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GIVING AN ACQUITTAL ITS DUE: WHY A QUARTET OF SIXTH AMENDMENT CASES MEANS THE END OF *UNITED STATES V. WATTS* AND ACQUITTED CONDUCT SENTENCING

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In 2007, Mr. Joseph Jones, Mr. Desmond Thurston, and Mr. Antwuan Ball exercised their Sixth Amendment right to require the government prove to a Washington, D.C. jury that they were guilty beyond all reasonable doubt of multiple offenses arising from their alleged involvement with a crack-dealing gang.[1] The three defendants were charged with conspiracy to distribute crack, distribution of crack (multiple counts), and various violent crime and racketeering offenses.[2] At trial, the government's proof included recordings of the defendants selling crack, testimony from former defendants turned cooperators, and testimony from witnesses who had purchased crack from the three defendants.[3] On November 28, 2007, the jury convicted the three men of the distribution charges, but acquitted them of the conspiracy, racketeering, and violent crime charges.[4]

Despite the acquittal on the conspiracy charge, the sentencing judge leveraged the distribution convictions to find by a preponderance of the evidence that the defendants' "crimes were part of a common scheme to distribute crack."[5] The judge then determined, again using the preponderance standard, that the scheme involved sales of over 500 grams of crack for Mr. Jones, and 1.5 kilograms of crack for the other two defendants.[6] Based on these findings, the judge increased the three defendants' sentencing exposure under the Federal Sentencing Guidelines from between 27 and 71 months imprisonment, to 324 to 405 months for Mr. Jones, 262 to 327 months for Mr. Thurston, and 292 to 365 months for Mr. Ball.[7] The judge varied below the enhanced ranges to impose prison sentences of 180 months for Mr. Jones, 194 months for Mr. Thurston, and 225 months for Mr. Ball.[8]

The three defendants appealed their sentences on the basis that "their sentences violated their Sixth Amendment right to trial by jury because they were based, in part, on [their] supposed involvement in the very conspiracy that the jury acquitted them of participating in."[9] While the D.C. Circuit "underst[oo]d why appellants find sentencing on acquitted conduct unfair," the law allowed it, so the appellate court found no fault with sentences the three defendants received.[10]

This outcome shocks the conscience of the average layperson whose knowledge of the criminal justice system likely begins and ends with "innocent until proven guilty." That is because what allowed this outcome is a dirty secret of the criminal justice system: *United States v. Watts*. *Watts* allows judges to sentence multi-count defendants for conduct underlying acquitted counts.[11] It is an allocation of judicial power that (for most) provokes visceral protestation. Yet, it is a practice that has continued largely unabated before and after the Supreme Court blessed it in *Watts* over 17 years ago.

Many commentators and scholars have written how acquitted conduct sentencing violates the intent and spirit of the Fifth and Sixth Amendments. This article takes this

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[1] United States v. Jones, 744 F.3d 1362, 1365, 1368 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 8 (2014). Only Mr. Jones and Mr. Ball were charged with the violent crimes. *See id* at 1365 n1.
[2] *Id.* at 1365 & n.1.
[3] *Id.* at 1365.
[4] *Id.* at 1365 & n.1.
[5] *Id.* at 1365.
[6] *Id.* at 1365-66.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 1368.
[10] *Id.* at 1369; The Supreme Court denied the defendants' petition for writ of certiorari. Jones v. United States, 135 S. Ct. 8 (2014). The denial, and Justice Scalia's dissent, is discussed later in this article.
[11] 519 U.S. 148, 149 (1997).

common analysis one step further, by arguing that a quartet of Supreme Court Sixth Amendment cases are a Constitutional bar to acquitted conduct sentencing. With *Apprendi v. New Jersey*[12], *Blakely v. Washington*[13], *United States v. Booker*[14], and more recently, *Alleyne v. United States*[15], the Supreme Court reinforced, clarified, and extended the line in the sand that separates the power and reach of the bench from the province of the jury. Taken together, this "max-min quartet" firmly establishes that a judge's sentencing power begins and ends with the jury and the reasonable doubt standard.[16] More importantly, they provide the means to force the Sixth Amendment confrontation that the Supreme Court deftly avoided in *Watts* -- a confrontation that *Watts* cannot survive.

SENTENCING REFORM ACT OF 1984 AND THE BIRTH OF THE GUIDELINES

Before examining *Watts* and the max-min quartet, it is important to understand the judicial context and environment that allowed *Watts* and acquitted conduct sentencing to emerge and survive, despite contradicting bedrock principles of the American criminal justice system.

For nearly a century prior to 1984, the federal system employed an indeterminate sentencing model that approached crime as a moral disease to be cured through rehabilitation.[17] Indeed, the model "was premised on a faith in rehabilitation."[18] Judges, supported by parole officers, were viewed as experts of the disease, and were therefore vested with broad discretion to fashion sentences that provided sufficient time to cure defendants through rehabilitation.[19]

During this time, judicial sentencing authority and practice were largely unregulated and unchecked. The majority of federal criminal statutes had open-ended punishment ranges or merely set the maximum numbers of years a defendant could be sentenced to prison.[20] Judges had unquestioned discretion to sentence a defendant anywhere within the statutory limits.[21] Appellate courts took a hands-off approach and interjected themselves only when a sentence exceeded the statutory limits or reflected a gross abuse of discretion.[22] This unfettered respect for judicial discretion extended even to

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[12] 530 U.S. 466 (2000).
[13] 542 U.S. 296 (2004), *reh'g denied,* 542 U.S. 961 (2004).
[14] 543 U.S. 220 (2005).
[15] 133 S. Ct. 2152 (2013).
[16] *See* cases cited *supra* notes 12-15.
[17] *See* Mistretta v. United States, 488 U.S. 361, 363-66 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing."); *see also* Tapia v. United States, 131 S. Ct. 2382, 2383, 2386 (2011) (citing and quoting *Mistretta,* 488 U.S. at 363); *see also* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1186 (1993).
[18] *Tapia,* 131 S. Ct. at 2386; *see also Mistretta,* 488 U.S. at 363 ("Both indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable rehabilitation . . . .").
[19] *See Mistretta,* 488 U.S. at 363-64. *Tapia,* 131 U.S. at 2386 ("If the judge decided to impose a prison term, discretionary authority shifted to parole officials: Once the defendant had a spent a third of his term behind bars, they could order his release.").
[20] *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).
[21] Jones v. United States, 327 F.2d 867, 869-70 (D.C. Cir. 1963) ("It is clear beyond peradventure that this court had and has no control over a sentence which comports with the applicable statute, 'even though it be a death sentence.' Nor may we reduce or modify a sentence nor require a trial judge to do so.") (quoting Rosenberg v. United States, 344 U.S. 889, 890 (1952)); United States v. Lowery, 335 F. Supp. 519, 521 (D.D.C. 1971) ("It is clear that absent a manifest abuse of discretion, and provided the trial judge complies with the applicable statute, his discretion in sentencing cannot be infringed upon."); Stith & Koh, *supra* note 20, at 225.
[22] Stith & Koh, *supra* note 20, at 226, 245; *see also Mistretta,* 488 U.S. at 364.

death sentences.[23] A judge's sentence, for the most part, was final and absolute.[24] It was only with the introduction of federal parole in 1910, did Congress reduce (somewhat) judicial sentencing power.[25]

By the 1970s, "this model of indeterminate sentencing eventually fell into disfavor."[26] The model, and unchecked judicial sentencing discretion, came under increasing criticism from academics and legislators from both the political left and right.[27] To the conservative right, judges were using their unchecked discretion to impose lenient, disparate, and inconsistent sentences that allowed dangerous, repeat offenders to escape sufficient terms of imprisonment.[28] For the liberal left, the problem was a growing disparity in the sentences handed to minorities compared to the lighter sentences white defendants received for comparable crimes.[29]

After a decade of many fits and starts (and failures) to revamp sentencing policy, the contrasting concerns of the political left and right converged with the passage of the Sentencing Reform Act of 1984 (hereinafter the "SRA").[30] The SRA was a near complete overhaul of federal sentencing policy and practice.[31] Most notably, the SRA was the abandonment of the indeterminate model in favor of a determinate model that Congress believed would yield consistent and proportionate sentences, and ease the public's confusion and concern about sentencing lengths.[32] To be the engine of this new model, the SRA created the United States Sentencing Commission (hereinafter the "Commission"),

[23] *See, e.g., Rosenberg*, 344 U.S. at 889-90 (1952) ("A sentence imposed by a United States district court, even though it be a death sentence, is not within the power of the Court to revise.") (discussing congressional action in 1911 abolishing the right to an appeal).

[24] *Lowery*, 335 F. Supp. at 521 ("Initially, it cannot be gainsaid that in matters relating to sentencing the trial court has virtually absolute, if not unfettered discretion.").

[25] Stith & Koh, *supra* note 20, at 226-27 ("[P]arole authorities were assigned the task of determining the actual release date for most federal prisoners . . . With the advent of federal parole, federal prison sentences became partially indeterminate.") (explaining that parole reduced judicial sentencing power).

