution gains an incredible advantage.[264] Prosecutors only need one conviction in order to proceed to sentencing, where they are able to relitigate, under the preponderance standard, the charges that they were not able to prove beyond a reasonable doubt.[265] When a defendant is faced with multiple charges, knowing through counsel that any charge for which he receives an acquittal could be used to enhance his sentence if the prosecution obtains a conviction for only a single charge, he could be more likely to accept a plea deal.[266] The defendant thus not only has to "weigh whether she can emerge successful at trial, but also the added penalty exposure posed by charges she can beat under the reasonable doubt standard, but may lose under the preponderance standard at sentencing,"

262. *Blakely*, 542 U.S. at 310 ("[N]othing prevents a defendant from waiving his *Apprendi* rights . . . . States may continue to offer judicial fact-finding as a matter of course to all defendants who plead guilty.")

263. *See* Outlaw II, *supra* note 5, at 198.

264. *See* Andrew Delaplane, *'Shadows' Cast by Jury Trial Rights on Federal Plea Bargaining Outcomes*, 57 AM. CRIM. L. REV. 207, 229 (2020) ("Prosecutors benefit most from this regime. Prosecutors are more likely to have access to relevant information regarding sentence length, and there are fewer barriers to introducing that information at sentencing."); SENTENCING GUIDELINES MANUAL, *supra* note 16, § 1B1.3(a); 18 U.S.C. § 3661 (2018).

265. *See* Outlaw II, *supra* note 5, at 198 (referring to this practice of bringing as many charges as possible because acquittals can be used at sentencing as "charge inflation"); Bibas, *supra* note 255, at 334 ("When the defendant is not up against the maximum, the prosecution can try again to prove enhancements at the second trial by a preponderance, undercutting the reasonable-doubt standard.").

266. *See* Bibas, *supra* note 255, at 334. The ability to present acquitted conduct at sentencing in order to enhance the defendant's sentence subsequently emboldens prosecutors to allege any possible charge, knowing that they solely need one conviction to proceed to sentencing. Brief for Professor Douglas Berman as Amicus Curiae Supporting Petitioner at 17, McClinton v. United States, 143 S. Ct. 2400 (No. 21-1557) [hereinafter Brief for Professor Douglas Berman] ("Prosecutors can brazenly charge any and all offenses for which there is a sliver of evidence, then pursue those charges throughout trial without fear of any consequences when seeking later to make out their case to a sentencing judge . . . . This enhances prosecutorial power at each major stage of a criminal prosecution."). The more charges that a prosecutor can bring against a defendant, no matter the evidentiary support for each of the accusations, leads the jury to make the "'determination that the defendant at some point did something wrong.'" *Id.* at 19 (quoting Blakely v. Washington, 542 U.S. 296, 307 (2004)). "'The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes.'" *Id.* at 20 (quoting Missouri v. Hunter, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting)).

where the evidentiary safeguards guaranteed at trial are not present.[267] Because the acquitted charges can be used at the sentencing of the one charge that produced a conviction, "a Guideline range that is identical in terms of the penal consequences to a defendant as if he was convicted on the basis of allegations not proved, or even alleged in the trial phase" is "trigger[ed]."[268] The increased pressure to accept a plea bargain because of the threat of an acquittal enhancement at sentencing conveys how acquitted-conduct sentencing undercuts a criminal defendant's right to a jury trial by essentially bullying the defendant into forgoing his jury trial right.[269]

VI. THE CURRENT LANDSCAPE

A. Where We Are Now

Without any further action, either from the Sentencing Commission, the Supreme Court, or Congress, any criminal defendant exposed to a conviction will also be exposed to the sentencing judge's consideration of the acquitted charges as "relevant conduct," thereby greatly enhancing his sentence, oftentimes to the same amount as would have been given had he been actually *convicted* of the acquitted charges.[270]

Many judges have explained their hesitations with the use of this insidious practice and necessarily the viability of *Watts*.[271] Justice Brett Kavanaugh,

267. *See* Outlaw II, *supra* note 5, at 198.

