Michigan Supreme Court
Lansing, Michigan

Syllabus

Chief Justice:
Bridget M. McCormack

Chief Justice Pro Tem:
David F. Viviano

Justices:
Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

Reporter of Decisions:
Kathryn L. Loomis

PEOPLE v BECK

Docket No. 152934. Argued on application for leave to appeal January 23, 2019. Decided July 29, 2019.

Eric L. Beck was convicted as a fourth-offense habitual offender of being a felon in possession of a firearm (felon-in-possession) and carrying a firearm during the commission of a felony (felony-firearm), second offense, after a jury trial in the Saginaw Circuit Court. He was acquitted of open murder, carrying a firearm with unlawful intent, and two additional counts of felony-firearm attendant to those charges. The applicable guidelines minimum sentence range for the felon-in-possession conviction was 22 to 76 months in prison, but the court imposed a sentence of 240 to 400 months (20 to 33⅓ years), to run consecutively to the mandatory five-year term for second-offense felony-firearm. The court, James T. Borchard, J., explained that it had imposed this sentence in part on the basis of its finding by a preponderance of the evidence that defendant had committed the murder of which the jury acquitted him. Defendant appealed and challenged his convictions and sentences on multiple grounds, including that the trial court erred by increasing his sentence on the basis of conduct of which he had been acquitted. The Court of Appeals, BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ., issued an unpublished per curiam opinion on November 17, 2015 (Docket No. 321806), remanding for further sentencing proceedings using the procedure set forth in *United States v Crosby*, 397 F3d 103 (CA 2, 2005), in light of *People v Steanhouse*, 313 Mich App 1 (2015), aff'd in part and rev'd in part 500 Mich 453 (2017). Defendant sought leave to appeal in the Supreme Court, which, after holding the application in abeyance for *Steanhouse*, ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1065 (2018).

In an opinion by Chief Justice MCCORMACK, joined by Justices VIVIANO, BERNSTEIN, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

Due process bars a sentencing court from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted and basing a sentence on that finding. Accordingly, defendant's sentence for felon-in-possession was vacated.

1. The Fourteenth Amendment of the United States Constitution incorporates the Sixth Amendment right to a jury trial in state prosecutions. It also provides the right to due process, which includes the presumption of innocence. The United States Supreme Court has issued a number of decisions potentially relevant to whether a sentencing judge may rely on acquitted

conduct when sentencing a defendant without violating due process or the right to a jury trial. In *McMillan v Pennsylvania*, 477 US 79 (1986), the Court did not specifically address acquitted conduct, but it held that a state statute allowing sentencing courts to find by a preponderance of the evidence a fact the jury had not been asked to decide did not violate the Due Process Clause of the Fourteenth Amendment or the jury-trial guarantee of the Sixth Amendment. In *United States v Watts*, 519 US 148 (1997), which addressed a sentencing court's reliance on acquitted conduct in the context of the Double Jeopardy Clause of the Fifth Amendment rather than the Due Process Clause, the Court held, citing *McMillan*, that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge as long as that conduct has been proved by a preponderance of the evidence. The United States Supreme Court's jurisprudence analyzing a defendant's due-process and Sixth Amendment rights changed significantly after *Jones v United States*, 526 US 227 (1999), and *Apprendi v United States*, 530 US 466 (2000), which held that other 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. The Michigan Supreme Court addressed the use of acquitted conduct in *People v Ewing (After Remand)*, 435 Mich 443 (1990), a case that resulted in a fractured set of opinions in which it was not entirely clear what rule of law commanded a majority.

2. *McMillan* could not be considered dispositive of claims that the use of acquitted conduct does not violate due process because *McMillan* did not involve the use of acquitted conduct; intervening caselaw based on *Alleyne v United States*, 570 US 99 (2013), essentially overruled *McMillan*'s Sixth Amendment analysis; and the intertwining nature of the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process rendered *McMillan*'s due-process analysis significantly compromised. *Watts* was also unhelpful in resolving whether the use of acquitted conduct at sentencing violated due process because *Watts* addressed only a double-jeopardy challenge to the use of acquitted conduct.