[26] Tapia v. United States, 131 S. Ct. 2382, 2387 (2011); *see also* Gerald Leonard & Christine Dieter, *Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing*, 17 BERKELEY J. CRIM. L. 260, 271 (2012).

[27] *See* Leonard & Dieter, *supra* note 26, at 271; *see also* S. Rep. No. 98-225, at 41 (1983) (Conf. Rep.) ("The absence of a comprehensive federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants."); *See also* Stith & Koh, *supra* note 20, at 228. Perhaps the most influential critic was Marvin Frankel, a well-respected former federal judge and former Columbia law school professor. *Id.* In 1972, while serving on the bench, Judge Frankel published *Criminal Sentences: Law Without Order*, which zealously criticized judicial "wholly unchecked and sweeping" sentencing authority and called for the creation of a "Commission on Sentencing" responsible for establishing "binding" sentencing guides. *Id.* Judge Frankel's views and his book would serve as the model and inspiration for the Sentencing Reform Act of 1984, *Id.*

[28] *See* S. Rep. No. 98-225, at 44-45; *see* Leonard & Dieter, *supra* note 26, at 271; *see* 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, 374 (2010).

[29] *See* S. Rep. No. 98-225, at 65; *see also Tapia,* 131 S. Ct. at 2387; *see* Leonard & Dieter, *supra* note 26, at 271.

[30] *See* S. Rep. No. 98-225, at 65 ("The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform."); *see also Tapia*, 131 S.Ct. at 2387. See Stith & Koh, *supra* note 20, for a discussion of the comprehensive legislative history of the SRA.

[31] Burns v. United States, 501 U.S. 129, 132-33 (1991) ("The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes."); *see also* S. Rep. No. 98-225, at 65, ("[The SRA] meets the critical challenge of sentencing reform. The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain.").

[32] *See* Setser v. United States, 132 S. Ct. 1463, 1474-75 (2012); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1190 (1993); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2013) [hereinafter "U.S.S.G."]. In passing the SRA, Congress sought "honesty in sentencing", "to avoid the confusion and implicit deception" of indeterminate sentencing, and "reasonable uniformity." *Id.* [Note: The sentencing guidelines are referred throughout this Article as the "Guidelines"].

and charged it with crafting the federal sentencing guidelines (hereinafter the "Guidelines").[33]

The SRA also shifted the focus of sentencing from rehabilitation to punishment and deterrence.[34] More bluntly, the SRA was the legislative rejection of the premise that prison was for rehabilitation.[35] Indeed, Congress made its rejection clear by limiting judicial discretion to the sentencing factors specified by Congress, of which rehabilitation is one of many, and one that is not highly valued.[36]

MODIFIED REAL OFFENSE SENTENCING UNDER THE GUIDELINES

It took the Commission nearly three years to draft the Guidelines and for Congress to approve them. At the start, the Commission's critical decision was whether to base the Guidelines on the charged offense or the "real" offense.[37] In a "charge offense" system, a defendant is sentenced solely on the offense of conviction (and his criminal record) without considering the particulars of the defendant's criminal conduct.[38] Charge offense sentencing restrains judicial discretion and promotes sentencing consistency, but at the expense of particularized sentencing, which recognizes that criminal offenses are committed with varying degrees of culpability and that not all defendants are the same.

In contrast, under a "real offense" system, a defendant's sentence is based on the particulars and specifics of his criminal conduct, the context of the conduct, and who was involved with or injured by the conduct.[39] The advantage of real offense sentencing is that it allows a judge to tailor a sentence specifically to the circumstances that aggravate or mitigate a particular criminal act. The downside is that real offense sentencing fosters sentencing disparity -- a defendant's sentence is largely determined by which judge the defendant draws and how the judge subjectively views the defendant and the defendant's conduct.

The Commission initially pursued a real offense system.[40] However, this effort "proved unproductive" as the Commission failed to find a "practical way to combine and account for the large number of diverse harms arising in different circumstances."[41] The

[33] *Mistretta*, 488 U.S. at 367-68 (1989); *Tapia*, 131 S. Ct. at 2387; *see also* S. Rep. No. 98-225 at 63 ("[The SRA] creates a United States Sentencing Commission whose duty is to promulgate sentencing guidelines and policy statements."); Lear, *supra* note 32, at 1190.
[34] *Mistretta*, 488 U.S. at 367 ("[The SRA] rejects imprisonment as a means of promoting rehabilitation . . . and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals.") (citation omitted); *see also* Lear, *supra* note 32, at 1190-91.
[35] *See* United States v. Irey, 612 F.3d 1160, 1228-29 (11th Cir. 2010); *see also* S. Rep. No. 98-225, at 40 ("The sentencing provisions of current law were originally based on a rehabilitation model . . . . Recent studies suggest that this approach has failed, and most sentencing judges as well as the parole commission agree that the rehabilitation model is not an appropriate bases for sentencing.").
[36] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 1998 (1984) (codified as 18 U.S.C. § 3582) ("[I]mprisonment is not an appropriate means of promoting correction and rehabilitation."); *see generally Tapia,* 131 S. Ct. 2382 (holding that the SRA precluded a sentencing court from lengthening a defendant's prison term to promote rehabilitation); *but see* 18 U.S.C.A. § 3553(a)(2)(D) (West 2010) ("[T]o provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.").
[37] *See* U.S.S.G., *supra* note 32, §1A1.4(a) ("One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct . . . or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted . . . .").
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*

Commission was also unable to devise a simple and efficient system that would not result in the sentencing disparities the SRA was enacted to prevent.[42]

The Commission eventually settled on a modified real offense system that incorporates elements of charge offense sentencing.[43] This hybrid system is employed today. It consists of base offense levels for every federal offense and pre-set offense level increases (and a few decreases) based on contextual factors. The base offense level with the adjustments produce a final offense level that ranges from one to forty-three.[44] Separately, to account for the varying criminal records of defendants, the Commission established a point-based system for measuring a defendant's criminal record and status at the time of the instant conviction.[45] A defendant's total number of criminal history points determines into which of the six criminal history categories he falls.[46] Using the Guidelines' sentencing table, the intersection point of a defendant's the final offense level and his criminal history category yield his presumptive sentencing range.[47]

RELEVANT CONDUCT

A central tenet of real offense sentencing is that sentencing judges are free to set a term of imprisonment, within the statutory maximum, based on the specific conduct of the defendant and all that resulted from the conduct. In real offense sentencing a judge is not limited by the elements of the offense of conviction. The "modified" approach of the Guidelines incorporates this tenet by allowing judges to sentence a defendant based on "relevant conduct."[48] Relevant conduct extends outside and beyond the elements of the offense of conviction, as well as the offense itself.[49] Relevant conduct can consist of facts related to the criminal conduct underlying the conviction, uncharged conduct, dismissed charges, the conduct of others done "in furtherance of the jointly undertaken criminal activity," or (the focus of this Article) acquitted conduct.[50]

To encapsulate "relevant conduct" the Guidelines enumerate a number of "specific offense characteristics" and "applicable general adjustments" consisting of particular mitigating or aggravating circumstances that increase (or at times decrease) a defendant's offense level by a prescribed number of levels.[51] The number of adjustments

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[42] *Id.*
[43] Lear, *supra* note 32, at 1194; Leonard and Dieter, *supra* note 26, at 273; The Commission characterization of the system as a charge offense system that "contains a significant number of real offense elements," U.S.S.G., *supra* note 37, §1A1.4(a), is belied by the real offense adjustments and considerations that are built into or accompany nearly every factor for determining a defendant's sentencing range, from his base offense level, *see, e.g.*, U.S.S.G., *supra* note 37, §4A1.1(d) (requiring the addition of two criminal history points if the defendant committed the instant offense while under any criminal justice sentence such as probation or parole). On its face and in practice, the Guidelines are a real offense system that has elements of a charge offense system.
[44] *See generally* U.S.S.G., *supra* note 37, §1B1.1(a); *see also id.* §2A1.1(a).
[45] *Id.* § 1B1.1(a).
[46] *Id.*
[47] *Id.*
[48] *Id.* § 1B1.3.
[49] *Id.*; *see also id.* § 5K2.21 (allowing a court to "depart upward" for dismissed or uncharged conduct).
[50] *Id.* § 1B1.3(a)(1). However, the Guidelines do not explicitly provide that acquitted conduct is "relevant conduct." Indeed, the Guidelines provide only a bland and passive endorsement of acquitted conduct sentencing. *See id.* § 6A1.3 cmt. background ("In determining relevant facts, sentencing judges are not restricted to information that would be admissible at trial.") (citing *Watts* in support of the Guidelines' sentencing policy).
[51] *Id.* § 1B1.3. The number of enumerated offense adjustments is fixed, and in some ways limited. For the Commission to account for the nearly unlimited variations and variables of conduct and harm would have rendered the Guidelines too complex, dense, and unworkable. *See id.* § 1A1.4(a) ("[N]o practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did [the Commission] find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a

is fixed, and in some ways limited, because to account for "every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect."[52] However, for egregious conduct that falls through the cracks, the Guidelines encourage judges to increase a defendant's offense level or sentence a defendant above his presumed guideline range. [53]

Relevant conduct sentencing under the Guidelines mirrors the statutory directive from Congress that "[n]o limitation shall be placed on the information concerning the background, character, and *conduct* of a person convicted of an offense which a [court] may receive and consider for the purpose of imposing an appropriate sentence."[54] Relevant conduct sentencing, therefore, is essentially without boundaries or limits. One such absent border is the reasonable doubt standard. The preponderance of evidence standard reigns for sentencing.[55] It is a standard that is free from the purposefully burdensome constraints and obligations of the reasonable doubt standard, in favor of a standard where a splinter over 50% exposes a defendant to an enhanced sentence.[56] Once the door of conviction is opened, a defendant is left to answer for his entire life up to that moment, regardless of how tenuous the link to the offense of conviction, and regardless that the proof would fail to convince a jury.