268. Yalinçak, *supra* note 5, at 715; *see also* Douglas Ankney, *Acquitted Conduct Sentencing*, CRIM. LEGAL NEWS (Mar. 2022), https://www.criminallegalnews.org/news/2022/feb/15/acquitted-conduct-sentencing/ ("Defendants are aware that even when acquitted of all charges save one, they might still receive the maximum penalty allowed as if they had been convicted on all charges.").

269. *See* Delaplane, *supra* note 264, at 231 ("When prosecutors manipulate charges in order to prove relevant conduct by a preponderance at sentencing, this is a circumvention of the jury trial right."); United States v. Bell, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millet, J., concurring) ("At the same time, factoring acquitted conduct into sentencing decisions imposes almost insurmountable pressure on defendants to forgo their constitutional right to a trial by jury. Defendants will face all the risks of conviction, with no practical upside to acquittal unless they run the board and are absolved of *all* charges.").

270. *See* cases cited *supra* note 83.

271. *See* United States v. Canania, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring) ("I wonder what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing."); United States v. Mercado, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting) ("Reliance on acquitted conduct in sentencing diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment. Both *Booker* and the clear import of the Sixth Amendment prohibit such a result.").

during his time on the D.C. Circuit, expressed that the use of acquittal enhancements exposes Due Process and Sixth Amendment concerns.[272] Judge Rosemary Barkett, in her concurrence in *Faust*, demonstrated distress to follow the Supreme Court precedent, explicitly stating that the "precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment."[273] Judge Nancy Gertner lamented that "[i]t makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and *also* conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing."[274]

In terms of the state criminal system, in 2021, the New Jersey Supreme Court renounced *Watts*, strictly limiting its holding to the Double Jeopardy context rather than extending it to the Due Process context, believing the case to be repugnant to its state constitution.[275] In a consolidated case, the court

272. *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); United States v. Henry, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) ("The oddity of all this is perhaps best highlighted by the fact that courts are still using *acquitted* conduct to increase sentences beyond what the defendant otherwise could have received" after *Booker* "stated that the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved *to a jury beyond a reasonable doubt*.").

273. United States v. Faust, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring) ("Thus the holding of *Watts,* explicitly disavowed by the Supreme Court as a matter of Sixth Amendment law, has no bearing on this case in light of the Court's more recent and relevant rulings[.]").

274. United States v. Pimental, 367 F. Supp. 2d 143, 150 (D. Mass. 2005) (internal citations omitted); *see also* United States v. Sabillon-Umana, 772 F.3d 1328, 1331 (10th Cir. 2014) (stating that judicial fact-finding at sentencing "rests in part on a questionable foundation. It assumes that a district judge may either decrease or increase a defendant's sentence . . . based on facts the judge finds without the aid of a jury or the defendant's consent. It is far from certain whether the Constitution allows [this].").

275. *See* State v. Melvin, 258 A.3d 1075, 1087 (N.J. 2021).

heard on appeal *State v. Melvin*[276] and *State v. Paden-Battle*,[277] in which both defendants received greater sentences through the sentencing judge's reliance on their acquitted conduct.[278] The New Jersey Supreme Court began its analysis by differentiating its constitution from the U.S. Constitution, noting that its constitution "affords greater protection for individual rights than its federal counterpart," specifically with regards to its "heightened protection of due process rights."[279] The court then turned to the jury trial issue, referencing the state's right to a criminal trial as "inviolate."[280] The court emphasized that a jury's verdict simply cannot be disturbed, and that a "re-litigation of facts in a criminal case under the lower preponderance of the evidence standard would render the jury's role in the criminal justice process null and would be fundamentally unfair."[281] Not only is the jury's verdict "final and unassailable," but to the court, an acquittal carries a "presumption of innocence," and any judicial probing into the finality of an acquittal violates the defendant's right to a jury trial.[282] Conclusively, the New Jersey Supreme Court essentially regurgitated most of the arguments that have been made against acquitted-conduct sentencing.[283]