3. Reliance on acquitted conduct at sentencing violates due process based on the guarantees of fundamental fairness and the presumption of innocence, as several state courts and many judges and commentators have concluded. When a jury has made no findings regarding a defendant's conduct, as in *McMillan*, no constitutional impediment prevents a sentencing court punishing the defendant as if the defendant engaged in that conduct using a preponderance-of-the-evidence standard. But when a jury has specifically determined that the prosecution has not proved beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent. The use of the preponderance-of-the-evidence standard in evaluating conduct that is protected by the presumption of innocence violates due process. Because the sentencing court punished the defendant more severely on the basis of the judge's finding by a preponderance of the evidence that the defendant committed the murder of which the jury had acquitted him, it violated the defendant's due-process protections.

Sentence for felon-in-possession vacated; case remanded to the Saginaw Circuit Court for resentencing.

Justice VIVIANO, concurring, agreed with the majority that due process precludes consideration of acquitted conduct at sentencing under a preponderance-of-the-evidence standard, but he wrote separately to state his position that defendant's sentence also violated the Sixth

Amendment because it would not have been reasonable but for the judge-found fact that defendant had committed the conduct for which he had been acquitted. Justice VIVIANO further stated that he had serious concerns regarding whether the consideration of acquitted conduct at sentencing could ever comply with the Sixth Amendment.

Justice CLEMENT, joined by Justices MARKMAN and ZAHRA, dissenting, stated that a trial court does not violate the presumption of innocence by considering conduct underlying an acquitted charge when sentencing a defendant for convicted offenses because, at sentencing, the standard of proof is lower, requiring only that the facts considered by the trial court are supported by a preponderance of the evidence. She stated that defendant was not sentenced as if he had been convicted of the crime of murder, but rather as if he had been convicted of felon-in-possession as a fourth-offense habitual offender, with the trial court further determining by a preponderance of the evidence that defendant had caused a death while doing so. Justice CLEMENT noted that the majority's standard was unsupported by precedent, was contrary to *Ewing*, and might be difficult to apply in practice. She would have affirmed the Court of Appeals' holding that the trial court did not err by considering conduct underlying defendant's acquitted charge but reversed the Court of Appeals' decision to remand the case to the trial court for a *Crosby* hearing. Instead, she would have remanded the case to the Court of Appeals pursuant to *People v Steanhouse*, 500 Mich 453 (2017), to determine whether the trial court abused its discretion by violating the principle of proportionality.

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OPINION

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FILED July 29, 2019

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 152934

ERIC LAMONTEE BECK,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

MCCORMACK, C.J.

In this case, we consider whether a sentencing judge can sentence a defendant for a crime of which the defendant was acquitted.

That the question seems odd foreshadows its answer. But to explain the question first: Once a jury acquits a defendant of a given crime, may the judge, notwithstanding that acquittal, take the same alleged crime into consideration when sentencing the defendant for *another* crime of which the defendant was convicted? Such a possibility presents itself when a defendant is charged with multiple crimes. The jury speaks, convicting on some

charges and acquitting on others. At sentencing for the former, a judge might seek to increase the defendant's sentence (under the facts of this case, severely increase, though we consider the question in principle) because the judge believes that the defendant really committed one or more of the crimes on which the jury acquitted.

Probably committed, that is: A judge in such circumstances might reason that although the jury acquitted on some charges, the jury acquitted because the state failed to prove guilt on those charges beyond a reasonable doubt. But the jury might have thought it was somewhat likely the defendant committed them. Or the judge, presiding over the trial, might reach that conclusion. And so during sentencing, when a judge may consider the defendant's *uncharged* bad acts under a lower standard—a mere preponderance of the evidence—the judge might impose a sentence reflecting both the crimes on which the jury convicted, and also those on which the jury acquitted but which the judge finds the defendant more likely than not did anyway. Is that permissible?