UNITED STATES V. WATT

In two cases decided together in 1997 as *United States v. Watts*,[57] the Supreme Court established that a sentencing court may consider acquitted conduct otherwise proven under the preponderance standard at sentencing to determine a defendant's sentence. [58]

In *Watts,* police found cocaine base and two loaded firearms in separate parts of Watts's home. [59] At trial, Watts was convicted of possessing with the intent to distribute cocaine base, but acquitted of the using a firearm in relation to the drug offense.[60] In the companion case, Putra was captured on videotape selling cocaine to a government informant on two separate occasions (May 8, 1992 and May 9, 1992). The jury convicted

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speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases.").

[52] *Id.* §1A1.3.

[53] *See, e.g., id.* §§ 5K2.0-5K2.17.

[54] 18 U.S.C.A. § 3661 (West 2014) (emphasis added); *see also* U.S.S.G., *supra* note 37, § 1B1.4 (adopting § 3661). It is important to note that § 3661's broad unrestricted scope is not fully embraced by the Guidelines. In contrast to § 3661, the Guidelines discourage or limit a judge from considering a defendant's education, vocational skills, drug or alcohol dependence, gambling addiction, employment record, family ties, race, sex, national origin, creed, religion, socio-economic status, disadvantaged upbringing in determining a sentence or decreasing a defendant's offense level. *See Id.* § 1B1.4 cmt. background; *Id.* §§ 5H1.2-5H1.6, 5H1.10, 5H1.12.

[55] *See* McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986) (holding that using the preponderance standard to find sentencing factors that enhance a sentence within the statutory maximum is consistent with due process); *see also* U.S.S.G., *supra* note 37, § 6A1.3 cmt. background ("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 the application of the guidelines to the facts of a case.").

[56] *See,* United States v. Watts, 519 U.S. 148, 156-57 & n.2 (1997).

[57] *Watts* consisted of two cases from the Ninth Circuit: *United States v. Watts* and *United States v. Putra*. *Watts* consisted of two cases from the Ninth Circuit: *United States v. Watts* and *United States v. Putra*. *Id.* at 149.

[58] In *Williams v. New York,* the Supreme Court opened the door to acquitted conduct sentencing by affirming a trial judge's imposition of the death sentence after the jury recommended a life sentence for the defendant's first degree murder charge. 337 U.S. 241, 252 (1949). The Supreme Court held that it is consistent with due process and proper under New York law, for the trial judge to rely on additional information obtained by the probation department, but not presented to the jury, to impose a harsher punishment than had been recommended by the jury. *Id.* at 242-43.

[59] *Watts*, 529 U.S. at 149.

[60] *Id.* at 149-50.

her of the distribution count for the May 8th transaction, but acquitted her for the May 9th transaction.[61] During the sentencing phase in both cases, the district court found that Watts and Putra had engaged in the conduct underlying the acquitted offenses, and used this "relevant conduct" to increase their respective final offense levels under the Guidelines.[62] For Watts, the adjustment consisted of a two-level bump for possession of a gun in connection with a drug offense.[63] For Putra, the court aggregated the amount of drugs from the May 8th and May 9th transactions to determine her offense level.[64] In both cases, the Ninth Circuit vacated the sentences and remanded for resentencing, on the ground that it was improper to punish the defendants for facts and offenses that the jury rejected with their acquittals.[65]

The Ninth Circuit's decisions created a circuit split.[66] In response, the Supreme Court took up *Watts* and *Putra*. The Court resolved the split by reversing and remanding both Ninth Circuit decisions by way of a short *per curiam* opinion that was issued without full briefing or oral argument.[67]

The Supreme Court's starting point was the "longstanding principle" codified by § 3661 and pre-dating the Guidelines, that "sentencing courts have broad discretion to consider various kinds of information," including conduct that may not have resulted in a conviction.[68] The Court noted that the Guidelines expressly adopted and incorporated this principle.[69] In the Court's view, this "longstanding principle" plus the Guidelines' broad embrace of "relevant conduct," created an expansive pool of sentencing conduct that includes acquitted conduct.[70]

Next, with a quick stroke of the pen, the Court dismissed any thought that acquitted conduct sentencing runs afoul of double jeopardy protections. The Court explained that it is "erroneous" to confuse punishing a defendant for a crime for which he was acquitted, with sentencing enhancements that increase a term of imprisonment because of the manner in which defendant committed the crime.[71] According to the Court, sentencing based on acquitted conduct is the latter, and therefore does not implicate double jeopardy.[72]

The Court ended its short opinion by clarifying what an acquittal means. Contrary to the Ninth Circuit's view in *Watts* and *Putra*, the Court explained that a "not guilty" verdict is not a rejection of any facts or a finding that the defendant is actually

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[61] *Id.*
[62] *Id.* at 150-51.
[63] *Id.* at 150 (citing U.S.S.G. § 2D1.1(b)(1) for triggering the bump).
[64] *Id.* at 150-51.
[65] *Id.*
[66] *Id.* at 149 ("Every other Court of Appeals has held that a sentencing court may [consider acquitted conduct], if the Government establishes that conduct by a preponderance of the evidence.").
[67] *Id.* at 170-71 (Kennedy, J., dissenting) ("For these reasons the case should have been set for full briefing and consideration on the oral argument calendar. From the Court's failure to do so, I dissent.").
[68] *Id.* at 151 (majority opinion).
[69] *Id.* at 152-53 (citing and discussing U.S.S.G. §1B1.3 and 1B1.4).
[70] *Id.* at 151-53.
[71] *Id.* at 154. In making the point, the Court relied solely on *Witte v. United States,* 515 U.S. 389 (1995). In *Witte*, the defendant pled guilty to a marijuana distribution charge, but was sentenced based on a guideline range that was calculated by including uncharged conduct involving cocaine importation. *Id.* at 389. The defendant was later indicted for the cocaine importation conduct. The Supreme Court held that the later indictment was not barred by double jeopardy because the sentencing court's use of the uncharged cocaine conduct in increased sentence for the marijuana charge did not constitute "punishment" for the cocaine conduct. *Id.*
[72] *Watts*, 519 U.S. at 154.

innocent.[73] To the Court, a "not guilty" verdict is narrow, specific, and "merely proves the existence of a reasonable doubt as to [a defendant's] guilt" because the government failed to prove at least one essential element of the offense beyond a reasonable doubt.[74] Therefore, to the Court, an acquittal provides no barriers to the government "relitigating an issue when presented in a subsequent action governed by a lower standard of proof."[75]

Justices Stevens and Kennedy issued separate dissents. Justice Kennedy took issue with the Court's decision to render an opinion without full briefing and oral argument.[76] Justice Stevens' criticism was more substantive and critical.[77] Justice Stevens methodically dismantled the majority's legal reasoning to show why neither the Court's "prior cases nor the text of [§ 3661] warrants this perverse result."[78] And he ended his dissent with a strong rebuke of what he saw as the majority's betrayal of the principles of constitutional criminal jurisprudence.[79]

THE COSTS OF ACQUITTED CONDUCT SENTENCING

Any discussion about the costs of acquitted conduct sentencing must start with the depreciation of the jury's primacy in our criminal justice system. The right to a jury trial is "fundamental to our system of justice"[80] whose importance is "hard to overemphasize."[81] Indeed, it is a civil right that the Founding Fathers agreed was absolutely necessary even though they disagreed about the size and role of the federal government.[82] Acquitted conduct sentencing undermines and devalues the role of the jury, and mocks the jury's historical roots and prominence by "trivializ[ing] 'legal guilt' or 'legal innocence' – which is what a jury decides."[83] Indeed, the practice "severs the connection between verdict and sentence," "thwarts the express will of the jury," and jeopardizes the jury's power to serve as the bulwark between the accused and the government.[84]

The next conspicuous cost is that acquitted conduct provides prosecutors with a second-bite at the apple of punishment under circumstances that substantially disfavor the defendant.[85] The forum of sentencing advantages the government – one fact-finder (judge)