New Jersey is fortunately not the first state to eliminate acquitted-conduct sentencing, but its holding unfortunately still "represents a minority

276. *Id*. at 1077. In *State v. Melvin*, the jury found Melvin guilty of unlawful possession of a handgun, but eventually acquitted him of the "most serious charges against him," which were first degree murder and first degree attempted murder. *Id.* at 1077–78. At sentencing, the sentencing judge disregarded the acquittals and found by a preponderance of the evidence that Melvin *did* shoot the victims. *Id* at 1079. If the judge solely considered the conviction, it would have carried a potential sentence of five to ten years imprisonment. *Id.* The judge ultimately sentenced Melvin to sixteen years in prison with an eight-year period of parole ineligibility. *Id.* at 1077.

277. *Id.* at 1078. In *State v. Paden-Battle*, the jury convicted Paden-Battle of kidnapping, conspiracy to commit kidnapping, and felony murder, but acquitted him of the remaining seven counts, which included first degree murder and conspiracy to commit murder. *Id.* The same judge as in *Melvin* found by a preponderance of the evidence that Paden-Battle "was the mastermind who orchestrated the victim's murder" and sentenced him to sixty years in prison despite the jury's acquittal. *Id.* at 1085–86 ("The court concluded that there was 'no doubt that the sentence was enhanced because the judge believed defendant ordered [the victim's] execution,' 'despite the jury verdict, [and] enhanced the sentence imposed.'" (quoting State v. Paden-Battle, 234 A.3d 332, 332 (N.J. Super. Ct. App. Div. 2020))).

278. *Id.* at 1091.

279. *Id.*

280. *Id.* at 1092 (citing N.J. CONST. art. I, ¶ 9).

281. *Id.*

282. *Id.* at 1088, 1094.

283. *See supra* Part IV (outlining the constitutional and policy arguments against acquitted-conduct sentencing).

position."[284] In 2019, the Michigan Supreme Court, like the New Jersey Supreme Court, limited the *Watts* decision to the Double Jeopardy Clause and cited the *Booker* footnote, interpreting it to expressly constrain the *Watts* holding to that specific context.[285] The Michigan Supreme Court held that acquitted-conduct sentencing infringes upon due process and the Sixth Amendment, and is inconsistent with our criminal justice's system's fundamental principle of the presumption of innocence.[286]

While the state criminal system seems to be gaining at least some momentum, essentially every federal circuit still permits judges to consider acquitted conduct during sentencing.[287] One cannot help but wonder why none of the federal circuits have implemented this narrow construction of *Watts* to inhibit acquitted-conduct sentencing and instead continue to apply its broad interpretation, especially considering that many judges on federal circuit benches have articulated doubt with this practice.[288] Regardless, consistent reluctances explicitly communicated by judges and scholars will hopefully result in the Supreme Court taking affirmative action to either substantially limit *Watts* or, preferably, outright overrule it.[289]

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284. People v. Beck, 939 N.W.2d 213, 225 (Mich. 2019); *see, e.g.*, State v. Witmer, 10 A.3d 728, 733–34 (Me. 2011) (identifying California, Colorado, Florida, Missouri, Ohio, and Wisconsin as states that allow acquitted-conduct sentencing).

285. *Beck*, 939 N.W.2d 213 at 224 (citing United States v. Booker, 543 U.S. 220, 240 n.4 (2005)) ("Five justices gave [*Watts*] side-eye treatment in *Booker* and explicitly limited it to the double-jeopardy context.").

286. *Id.* at 227.

287. *See* Elwood, *supra* note 30 ("[E]ssentially every federal court of appeals and many state courts have read the [*Watts*] opinion to have conclusively resolved the constitutionality of acquitted-conduct sentencing.").