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[73] *Id.* at 155.
[74] *Id.* (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984)).
[75] *Id.* at 156 (quoting Dowling v. United States, 493 U.S. 342, 343 (1990)).
[76] *Id.* at 170 (Kennedy, J., dissenting).
[77] *Id.* at 159-70 (Stevens, J., dissenting).
[78] *Id.* at 164.
[79] *Id.* at 169-70 ("The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.").
[80] Duncan v. Louisiana 391 U.S. 145, 153 (1968).
[81] United States v. White, 551 F.3d 381, 392 (6th Cir. 2008) (Merritt, J., dissenting).
[82] *See, e.g.*, THE FEDERALIST NO. 83 (Alexander Hamilton) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."); *See also* Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("[T]he jury-trial guarantee was one of the least controversial provisions of the Bill of Rights.").
[83] United States v. Pimental, 367 F. Supp. 2d 143, 152 (D. Mass. 2005).
[84] United States v. Mercado, 474 F.3d 654, 662-64 (9th Cir. 2007) (Fletcher, J., dissenting); *see also* United States v. Coleman, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005) ("Stated differently, the jury is essentially ignored when it disagrees with the prosecution."), *overruled in part by* United States v. Kaminski, 501 F.3d 655, 657 (6th Cir. 2007). This outcome is not only "nonsensical" but violates the letter and spirit of our country's criminal jurisprudence. *Id.*
[85] *See* 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, 182-83 (1996); *see also Coleman*, 370 F. Supp. 2d at 672; *see also* United

University of Denver Criminal Law Review, Vol. 5, Iss. 1 [2015], Art. 6

as opposed to multiple fact-finders who must be unanimous to convict (jury), a lower standard of proof, looser evidentiary rules, and a finding that the defendant is already guilty of something.[86] It is against this backdrop that acquitted conduct sentencing allows prosecutors to present the same evidence rejected by the jury (or even was deemed inadmissible at trial) to establish that a defendant deserves an enhanced prison sentence for conduct the jury did not find supported a guilty verdict. In effect, after failing before a jury, the prosecution is allowed a "mini-trial" to re-ligate the issue under more favorable circumstances.[87] And "[w]ith this second chance at success, the Government almost always wins."[88]

A related cost is that acquitted conduct sentencing empowers and emboldens prosecutors to charge additional offenses with the intent of establishing "guilt" at sentencing (under more favorable conditions) rather than at trial. In other words: charge inflation. Take for instance a prosecutor who believes (or rather desires) that five charges could apply to a defendant's conduct, but recognizes that only two charges can be proven beyond a reasonable doubt. In this scenario, acquitted conduct sentencing encourages the prosecutor to pursue all five charges because only one conviction is needed to open the door at sentencing to any of the charges rejected by the jury.[89] In addition to the costs in prison years, charge inflation contributes to pleas through cost-benefit coercion. A defendant facing multiple charges 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. More often than not, the result of this calculation is that the potential years of imprisonment after trial, even if the defendant is able beat some of the charges, far outweighs the plea offer provided by the government.

Finally, another cost are the potential sentencing disparities that the Guidelines are designed to prevent. Not all judges engage in acquitted conduct sentencing, and the judges that do engage in the practice, do not do so in a uniform manner. Disparities are a inescapable consequence of defendants who appear before judges who reject acquitted conduct sentencing and those who embrace it in varying degrees.

MAX-MIN QUARTET

As the central thesis of this Article is based on the "max-min quartet" of *Apprendi, Blakely, Booker, and Alleyne,* a brief overview of the four cases is warranted.

Apprendi v. New Jersey[90]

Apprendi was arrested for firing several shots into the home of a black family who recently moved into an all-white neighborhood. During post-arrest questioning, Apprendi stated that he fired into the house because the occupants were "black in color"

States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("Government gets the proverbial 'second bite at the apple' during sentencing to essentially retry those counts on which it lost.").

[86] *Coleman,* 370 F. Supp. 2d at 672 ("[C]onsideration of acquitted conduct skews the criminal justice system's power differential much in the prosecution's favor.").

[87] *Id.* at 672-73.

[88] *Canania,* 532 F.3d at 776.

[89] United States v. Ebbole, 917 F.2d 1495, 1501 (7th Cir. 1990) ("[Relevant conduct sentencing] obviously invite[s] the prosecutor to indict for less serious offenses which are easy to prove and then expand them in the probation office.") (quoting United States v. Miller, 910 F.2d 1321, 1332 (6th Cir. 1990)) (Merritt, J., dissenting).

[90] 530 U.S. 466 (2000).

and he did not "want them in the neighborhood."[91] He was subsequently charged by a New Jersey grand jury with 23 counts for the shootings and unlawful weapon possession.[92] None of the charged counts referred to New Jersey's hate crime statute.

Pursuant to a plea agreement, Apprendi pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose, and one count of possession of an antipersonnel bomb. New Jersey law set a penalty range of five to ten years for the firearm possession counts, and three to five years for the antipersonnel bomb count.[93] Under the plea agreement, the state reserved the right to seek an enhanced sentence under New Jersey's hate crime statute, while Apprendi reserved the right to claim that a hate crime enhancement violated the Constitution.[94]

The trial court held an evidentiary hearing on the state's motion in support of the hate crime enhancement. The judge found by a preponderance of the evidence that the enhancement was warranted.[95] Apprendi was sentenced to 12 years for one of the firearm possession counts (or two years over the ten-year maximum), and to shorter concurrent sentences for the remaining two counts.[96]

Apprendi appealed arguing that for the hate crime enhancement to apply, the Constitution's due process clause required the government to prove the bias motive to a jury guided by the reasonable doubt standard. The state appellate court and the New Jersey Supreme Court rejected Apprendi's argument. Both courts of review relied heavily on *McMillan v. Pennsylvania* to find that the hate crime enhancement was a sentencing factor, rather than an element or separate offense requiring the reasonable doubt standard.[97]

The Supreme Court, however, sided with Apprendi. The Court held that New Jersey's hate crime statute violated due process because it allowed a judge to increase a sentence beyond the statutory maximum based on the preponderance of the evidence.[98] In reaching this decision, the Court started with the premise that "taken together" the Sixth Amendment's trial rights and the Fourteenth Amendment's due process rights "indisputably 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.'"[99]

The Court then explored the "historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties."[100] For years since the nation's founding, according to the Court, "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court . . . ."[101] The Court acknowledged that trial practices can "change in the course of centuries

[91] *Id.* at 469 (noting that Apprendi later retracted the statement).
[92] *Id.*
[93] *Id.* at 469-470.
[94] *See id.* at 468-69. New Jersey's hate crime statute provided for an "extended term" of imprisonment if the trial judge found under the preponderance standard that a defendant committed the crime to intimidate a person or group because of the person's or group's race, color, gender, or other protected classes. *Id.*
[95] *Id.* at 470-71.
[96] *Id.* at 471.
[97] 477 U.S. 79, 91 (1986) (holding that using the preponderance standard to find sentencing factors that enhance a sentence within the statutory maximum is consistent with due process).
[98] *Apprendi*, 530 U.S. at 491-92, 497.
[99] *Id.* at 476-77 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).
[100] *Id.* at 482.
[101] *Id.* at 478.

University of Denver Criminal Law Review, Vol. 5, Iss. 1 [2015], Art. 6

and still remain true to the principles" of the Founding Fathers.[102] But, the Court stressed, this "practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt."[103]

With these principles in mind, the Court proceeded to reject all three arguments put forward by New Jersey in support of its statute. The state's first argument was that the hate crime statute's biased purpose penalty was a "traditional sentencing factor" and not an "element" of a separate hate crime offense.[104] To the Court, characterizing "biased purpose" as just a sentencing factor regarding motive, greatly undervalued its legal significance. "By its very terms, this statute mandates an examination of the defendant's state of mind – a concept known well to the criminal law as the defendant's *mens rea*."[105] And a defendant's intent, or *mens rea,* "is perhaps as close as one might hope to come to a core criminal offense 'element.'"[106]

The state's second argument – *McMillan* allows a legislature to authorize a judge to find a traditional sentencing factor on the basis of a preponderance of the evidence – was equally unavailing. The Court read *McMillan* to frown on a legislature allowing a judge to significantly increase a defendant's maximum penalty using the preponderance of the evidence standard.[107] Moreover, it was of no Constitutional consequence to the Court, that the New Jersey legislature placed the hate crime enhancer within the sentencing provisions of the state's criminal code. The placement did "not define its character," which the Court found resembled an element rather than a sentencing factor.[108]

The Court used few words to dispatch the state's final argument - that *Almendarez-Torres v. United States* extended *McMillan*'s holding to the New Jersey statute.[109] To the Court, the two situations were far too different. *Almerdarez-Torres* concerned recidivism, which does not relate to the commission of the offense itself. New Jersey hate crime statute, conversely, "goes precisely to what happened in the 'commission of the offense.'"[110]

In sum, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[111]

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[102] *Id.* at 483.
[103] *Id.* at 483-84.
[104] *Id.* at 492.
[105] *Id.*
[106] *Id.* at 493.
[107] *Id.* at 494-95. The Court noted that New Jersey's hate crime statute turned a second-degree offense into a first-degree offense under the state's criminal code, and therefore subjected defendants to significantly heightened penalties. *Id.* at 494. In Apprendi's case, the statute potentially doubled Apprendi's maximum sentence from 10 years to 20 years – a "differential . . . unquestionably of constitutional significance." *Id.* at 495.
[108] *Id.* at 495-96.
[109] *Id.* at 496; *see also* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (holding that it was constitutional for Congress to define recidivism, particularly illegal re-entry into the United States after being deported following an aggravated felony conviction, as a sentencing factor, and not an element of the offense).
[110] *Apprendi*, 530 U.S. at 496 ("There is a vast difference between accepting the validity of a prior judgment of conviction [provided beyond a reasonable doubt] and allowing the judge to find the required fact under a lesser standard of proof.").
[111] *Id.* at 490.

Blakely v. Washington[112]

Four years later, the Supreme Court used *Apprendi* to invalidate another state's use of sentencing factors to enhance a defendant's sentence beyond the statutory maximum.[113] In *Blakely*, the defendant pled guilty to second-degree kidnapping involving domestic violence and use of a firearm stemming from a violent episode involving his estranged wife. Under Washington state law at the time, second degree kidnapping was a class B felony with a 10-year imprisonment limit.[114] Another state law limited the punishment for second degree kidnapping with a firearm to a range of 49 to 53 months imprisonment, unless a judge found compelling and exceptional reasons to impose a sentence exceeding the range.[115]

During the sentencing hearing, Blakely's wife recounted the graphic details of the kidnapping.[116] Having found that Blakely acted with "deliberate cruelty", the judge rejected the state's recommendation for a sentence within the 49 to 53 month range, and instead imposed a sentence of 90 months (or 37 months beyond the standard maximum).[117]

When the case reached the Supreme Court, Washington state argued that there was no *Apprendi* violation because the relevant statutory maximum was not 53 months, but rather the 10-year maximum for class B felonies under state law.[118] The Supreme Court rejected the argument head-on, and set a bright-line rule for what constitutes the "statutory maximum" under *Apprendi*:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . .* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.[119]

The Court then used this bright line rule to find Blakely's 90-month sentence constitutionally infirm. It was particularly important to the Court that the judge could not have imposed the 90-month sentence based on the admitted facts in Blakely's guilty plea.[120] Because the judge needed to find additional facts, beyond those admitted by

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[112] 542 U.S. 296 (2004).
[113] *Id.* at 301 ("This case requires us to apply the rule we expressed in *Apprendi* . . . .").
[114] *Id.* at 298–300; WASH. REV. CODE § 9A.40.030 (1975), *amended by* Leg. Serv. 57-6151, 2d Spec. Sess., at 356 (Wash. 2001).
[115] The 49 to 53-month range consisted of, under Washington state law, a "standard range" of 13 to 17 months for second-degree kidnapping and a 36-month firearm enhancement. *Blakely*, 542 U.S. at 299.
[116] Blakely had abducted his wife from their home, bound her with duct tape, forced her at knifepoint into a box in the bed of his pickup truck, and ordered their 13-year old son to follow the truck in another car under threat of shooting his wife with a shotgun. *Id.* at 298. The judge held a three-day bench hearing following Blakely's objection to the sentence to obtain further testimony about the circumstances of the kidnapping. *Id.* at 300. The judge affirmed his finding of deliberate cruelty and the 90-month sentence at then end of the hearing. *Id.* at 301.
[117] *Id.* at 300.
[118] *Id.* at 303.
[119] *Id.* at 303-04 (citations omitted).
[120] *Id.* at 304.

Blakely (or found by a jury), to impose the enhanced sentence, the Court held that the 90-month sentence ran afoul of the Constitution and *Apprendi*.[121]

After finding the 90-month sentence was invalid, the Court addressed *Apprendi*'s critics. The Court explained that for "[t]hose who would reject *Apprendi*," there were two unsound alternatives.[122] The first alternative "is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors – no matter how much they may increase punishment – may be found by the judge."[123] The Court quickly deemed it "absurd" to follow this path, because the jury would cease to "function as [the] circuitbreaker in the State's machinery of justice," and judges and the State would have unlimited punishment power.[124]

The second alternative "is that legislatures may establish legally essential sentencing factors *within limits* – limits crossed when, perhaps, the sentencing factor is a 'tail which wags the dog of the substantive offense.'"[125] The Court's problem with this alternative was the subjectivity of determining whether a sentencing factor exceeds constitutional limits and improperly expands the role of the judge.[126] This subjectivity, in the Court's mind, is inconsistent with the Sixth Amendment's empowerment of the jury (which reflects the founders' fear of the power of government and judges).[127]

The Court then made clear that its decision was not about the constitutionality of determinate sentencing, but rather "about how it can be implemented in a way that respects the Sixth Amendment."[128] In response to critics (such as Justice O'Connor), the majority felt it was of no consequence that determinate sentencing schemes involve less judicial fact-finding than indeterminate sentencing schemes.[129] What was important to the majority was whether determinate sentencing schemes involve more *judicial power* than jury fact-finding, and therefore requiring more diligent protection of Sixth Amendment trial and jury rights.[130]

United States v. Booker[131]

Booker is well known for transforming the Guidelines into a provider of advisory sentences rather than mandatory ones. What is often lost is that the decision rested on the Supreme Court extending *Apprendi* to the Guidelines to find that Booker's enhanced sentence violated his Sixth Amendment right to a jury trial.

Booker was convicted at trial of possessing with the intent to distribute 50 grams of crack, which triggered a 10-year mandatory minimum sentence.[132] Booker's guideline range was 210 to 262 months imprisonment based on his criminal history and the evidence

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[121] *Id.* at 304-05.
[122] *Id.* at 306.
[123] *Id.*
[124] *Id.* at 306-07; *see id.* at 307 ("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.").
[125] *Id.* (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).
[126] *Id.* at 307-08 ("With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.").
[127] *Id.* at 308.
[128] *Id.*
[129] *Id.* at 308-09.
[130] *Id.*
[131] 543 U.S. 220 (2005).
[132] *Id.* at 227.

at trial that his conduct involved 92.5 grams of crack.[133] At sentencing the trial judge concluded by a preponderance of the evidence that Booker's conduct involved an additional 556 grams of crack.[134] Based on this finding, the Guidelines required Booker to receive a sentence between 360 months and life imprisonment.[135] The trial judge sentenced Booker to the low-end of the range -- 360 months in prison.[136]

Booker's appeal presented two questions to the Supreme Court. The first was "Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the [Guidelines] based on the sentencing judge's determination of fact (other than a prior conviction) that was not found by the jury or admitted by the defendant[?]"[137] If the answer was "yes," the second question concerned the proper remedy – whether the Guidelines as whole had to be scrapped as unconstitutional or could parts of the Guidelines be excised to save the rest.[138]

The Court answered "yes" to the first question. In delivering the majority opinion, Justice Stevens relied heavily on *Apprendi* and *Blakely* to hold that "[a]ny fact (other than a prior conviction) that leads to a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond all reasonable doubt."[139] According to Justice Stevens, those cases (and other similar cases) made clear that a defendant has a "right to have a jury find the existence of 'any particular fact' that the law makes essential to his punishment."[140]

Nonetheless, the Court resisted rendering the entire Guidelines unconstitutional, primarily because of all the efforts behind the passage of the SRA. In speaking for the Court on the second question, Justice Breyer announced the Court's remedy for saving the Guidelines from constitutional purgatory was to surgically remove the provisions that rendered the Guidelines mandatory.[141] Justice Breyer explained that this approach, above all other alternatives, would allow the Sixth Amendment rights of defendants to live in concert with the determinate sentencing scheme Congress desperately wanted.[142]

Alleyne v. United States[143]

While *Apprendi* and *Blakely* firmly established the limits of judicial fact-finding to impose a sentence beyond a statutory maximum, questions remained about the constitutional limits of judicial fact-finding to increase a defendant's minimum sentence. Two years after *Apprendi,* the Supreme Court temporarily settled the questions with its *Harris v. United States* decision, which held that judges remained free to find facts to set or increase a mandatory minimum faced by a defendant.[144] *Harris*'s lifespan came to a

[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* at 245.
[138] *Id.*
[139] *Id.* at 244.
[140] *Id.* at 32 (quoting *Blakely,* 542 U.S. at 301)
[141] *Id.* at 245-58.
[142] *Id.* at 258.
[143] 133 S. Ct. 2151 (2013).
[144] 536 U.S. 545, 568-69 (2002), *overruled by Alleyne*, 133 S. Ct. 2151. The Court blessed the trial court's finding by preponderance of the evidence that a firearm was brandished during criminal offense for purposes of imposing enhanced sentence under 18 § 924(c)(1)(A). *Id.* at 567-68. The Court held that judicial finding of facts

screeching halt in 2013 with the *Alleyne* decision.