288. *See, e.g.*, *Seventh Circuit Upholds Use of Acquitted Conduct to Triple Sentencing Exposure on a Preponderance of the Evidence*, 135 HARV. L. REV. 2227, 2231 (2022). The author explains an additional argument, in the context of *United States v. McClinton*, that federal circuits can use to limit the use of acquitted-conduct sentencing: utilizing an "exception" that was described in *Watts*. *Id.* at 2230. The exception is that whenever relevant conduct would "dramatically increase the sentence," a higher standard of proof than the preponderance standard could be required. *Id.* (citing United States v. Watts, 519 U.S. 148, 156 (1997) (per curiam)). The author urges for federal circuits to adopt this exception. *Id*. at 2334 ("[T]he application of a clear and convincing evidentiary standard at sentencing . . . could be the first step in spurring movement toward the categorical exclusion of the consideration of acquitted conduct at sentencing. If more circuits are vocal about requiring a higher evidentiary standard for the use of acquitted conduct at sentencing in cases like *McClinton*, the Supreme Court may be more inclined to readdress the question it left open in *Watts*.").

289. *See* Brief for 17 Former Federal Judges, *supra* note 30, at 7 ("Without the Court's guidance in this case, the practice will continue; acquitted conduct may come into play in criminal sentencings that

But it would not be surprising if the Supreme Court continues to remain indifferent to this issue, especially because the Court recently refused to hear McClinton's case, as well as all other cases in the 2023 term that dealt with acquitted-conduct sentencing.[290] The Court's choice to deny certiorari in these cases was heavily predicted as there was great reason to think that the Court would stay disinterested.[291] Numerous petitions for writ of certiorari have presented themselves in front of the Court in the past where the Court could have spoken on the issue of acquitted-conduct sentencing, only for the Court to then deny the petitions.[292]

In *Jones v. United States*, Justice Scalia, with whom Justice Thomas and Justice Ginsburg joined, dissented in the denial of certiorari in a case where the defendants were convicted of distributing a small amount of cocaine, but were acquitted of conspiracy to distribute.[293] The sentencing judge found by a preponderance of the evidence that the defendants *did* engage in the conspiracy, and sentenced them to 180, 194, and 225 months imprisonment respectively, when their Guidelines sentencing range would have been between twenty-seven and seventy-one months.[294] The dissenters felt that "[t]his has gone on long enough," and reiterated the conclusion that was reached in *Apprendi* that "'[a]ny fact that increases the penalty to which a defendant is exposed constitutes an element of a crime,' and 'must be found by a jury, not a judge.'"[295] With members of the Supreme Court who have openly raised concern regarding acquitted-conduct sentencing, one could only hope that there

take place almost every day in every federal courthouse, and the 'unbroken string of cases disregarding the Sixth Amendment,' as described by Justice Scalia, will continue to grow longer.").

290. *See* Yalinçak, *supra* note 5, at 720–21 (arguing that the Supreme Court "is far from ready to meaningfully limit judicial fact-finding where it impacts the measure of penal consequences to a defendant"); *see also* Bishop, *supra* note 32.

291. For relevant instances where the Court refused to address the constitutionality of acquitted-conduct sentencing, see United States v. Osby, 832 F. App'x 230 (4th Cir. 2020), *cert. denied*, 142 S. Ct. 97 (2021); United States v. Cabrera-Rangel, 730 F. App'x 227 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 926 (2019); United States v. Siegelman, 786 F.3d 1322 (11th Cir. 2015), *cert. denied*, 577 U.S. 1092 (2016); United States v. Stroud, 673 F.3d 854 (8th Cir. 2012), *cert. denied*, 568 U.S. 1232 (2013).

292. *See* United States v. Osby, 832 F. App'x 230 (4th Cir. 2020), *cert. denied*, 142 S. Ct. 97 (2021); United States v. Cabrera-Rangel, 730 F. App'x 227 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 926 (2019); United States v. Siegelman, 786 F.3d 1322 (11th Cir. 2015), *cert. denied*, 577 U.S. 1092 (2016); United States v. Stroud, 673 F.3d 854 (8th Cir. 2012), *cert. denied*, 568 U.S. 1232 (2013).

293. Jones v. United States, 574 U.S. 948, 948 (2014) (Scalia, J., dissenting).

294. *Id.*

295. *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 483 & n.10 (2000); Cunningham v. California, 549 U.S. 270, 281 (2007)).

will be a day when the Court decides to put an end to this unconstitutional practice, instead of refusing the opportunity to hear McClinton's case, which is one of the most egregious instances of acquitted-conduct sentencing in practice.[296]

B. What Should Be Done About It

Because the Supreme Court decided to pursue apathy with regards to acquitted-conduct sentencing, some have suggested that lower courts "should offset this imbalance" by providing an instruction to the jury on the possibility that an acquittal enhancement will be used against the defendant.[297] An instruction such as this would pose to the jury the gravity of its verdict and to hopefully deter "its inclination to arrive at a compromise guilty verdict."[298] Then, the jury, if it convicts on one charge, would know the defendant will probably get a higher sentence based on the acquitted charges and could adjudge accordingly.[299]

Others have suggested that Congress should simply do away with acquitted-conduct sentencing through federal statute.[300] However, Congress is typically "dysfunctional, paralyzed by ideological extremism and partisan gamesmanship," and acquitted-conduct sentencing likely is not high enough on their priority list for them to act.[301] Additionally, because Congress is filled with "tough on crime" advocates, the hope for a piece of legislation that comes to the benefit of criminal defendants seems too far from within grasp.[302] Even if bipartisan support can be found, "some states will continue to permit consideration of acquitted conduct at sentencing because their laws will not be

296. *See* McClinton v. United States, 143 S. Ct. 2400, 2400–03 (2023); *see also* Elwood, *supra* note 30.

297. *See* Shors, *supra* note 5, at 1391–92 ("Such an instruction would more fairly direct the jury's deliberations toward a decision at the guilt phase.").

298. *Id.* at 1392.

299. *Id.* The jury has the right to nullify. *See generally* JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW CASES AND MATERIALS 19 (Jesse H. Chopper et al. eds., 8th ed. 2019) (introducing the nullification powers of a jury).

300. *See* Johnson, *The Puzzling Persistence of Acquitted Conduct*, *supra* note 5, at 42–43; Farkish, *supra* note 201, at 121(supplying model legislation).

301. *See* Johnson, *The Puzzling Persistence of Acquitted Conduct*, *supra* note 5, at 42.

302. *See id.* ("[T]he contours of congressional reform of sentencing are unpredictable, and the politics unfavorable for defendant-friendly sentencing reforms.") (citing Frank O. Bowman III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 41 AM. CRIM. L. REV. 217, 218 (2004)).

impacted by federal legislation."[303]

Other scholars have recommended that the Sentencing Commission take action.[304] Although issues can arise should the Commission try to act, the Commission taking a stand to propose a solution could be a step in the right direction.[305] With a rejuvenated Sentencing Commission appointed by President Joe Biden, the commissioners in 2023 voted to issue a proposed amendment that would abolish the consideration of acquitted conduct at sentencing.[306] The proposed amendment would disallow acquitted conduct to be considered as "relevant conduct" for the purposes of determining the sentencing range under the Guidelines, unless the conduct was admitted to in a guilty plea, or "found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction."[307]

303. Michael Pepson & Jeremiah Mosteller, *US Supreme Court Should Tackle Acquitted Conduct Sentencing*, BLOOMBERG L. (Sept. 14, 2022), https://news.bloomberglaw.com/us-law-week/us-supreme-court-should-tackle-acquitted-conduct-sentencing.