Alleyne and an accomplice robbed a store manager on his way to deliver the store's daily deposits at a local bank. During the robbery, Alleyne's accomplice approached the manager with a gun.[145] A jury convicted Alleyne of multiple offenses related to the robbery, including using or carrying a firearm in relation to a crime of violence (18 U.S.C. § 924(c)(1)(A)), which carries various mandatory minimum penalties based on how the firearm was used during the crime.[146]

The jury's verdict form did not indicate that Alleyne or his accomplice "brandished" the firearm during the robbery.[147] Yet based on the presentence report that recommended the seven-year "brandishing" penalty for Allyene, and evidence presented at trial, the trial court imposed the seven-year mandatory minimum sentence for brandishing on the § 924(c) count.[148] The court dismissed Allyene's objection to the sentence on the ground that under *Harris,* brandishing was a sentencing factor that the court could find by a preponderance of the evidence without violating the Constitution.[149]

The Supreme Court used *Alleyne* to re-examine whether *Harris* was consistent and compatible with *Apprendi*. The Court concluded that it was not.[150] In reaching this conclusion, the Court started with the principle that 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."[151] To the Court, the failure of *Harris* to extend this principle to facts increasing a mandatory minimum sentence was inconsistent with *Apprendi's* definition of "elements," which "necessarily includes not only facts that increase the ceiling, but also those that increase the floor."[152] As the Court recognized, a fact that sets or increases a mandatory minimum "aggravates the punishment" just as it does when it increases a statutory maximum.[153] And therefore, to pass constitutional muster "[f]acts that increase the mandatory minimum sentence are . . . elements and must be submitted to the jury and found beyond a reasonable doubt."[154]

After establishing the bright line rule, the Court further explained why *Harris* had to give way to *Apprendi*. To the Court, *Harris* violated the principle established by "common-law and early American practice," and embodied in *Apprendi*, that facts that increase the prescribed penalties a defendant faces are elements of the offense.[155] It does not matter whether the facts increase the floor of the prescribed penalties, as opposed to the ceiling, because it "is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed."[156] What is key for Sixth Amendment purposes, according to the Court, is that facts that increase or

increase a defendant's mandatory minimum sentence within the statutory range does not violate the Constitution. *Id.* at 568-69.
[145] *Alleyne*, 133 S. Ct. at 2155.
[146] *Id.* at 2155-56. The statute sets a base minimum sentence of 5 years imprisonment; a minimum of 7 years imprisonment if the firearm was "brandished"; and a minimum of 10 years imprisonment if the firearm was "discharged." 18 U.S.C.A. § 924(c)(1)(A) (West 2006).
[147] *Alleyne*, 133 S. Ct. at 2156.
[148] *Id.*
[149] *Id.*
[150] *Id.* at 2158 ("*Harris* was wrongly decided and that it cannot be reconciled with our reasoning in *Apprendi*.").
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* at 2160.
[156] *Id.*

trigger a mandatory minimum "aggravate" a defendant's punishment because there is a "heighten[ed] loss of liberty associated with the crime."[157] Therefore the *Harris* decision's attempt to limit *Apprendi* only to facts increasing a statutory maximum was without sound legal footing, and the "principle applied in *Apprendi* applies in equal force to facts increasing the mandatory minimum."[158]

The Court then disparaged the reasoning in *Harris* that a judge is constitutionally permitted to impose a enhanced mandatory minimum if the enhanced sentence is within the statutory range of the offense of conviction found by a jury (or agreed to pursuant to a plea agreement).[159] To the *Alleyne* Court, "[i]t is no answer to say that a defendant could have received the same sentence with or without the fact."[160] The key inquiry, the Court explained, is always whether a fact "alters the legally prescribed punishment so as to aggravate it" and is therefore an element of the offense that must be submitted to the jury.[161]

WHY THE MAX-MIN QUARTET SPELLS THE END FOR *WATTS*

Inexplicably, what has been largely lost over the years is that in *Watts* the Supreme Court did not address whether the Sixth Amendment posed a barrier to acquitted conduct sentencing.[162] Since *Watts,* many circuits have addressed the issue, and unfortunately have concluded that acquitted conduct sentencing is consistent with the Sixth Amendment.[163] However, a number of these decisions rest on a misunderstanding that *Watts* addressed the Sixth Amendment issue in favor of acquitted conduct sentencing, [164] and others were decided before the max-min quartet was complete.[165] Whatever the circumstances or reasoning, these decisions must be re-examined in the full light of the max-min quartet.[166]

To understand how and why the max-min quartet should put an end to acquitted conduct sentencing, it is best to start with the circumstances where there can be no

[157] *Id.* at 2161; *see id.* at 2160 ("It is impossible to dissociate the floor of a sentencing range from the penalty affixed to a crime.").
[158] *Id.* at 2160.
[159] *Id.* at 2160-63.
[160] *Id.* at 2162.
[161] *Id.* The court noted that its decision did not mean that "any fact that influences judicial discretion must be found by a jury," nor did it upset the "the broad discretion of judges to select a sentence within the range authorized by law." *Id.* at 2163.
[162] *See, e.g.,* United States v. Booker, 543 U.S. 220, 240 n.4 (2005) ("*Watts,* in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause . . . .").
[163] *See, e.g.,* United States v. Milton, 27 F.3d 203, 211 (6th Cir. 1994); United States v. Dorcely, 454 F.3d 366, 369 (D.C. Cir. 2006); United States v. Ashworth, 139 Fed. App'x. 525, 527 (4th Cir. 2005); United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005).
[164] *See, e.g.,* United States v. Mercer, 242 Fed. App'x. 932 (4th Cir. 2007) (relying on *Watts* to reject the defendant-appellants' Fifth and Sixth Amendment challenge to trial court having used acquitted conduct to enhance his sentence); United States v. Mercado, 474 F.3d 654, 661 (9th Cir. 2007) (Fletcher, J. dissenting) ("The majority's reliance on *Watts* as dispositive of Sixth Amendment issues is misplaced. *Watts* neither considered nor decided the [Sixth Amendment] issue currently before us."); *see also* People v. Rose, 776 N.W.2d 888, 888 n.3 (Mich. 2010) ("Although other courts have recognized that *Watts* is not controlling on the Sixth Amendment question, they have nevertheless been influenced by the other courts that erroneously presumed the contrary.").
[165] *See infra* note 161.
[166] United States v. Coleman, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005) ("The underlying premises of *Booker* and its predecessors – *Jones, Apprendi . . . and Blakely* – detract from *Watts'* continued validity.").

dispute.[167] First, the max-min quartet, specifically *Apprendi*, is a complete bar to using acquitted conduct to extend a sentence beyond the statutory maximum of conviction. Second, the quartet (specifically *Blakely*) bars a sentencing judge from using acquitted conduct to extend a statutory maximum. Finally, the quartet, (specifically *Alleyne*) bars the use of acquitted conduct to establish or increase a mandatory minimum sentence.

What is unresolved is the grey middle: judges using acquitted conduct to extend a prison sentence within the statutory maximum of the offense of conviction, without regard to an applicable mandatory minimum. So why does the max-min quartet put an end to judges using acquitted conduct in this area? The short answer is that the max-min quartet firmly reinforces bedrock and interdependent principles underneath the Sixth Amendment's trial rights, and these principles are irreconcilable with allowing a sentencing judge to transform offense elements rejected (or not found beyond reasonable doubt) by a jury into sentencing factors that extend a defendant's term of imprisonment – even if the sentence is within statutory limits. These principles are:

1) *The Constitution demands that a jury find a defendant guilty of all the elements of the crime with which he/she is charged.*

2) *The character of a sentencing enhancer defines whether it is an offense element or a sentencing factor.*

3) *If a sentencing enhancer is an element then it must be submitted to the jury and found beyond a reasonable doubt, or admitted by the defendant.*

4) *A judge's sentencing authority is derived from, and limited by a jury's verdict.*

5) *The sentencing range faced by a defendant is defined by, and limited to the facts found by the jury beyond a reasonable doubt, or admitted by a defendant.*

Together, the principles reflect the Supreme Court's intent through the max-min quartet to protect and embolden the jury's power to not only resolve the question of guilt or innocence, *but also to find the facts essential to punishment.* The max-min quartet puts to rest the belief and practice that a conviction, without specific findings by a jury, automatically exposes a defendant to enhanced and extended penalties, mandatory penalties, and extended statutory maximums.

But these principles reflect a more subtle intent that is important for the argument presented here. The max-min quartet is part of an ongoing process to dismantle the practice of prosecutors and judges doing an end-run around the Sixth Amendment's promise that a conviction on jury-found facts must always precede punishment.[168] Without a conviction, a judge has *no* power to impose punishment. The max-min quartet reinforces not only the premise that a judge's sentencing power is dependent on a conviction, but also that a conviction does not grant a judge cart-blanche sentencing power. In short, the

[167] *Id.* ("*Apprendi* and its progeny, including *Booker*, have elevated the role of the jury verdict by circumscribing a defendant's sentence to the relevant statutory maximum *authorized* by a jury; yet the jury's verdict is not heeded when it specifically withholds authorization.").