304. *See* Johnson, *If at First You Don't Succeed*, *supra* note 5, at 189–91 (proposing that the Sentencing Commision should implement an amendment to the Guidelines to bar the use of acquitted conduct, and to explicitly reject considering acquitted conduct as relevant conduct). *But see* Johnson, *The Puzzling Persistence of Acquitted Conduct*, *supra* note 5, at 37–42 (explaining the potential problems that could arise if the Commission were to want to amend the Guidelines). Johnson notes that in the post-*Booker* world of the advisory Guidelines, the Commission's ability to prohibit the use of acquitted conduct could be thwarted, given the language of 18 U.S.C. § 3661. *Id.* at 41. Johnson cites to *Pepper v. United States*, which held that even though the Commission "specifically and categorically barred sentencing judges from relying on post-sentencing rehabilitation to sentence below the otherwise applicable Guidelines range," the Eighth Circuit nevertheless erred in disallowing the sentencing judge from relying on post-sentencing rehabilitation to justify a below Guidelines sentence. *Id.* (citing Pepper v. United States, 562 U.S. 476 (2011)). The *Pepper* Court concluded that even though the Commission provided a "clear and unequivocal" prohibition on consideration of this factor, its "post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views." *Id.* (citing *Pepper*, 562 U.S. at 501). Because of this precedent, complications could emerge should the Commission attempt to take out acquitted conduct from the Guidelines. *Id.* at 42.

305. *See* Johnson, *The Puzzling Persistence of Acquitted Conduct*, *supra* note 5, at 42.

306. Stewart Bishop, *Walls Start to Close in on Acquitted Conduct Sentencing*, LAW360 (Jan. 13, 2023), https://www.law360.com/articles/1565464/walls-start-to-close-in-on-acquitted-conduct-sentencing. Georgetown Law School professor Shon Hopwood said:

> While some members of the Supreme Court have complained about acquitted conduct, and some members of Congress have complained about the use of acquitted conduct, there's not been any legislation passed, and the Supreme Court has not reconsidered its prior views. I think the best step forward is for the Sentencing Commission to change the rules.

Id.

307. *Proposed Amendments to the Sentencing Guidelines (Preliminary)*, U.S. SENT'G COMMISSION (Jan. 12, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-

Public comments on this proposed amendment closed on February 22, 2024.[308] U.S. Senators Richard J. Durbin and Cory A. Booker succinctly stated that using "underlying conduct for which an accused was acquitted to enhance a sentence . . . would allow a judge to penalize a defendant as if the acquittal had not occurred, thereby stripping an accused of the right to due process and a jury trial."[309] Chief U.S. District Judge for District of Rhode Island Jack McConnell believes that "to allow acquitted conduct to be considered in sentencing is an affront to . . . our justice system."[310] And retired New York State Judge Charles W. Lander feels that acquitted-conduct sentencing is "NOT fair . . . for a myriad of ethical reasons."[311] Thus, if Congress refuses to act within six months to veto any of the amendments, then those proposed amendments will officially become part of the Sentencing Guidelines.[312]

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amendments/20230112_prelim_RF.pdf?utm_medium=email&utm_source=govdelivery. The proposed amendment would attach to U.S.G.G. § 1B1.3. *Id.* The proposed amendment reads:

> ACQUITTED CONDUCT---
> (1) Limitation—Acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless such conduct—
> (A) was admitted by the defendant during a guilty plea colloquy; or
> (B) was found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction.
> (2) Definition of Acquitted Conduct—For purposes of this guideline, "acquitted conduct" means conduct (i.e., any acts or omission) underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction.

Id.

308. For a sample of the submitted public comments that the Commission will consider during their deliberations, see *Public Comment from February 22, 2024*, U.S. SENT'G COMMISSION, https://www.ussc.gov/policymaking/public-comment/public-comment-february-22-2024 (last visted Mar. 22, 2024); *see also* Nicholas Liotta et al., *Sentencing Guidelines Amendment Would Preclude Acquitted Conduct from Being Used at Sentencing*, JD SUPRA (Jan. 30, 2023), https://www.jdsupra.com/legalnews/sentencing-guidelines-amendment-would-5584198/; *U.S. Sentencing Commission Seeks Comment on Proposals Addressing the Impact of Acquitted Conduct, Youthful Convictions, and Other Issues*, U.S. SENT'G COMMISSION (Dec. 14, 2023), https://www.ussc.gov/about/news/press-releases/december-14-2023.

309. U.S. SENT'G COMM'N, 2023-2024 AMENDMENT CYCLE: PROPOSED AMENDMENTS/PUBLIC COMMENT 15 (2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=14.

310. *Id.* at 42.

311. *Id.* at 44.

312. *Presumed Guilty: Using Acquitted, Dismissed, and Uncharged Conduct to Increase Sentences.*, DOUG PASSON L. (Jan. 30, 2023), https://dougpassonlaw.com/podcast/acquitted-conduct/. In an episode of his podcast "Set for Sentencing," Doug Passon speaks with Mark Allenbaugh and

One of the main reasons for the Supreme Court to have denied hearing McClinton's case was because the Sentencing Commission is presently in the process of ratifying this new amendment.[313] In Justice Sotomayor's opinion respecting the denial of certiorari, she reiterates the arguments that have been made against acquitted-conduct sentencing, including the existing tension between the practice and the historic role of the jury, and the use of the preponderance standard at sentencing hearings.[314] However, she still joins in denying certiorari because "[t]he Sentencing Commission . . . has announced that it will resolve questions around acquitted-conduct sentencing in the coming year."[315] Justice Kavanaugh agreed, even though he was one of a number of judges in the lower courts to have explicitly voiced distaste for this practice.[316]

However, even with the proposed amendment, issues regarding guilty pleas will arise given the amendment's carveout to allow for considering prior acquitted conduct if the defendant pleads guilty to that conduct.[317] Due to the rooted role of guilty pleas in the criminal justice system, the amendment will likely be nothing but performative; defendants will continue to accept overly harsh plea deals because the punishment if convicted will certainly be harsher.[318] Additionally, questions of the amendment's force will surely present themselves, given the advisory nature of the Guidelines as a whole.[319] Likewise, without the Supreme Court firmly declaring the unconstitutionality of this abhorrent practice by overruling *Watts*, state courts will still have the flexibility to utilize acquitted-conduct sentencing as the Sentencing

Professor Doug Berman, both national experts on federal sentencing, about the current state of acquitted-conduct sentencing. *Id*. Professor Berman also wrote an amicus brief in favor of McClinton in his case that was recently denied by the Supreme Court. *Id.*; *see* Brief for Professor Douglas Berman, *supra* note 266, at 17.

313. McClinton v. United States, 143 S. Ct. 2400, 2400–03 (2023).

314. *Id.* at 2403.

315. *Id.*

316. *Id.* at 2401, 2403 ("The use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions. But the Sentencing Commission is currently considering the issue."). For previous opinions in which Justice Kavanaugh has discussed acquitted sentencing, see *supra* note 272 and accompanying text.

317. *Presumed Guilty*, *supra* note 312.

318. *See* BYRNE HESSICK, *supra* note 256, at 5 ("The difference in punishment for those who plead guilty is by design. Those longer punishments after trial exist so that people will feel pressure to plead guilty."); *id.* at 52 ("Prosecutors now routinely require defendants to waive all sorts of other constitutional rights, in addition to their right to a jury trial, as part of the plea bargaining process. Prosecutors will often insist that a defendant waive her right to see the evidence against her, the right to a preliminary hearing in front of a judge, and the right to an appeal as part of the plea bargain.").

319. *See Presumed Guilty*, *supra* note 312.

Guidelines do not have jurisdiction over state courts.[320]

While the Commission's stance on this issue could be seen as a positive development, the Supreme Court taking direct action to address the constitutional contradictions of *Watts* and acquitted-conduct sentencing in general is the required resolution.[321] Moreover, the Commission choosing to tackle this issue should not mean that the Court ought to pursue a hands-off approach, for its reach in proclaiming the unconstitutionality of acquitted-conduct sentencing would far exceed the reach of the Commission's amendment.[322] Unfortunately, the Commission's grappling with this problem has not compelled the Supreme Court to take it more seriously, but rather it provided the Court with an excuse to wait idly by as defendants like McClinton are sitting in prison for crimes they were not convicted of committing.[323]

VII. CONCLUSION

The clash between acquitted-conduct sentencing and the enshrined truths that the Constitution imputes onto criminal defendants, as well as the unwavering perspectives of multiple legal authorities, convey the need and the urgency to do away with such a practice.[324] Acquitted-conduct sentencing is a breach of the Fifth and Sixth Amendments, and *Watts* is a breach of its superseding successors.[325] Even though solutions exist to alleviate this issue, such as from the Sentencing Commission, Congress, or the states themselves, the optimal solution is for the Supreme Court to speak, instead of shying away from an issue of its own production when many defendants are lying in prison for longer than they should because of it.[326]

320. *Id.*

321. *See* Bishop, *supra* note 306.