[168] Leonard & Dieter, *supra* note 26 at 280-281 ("[J]udges can find facts that contextualize an offense and enhance punishment but *the jury must first convict the defendant.*") (emphasis added).

clear implication of the max-min quartet is that a "judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance a defendant's sentence."[169]

To look at it another way, it makes no logical or constitutional sense, that the max-min quartet 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. Take for instance the *Jones* case discussed in the opening of this article. Certainly the trial judge could not have sentenced the defendants to a crack mandatory minimum sentence of 5 or 10 years for the acquitted conspiracy count. Yet, the judge found no barrier to using "facts" underlying the acquitted conspiracy count to bump the defendants' sentences from between 27 and 71 months imprisonment to between 180 and 225 months imprisonment – sentences well-above the crack mandatory minimums. It is a paradox that strains all credulity, and more importantly, renders jury acquittals meaningless.

This illogical paradox is amply reflected in a decision soon after *Booker: United States v. Magallenez.* In that case, the defendant was convicted by a jury of conspiring to distribute methamphetamine.[170] On a special verdict interrogatory, the jury attributed between 50 and 500 grams of methamphetamine to the defendant.[171] At sentencing, however, the trial judge attributed 1200 grams to the defendant and increased his sentence accordingly under the Guidelines.[172]

Relying on *Booker* (decided after Magallanez had been sentenced), the Tenth Circuit held it was error for the trial court "to increase Mr. Magallanez's sentence beyond the maximum authorized by the jury verdict through mandatory application of the Guidelines to judge-found facts" using the preponderance standard.[173] Yet, the circuit court rejected the defendant's argument that "under *Blakely* and *Booker*, the district court was required to accept the jury's special verdict of drug quantity for purposes of sentencing, rather than calculating the amount for itself."[174] According to the appellate court, because of *Watts,* a sentencing court "maintained the power to consider the broad context of a defendant's conduct, even when a court's view of the conduct conflicted with the jury's verdict."[175] Therefore, "[a]pplying the logic of *Watts* to the Guidelines system as modified by *Booker,* we conclude that when a district court makes a determination of sentencing facts by a preponderance test under the now-advisory Guidelines, it is not bound by jury determinations reached through application of the more onerous reasonable doubt standard."[176]

Although it does not involve acquitted conduct, *Magallanez* reflects the Kafka-esque world that is criminal sentencing jurisprudence under *Watts.* On one hand the Tenth Circuit chided the sentencing court for increasing a sentence beyond facts found by a jury

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[169] United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008).
[170] 408 F.3d 672 (10th Cir. 2005).
[171] *Id.* at 676.
[172] *Id.* at 682-83. The court's finding bumped the defendant's offense level from 26 or 30, to level 32. *Id.* at 682. This resulted in a sentencing range of 121-151 months, as opposed to 63-78 months under the offense level that corresponded with the jury's verdict. The court imposed a 121-month sentence. *Id.*
[173] *Id.* at 685
[174] *Id.* at 683.
[175] *Id.* at 684.
[176] *Id.* at 685.

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.

This leads to common rebuttal to Sixth Amendment challenges to acquitted conduct sentencing: that because *Booker* rendered the Guidelines advisory, the Sixth Amendment is not implicated when a trial judge relies on facts rejected by a jury to select a sentence within the statutory maximum for the offense of conviction.[177] The simple response to this argument is that the max-min quartet does not disturb this premise unless the judicially discovered "fact" is an element of an offense that was not found (or rejected) by the jury. An element is not stripped of its character, weight, and significance, once a jury is released following the verdict.[178] In today's advisory-Guidelines era, "all facts are not equal . . . especially not facts that amount to separate crimes."[179] What differentiates acquitted conduct facts, and thereby implicates the Sixth Amendment, is that they "are not facts enhancing the crime of conviction, like the presence of a gun or the vulnerability of a victim. Rather, they are facts comprising different crimes."[180]

A more probing response is that acquitted conduct sentencing turns *Booker* onto itself and strips away the Sixth Amendment protections it was supposed to reinforce.[181] The common understanding is that *Booker* gave judges back some of the sentencing discretion that had been taken away by the SRA and the Guidelines. What is often lost is that *Booker* also provided increased constitutional protections to federal criminal defendants facing sentencing.[182] Through *Booker,* the Supreme Court erected a Sixth Amendment wall between defendants and judicial fact-finding at sentencing. This wall limits a judge's sentencing authority to the "maximum authorized by the facts established by a plea of guilty . . . or proved to a jury beyond a reasonable doubt."[183] The purpose of this wall is to protect defendants from *fait accompli* sentences based on fact-finding at sentencing under a less demanding standard of proof. In other words, "Just because the jury has authorized *a* punishment [with a guilty verdict] does not mean that the jury has authorized *any* punishment."[184] *Booker,* therefore, restricts the sentencing power of judges relative to the defendant, as much as it expands judicial power in relation to the Guidelines.

Acquitted conduct sentencing betrays the former purpose. It is directly counter to *Booker*'s intent for judges to use acquitted conduct to extend the sentence range

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[177] *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."); *see also* United States v. White, 551 F.3d 381, 384-85 (6th Cir. 2008) (explaining that Post-*Booker* there is no Sixth Amendment violation when a judge looks at other facts, including acquitted conduct, to select a sentence within the statutory range).

[178] Ring v. Arizona, 536 U.S. 584, 602 (2002) ("The dispositive question, we said [in *Apprendi*] 'is one not of form, but of effect.' If a State makes an increase in an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.") (quoting *Apprendi*, 530 U.S. at 494.

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

[180] *Id.*

[181] *Id.* at 150–51 ("In a nutshell, this position, that one can consider acquitted conduct because the Guidelines are now advisory, seems to hark back to the period pre-mandatory Guidelines when there was a clear line between the trial sphere and the sentencing sphere").

[182] *Id.* at 153 ("The *Booker* remedy decision made the Guidelines advisory . . . . But the principal decision in that case and those that had foreshadowed it reflected the Court's new concern with the formal procedures for determining facts essential to sentencing.").

[183] *Booker,* 543 U.S. at 244..

[184] *Mercado*, 474 F.3d at 663.

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*. The outcome – a sentence longer than sanctioned by the jury – is the same. Under the max-min quartet, this backdoor sentencing not only implicates the Sixth Amendment, it runs afoul of it.

As one court explained, it is nonsensical for *Booker,* when it comes to acquitted conduct, to afford defendants *less* Sixth Amendment protections under an advisory Guidelines scheme:

> If the Guidelines are mandatory, "what the jury verdict authorized" means a sentence framed by the facts tried – *excluding* aggravating enhancements to that offense and surely excluding aggravating relevant conduct if those facts did not form part of the jury's verdict. With advisory Guidelines, when the trial judge is not required to accept a sentence driven by enhancements or relevant conduct, "what the jury verdict authorized" means a sentence just within the statutory maximum.
>
> However, when a count considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize, it considers facts of which the jury expressly disapproved. Nor is it enough to hark back to the idea that they jury "only decides guilty beyond a reasonable doubt, while the judge decides facts by a fair preponderance of the evidence." The argument is circular: The fair preponderance standard made sense in the context of fully indeterminate sentencing. It does not make sense in this hybrid regime where rules still matter, and certain facts have important, if not dispositive, consequences.[185]

Moreover, to claim that there is no Sixth Amendment violation because *Booker* rendered the Guidelines advisory is to ignore the "controlling influence" of the Guidelines.[186] The Guidelines remain the "Federal Government's authoritative view of appropriate sentences for specific crimes,"[187] and through a series of post-*Booker* rulings, the Supreme Court has ensured that the Guidelines remain so. Accordingly, the Guidelines are the "starting point and the initial benchmark" for all sentence determinations,[188] and failure to properly calculate a defendant's guideline range constitutes procedural error.[189] And once a defendant's guidelines are calculated, a within-guideline sentence may be presumed reasonable, and any departure or variance must be explained.[190] Indeed, a judge

[185] *Pimental*, 367 F. Supp. 2d at 152-53 (footnote omitted).
[186] Peugh v. United States, 133 S. Ct. 2072, 2084-85 (2013).
[187] *Id.* at 2085.
[188] Gall v. United States, 552 U.S. 38, 49 (2007); *See also* Rita v. United States, 551 U.S. 338, 347-49 (2007).
[189] *Peugh*, 133 S. Ct. at 2080.
[190] *Rita*, 551 U.S. at 347, 356-59.