322. *See id.*

323. *See id.*; *see also Seventh Circuit Upholds Use of Acquitted Conduct to Triple Sentencing Exposure on a Preponderance of the Evidence*, *supra* note 288, at 2234 n.71. The author read through defendant McClinton's trial documents and emphasized how his counsel pointed out that "direct testimony at trial regarding the killing could not have lasted more than five minutes" and "it was inconsistent among the witnesses." *Id.* Only two witnesses were questioned on the killing, with one testifying that McClinton shot Perry in the back and the other testifying that he shot Perry in the head. *Id.*

324. *See* Nicodemus, *supra* note 5, at 470 ("As it stands, the sentencing system works the rather unconscionable result of treating an acquittal like a conviction. The Supreme Court has now endorsed a system that violates the rights to a jury trial due process of law . . . and invites a general disrespect for the law.").

325. *See* Outlaw II, *supra* note 5, at 212–13.

326. *See supra* Part VI.

Although the elimination of acquitted-conduct sentencing's "importance should not be underestimated," there is no question that it will only cultivate a dent in the necessary transformation of the criminal justice system.[327] Prior dismissed or uncharged conduct, in addition to acquitted conduct, can be introduced at a defendant's sentencing hearing to enhance his sentence for the current offense.[328] The preponderance standard, the lowest standard of proof typically used in civil trials, will continue to be the standard to prove enhancements at sentencing where the evidentiary safeguards of trial do not apply, making the reasonable doubt standard a meager shell of the limited protection it is meant to offer to the criminal defendant.[329] Plea bargaining, a principal culprit in the crumbling of our adversarial jury system, is so entrenched into our legal system that our governing and judicial authorities cannot seem to envision a system without it.[330] There must be a push to recover the rights of criminal defendants that the Court has damaged so defendants like McClinton are no longer stuck in a world where the Queen of Hearts reigns, and instead can seek the justice that they deserve.[331]

Brenna Nouray*

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327. Johnson, *If at First You Don't Succeed*, *supra* note 5, at 202.

328. *See* Ngov, *supra* note 5, at 237 ("[U]nder the concept of relevant conduct, the defendant's sentence can be increased by the consideration of uncharged [or] dismissed . . . conduct."); Erin A. Higginbotham, *A Meaningless Relationship: The Fifth Circuit's Use of Dismissed and Uncharged Conduct Under the Federal Sentencing Guidelines*, 40 ST. MARY'S L.J. 267, 278 (2008) ("While a minority of circuit courts found the consideration of uncharged acts at sentencing inappropriate, a majority of circuits disagree[], finding the offenses relevant to determining the 'actual seriousness' of the charged offense.").

329. *See* SENTENCING GUIDELINES MANUAL, *supra* note 16, § 6A1.3 cmt. ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.").

330. *See* BYRNE HESSICK, *supra* note 256, at 44 ("For decades, judges have routinely imposed harsher sentences on those defendants who insist on going to trial rather than pleading guilty, and they have done so in order to discourage people from going to trial.").

331. *See* C.J. Ciaramella, *Sentencing Commission Proposes Restricting Judges' Use of Acquitted Conduc*t, REASON (Jan. 17, 2023, 2:49 PM), https://reason.com/2023/01/17/sentencing-commission-proposes-restricting-judges-use-of-acquitted-conduct/ ("It may sound bizarre and antithetical to what everyone is taught about the U.S. justice system, but defendants can be punished for crimes even when a jury finds them not guilty of the charges.").

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