"varies from a Guidelines sentence at his or her own peril."[191] "And so, in effect, the Guidelines, with respect to 'acquitted conduct,' remain very much mandatory."[192]

By slapping an "advisory" sticker on them, *Booker* did not "deprive the Guidelines of force as the framework for sentencing."[193] Since the Guidelines remain the dominant sentencing force post-*Booker*, when a judge uses facts rejected (or not found) by a jury to "alter the prescribed range of sentences to which a defendant is exposed and do[es] so in a manner that aggravates the punishment," the Sixth Amendment is certainly implicated.[194] In short, when it comes to the Guidelines, as one court noted, "[w]e cannot have it both ways: We cannot say that facts found by the judge are only advisory, that as a result, few procedural protections are necessary and also say that the Guidelines are critically important."[195]

A related common justification for acquitted conduct sentencing, is that the practice is consistent with the Sixth Amendment so long as the resulting sentence is within the statutory maximum of the offense of conviction. In other words, the offense of conviction is the jury's authorization of a sentence up to or equal to the statutory maximum based on facts found by the sentencing judge. However, the "jury authorization" argument rests on the premise that a *jury's verdict authorizes punishment.* A not guilty verdict is the most conspicuous expression of a jury's grant (rather withholding) of sentencing authority. "The fact that a jury has not authorized a particular punishment is never more clear than when the jury is asked for, and yet specifically withholds, that authorization."[196] Certainly no one would argue that the Sixth Amendment and other constitutional protections are not barriers to a judge sentencing a defendant who was acquitted of *all* charges, just because the judge found the government proved its case by a preponderance of the evidence. So it is absurd that an acquittal looses the effect of withholding sentencing authority just because it is in the company of a guilty verdict.[197]

* * * *

The max-min quartet reaffirms the principle that a criminal offense is a collection of individual elements, and elements are a collection of facts that must be proven beyond a reasonable doubt. Under the quartet, once an element, always an element.[198] A not guilty

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[191] United States v. Ibanga, 454 F. Supp. 2d 532, 538 (E.D. Va. 2006), *vacated and remanded*, 271 Fed. App'x. 298 (4th Cir. 2008); *See also* United States v. Canania, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring) ("[F]ederal district court judges are often acting as automatons-mechanically enhancing sentences with 'acquitted conduct' pursuant to the now 'advisory' Sentencing Guidelines.").

[192] *Canania*, 532 F.3d at 777 (Bright, J., concurring); *Rita*, 551 U.S. at 366 (Stevens, J., concurring) ("I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*.")

[193] *Peugh*, 133 S. Ct. at 2083.

[194] Alleyne v. United States, 133 S. Ct. 2151, 2156-58 (2013). The protection of a defendant's jury right must "not [be] motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." United States v. Booker, 543 U.S. 220, 237 (2005).

[195] Amended Sentencing Memo at 22, United States v. Pimental, 236 F. Supp. 2d 99 (E.D. Va. 2002) (No. 99-10310-NG), *aff'd in part and rev'd in part*, 380 F.3d 575 (1st Cir. 2004).

[196] *Mercado*, 474 F.3d at 664. *See also Id.* ("In the case of acquitted conduct, the jury has been given the opportunity to authorize punishment and specifically withheld it.").

[197] *See id.* at 663 (Fletcher, J., dissenting) ("It 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.") (quoting United States v. Pimental, 367 F. Supp. 2d 143, 150 (D. Mass. 2005).

[198] *Cf.* Oregon v. Ice, 555 U.S. 160, 173 (2009) (Scalia, J., dissenting) (arguing that when a judge's fact-finding is essential to the imposed punishment, "[t]hat 'should be the end of the matter.'") (quoting Blakely v. Washington, 542 U.S. 296, 313 (2004).

verdict does not, and cannot, recast an offense element into something less substantial, which can be found by a sentencing judge, using a lesser standard of proof, to extend a prison sentence.[199] Such re-labeling, as the Supreme Court forcefully asserted in *Booker*, is "irrelevant for constitutional purposes."[200] And under the quartet, it is of no import whether the sentence imposed using acquitted conduct facts falls within the range allowed by statute. All that matters is the jury has not provided authority for such a sentence, and the acquitted conduct facts expose a defendant to an aggravated prison sentence that he would otherwise not face.[201]

TURNING THE TIDE – JUSTICE SCALIA THE KEY?

The key to ending acquitted conduct may lie with an unlikely source – Justice Antonin Scalia. Through his dissent in *Jones*, Justice Scalia forcefully called on the Supreme Court to reach a definitive decision on judicial fact-finding during sentencings, and chided the Court for passing on the opportunity *Jones* permitted to do so:

> We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable – thereby exposing the defendant to the longer sentence – is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.
>
> For years, however, we have refrained from saying so. . . . the Courts of Appeal have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range. This has gone on long enough.[202]

While the tone is suggestive, Justice Scalia's dissent does not explicitly say which way he would vote if the issue were properly before the Court. One must remember that Justice Scalia concurred with the majority decision in *Watts*.[203] However, a Scalia dissent a few years prior to the *Jones* case suggests that the Justice's comfort with acquitted conduct sentencing has dissipated over time.

In *Oregon v. Ice,* the Supreme Court held that the Sixth Amendment allowed states, such as Oregon in this instance, to assign to judges, rather than juries, the role of finding facts needed to impose consecutive, rather than concurrent, sentences for multiple offenses.[204] In dissenting, Justice Scalia argued that *Apprendi* was an uncompromising barrier to a sentencing scheme where judge-found facts were "'essential to' the punishment . . . imposed."[205]

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[199] No one would ever dispute that a judge's power to punish a defendant facing a one count indictment rests on the jury returning a guilty verdict. If the jury returns a not guilty verdict, the trial judge would have no authority to punish the defendant using judge-found facts under a preponderance of evidence standard. It simply defies logic to believe this power vacuum is filed just because a defendant faces multiple counts.
[200] *Booker*, 543 U.S. at 231. *See also* Ring v. Arizona, 536 U.S. 584, 605 (2002) ("[T]he characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury.").
[201] *See Alleyne*, 133 S. Ct. at 2158.
[202] *Jones*, 135 S. Ct. at 8-9 (2014) (Scalia, J., dissenting) (citations omitted).
[203] *See* 519 U.S. 148, 158 (1997).
[204] 555 U.S. 160 163-64 (2009).
[205] *Id.* at 173 (Scalia, J., dissenting) (quoting *Booker*, 543 U.S. at 223).

Justice Scalia took aim at the majority's effort to limit *Apprendi* to "only to the length of a sentence for an individual crime and not to the total sentence for a defendant."[206] The majority's faulty logic, according to Justice Scalia, was a betrayal to the "pains" the Supreme Court had taken "to reject artificial limitations upon the facts subject to the jury-trial guarantee."[207] These efforts "made clear that the guarantee turns upon the penal consequences attached to the fact, and not to its formal definition as an element of the crime."[208]

Together, Justice Scalia's dissents in *Oregon* and *Jones* provide cautious optimism that the Justice is ready to embrace an unambiguous and unyielding rule that the jury (and only the jury) is permitted to find facts necessary to extend a prison sentence regardless of the statutory limit. Or, he at least wants the Supreme Court to resolve the issue once and for all.

If the acquitted conduct sentencing does come before the Supreme Court again, who would side with Justice Scalia (assuming he is ready to end acquitted conduct sentencing)? Among the current ranks, Justices Ginsburg and Thomas joined Scalia's *Jones* dissent, and Chief Justice Roberts and Justice Thomas joined his *Oregon* dissent.[209] Assuming they all continued to follow Justice Scalia's lead, there would be at least four votes for ending acquitted conduct sentencing.

One could speculate about which justice could provide the crucial fifth vote. However, that speculation must be tempered by the reality of the vote to deny review of the *Jones* case. Although the denial order did not reveal how the justices voted, since it takes just four justices to grant review, it seems clear that the six justices that did not join Scalia's dissent voted for denial. This is not a good sign for those, including this author, eager to see the Supreme Court put an end to acquitted conduct sentencing.

CONCLUSION

"The Founders were keenly aware, though, that 'the jury right could be lost not only by gross denial, but by erosion.'"[210] *Watts* was a monumental breach of the Sixth Amendment, and its erosive effect on defendants' jury rights continues unabated. Acquitted conduct sentencing devalues to worthlessness the jury's role in measuring whether the government has met its burden at trial, and empowers and encourages prosecutors to over-charge knowing that one guilty verdict will supersede any not guilty verdicts a jury renders. It is practice that indeed is a "jagged scar on our constitutional complexion."[211]

For too long, courts have rested on *Watts* to justify this invidious practice. In *Watts*, however, the Supreme Court side-stepped the Sixth Amendment and the barrier it poses to acquitted conduct sentencing. It is a maneuver that is no longer available now that the max-min quartet has fortified the line between judge and jury, and re-invigorated the

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[206] *Id.* ("I cannot understand why we would make such a strange exception to the treasured right of trial by jury.").
[207] *Id.*
[208] *Id.*
[209] *See Jones*, 135 S. Ct. at 8; *Ice*, 555 U.S. at 173.
[210] United States v. White, 551 F.3d 381, 393-94 (6th Cir. 2008) (Merritt, J., dissenting) (quoting *Jones*, 526 U.S. at 248 (1999)).
[211] United States v. Baylor, 97 F.3d 542, 550 (D.C. Cir. 1996) (Wald, J., concurring).

role of the Sixth Amendment in sentencing. Armed with the max-min quartet, now is the time for a direct Sixth Amendment assault on acquitted conduct sentencing "in order to again ensure that the 'right of jury trial [will] be preserved, in a meaningful way guaranteeing that the jury [will] still stand between the individual and the power of the government.'" [212]

[212] Brief of Law Professor as Amicus Curiae in Support of Petitioners at 15, *Jones*, 135 S. Ct. 8 (No. 13-10026) (quoting United States v. Booker, 543 U.S. 220, 237 (2005)).