We hold that the answer is no. Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime.

Because the trial court in this case relied at least in part on acquitted conduct[1] when imposing sentence for the defendant's conviction of being a felon in possession of a

[1] A brief aside on vocabulary: The dissent criticizes the term "acquitted conduct" as misleading, but that term comes directly from United Supreme Court precedent. See, e.g., *Watts v United States*, 519 US 148, 153-154; 117 S Ct 633; 136 L Ed 2d 554 (1997); *Booker v United States*, 543 US 220, 240; 125 S Ct 738; 160 L Ed 2d 621 (2005).

firearm, we reverse the Court of Appeals, vacate that sentence, and remand the case to the Saginaw Circuit Court for resentencing.[2]

I. FACTS AND PROCEDURAL HISTORY

The defendant was jury-convicted as a fourth-offense habitual offender of being a felon in possession of a firearm (felon-in-possession) and carrying a firearm during the commission of a felony (felony-firearm), second offense, but acquitted of open murder, carrying a firearm with unlawful intent, and two additional counts of felony-firearm attendant to those charges. The applicable guidelines range for the felon-in-possession conviction was 22 to 76 months, but the court imposed a sentence of 240 to 400 months (20 to 33⅓ years), to run consecutively to the mandatory five-year term for second-offense felony-firearm. The court explained its reasons for the sentence imposed as, among other things, its finding by a preponderance of the evidence that the defendant committed the murder of which the jury acquitted him. The court stated (emphasis added):

> With respect to that charge the Court does find that there are compelling reasons to go over the guidelines. The Court believes that . . . to sentence within the guidelines would not be proportionate to the seriousness of the defendant's conduct or the seriousness of his criminal history. And for that reason the Court is going to go over the guidelines in setting a sentence that is, in fact, proportionate to those things.
>
> In addition to that, the maximum—when you reach the maximum on the guidelines in this case it's at 75 points, this is way over that at 125 points.

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[2] Defendant's request that the resentencing occur before a different judge is denied because we are not persuaded that the standards set forth in *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997), require reassigning the case to a different judge. See *People v Hicks*, 485 Mich 1060 (2010) (applying the *Hill* standards). In all other respects, the defendant's application for leave to appeal is denied because we are not persuaded that the remaining questions presented should be reviewed by this Court.

That is another reason the Court may, and will go over the guidelines in this case.

This gentleman has a prior murder conviction on his record that he pled guilty to for which he served 13 years in prison. That was in 1991. He was discharged from parole in 2007. In 2010, only three years later, he pled no contest to a firearms, possession by a felon for which he received 252 days in jail. And then this charge, offense date was June 11, 2013 where, again, he is in possession of a firearm at a murder scene.

The testimony in this case by one of the witnesses who could not identify him was that a man approached the victim with a gun. She saw a muzzle flash and the victim fell to the ground and the perpetrator ran off.

The other witness, who was not alive at the time of the trial, and was barely alive at the time of the prelim, identified this gentleman as the person who approached the victim with the gun. Gave a positive identification. Indicated she saw the gun. Then her story wavered as far as whether she saw the shooting or whether she was in her kitchen at the time of the shooting. I think the inconsistency, and where she was at the time of the shooting, as well as her not being in court, affected the jury's verdict. *They could not find, beyond a reasonable doubt, that the defendant committed the homicide. But the Court certainly finds that there is a preponderance of the evidence that he did*.

And I am not substituting my opinion for their's [sic]. I am just bound by a different standard in this matter. And that is the reason for the Court's finding that, in fact, this gentleman, in my opinion, did kill the victim for no reason other than jealousy. But, at the very minimum, he was the only person seen at the scene with a weapon seconds prior. Two people hearing a shot, and another lady seeing a shoot[ing] by someone she couldn't identify. And, certainly, provided the weapon. *But in the Court's opinion, he didn't just provide it, he actually was the person who perpetrated the killing. And I do find by a preponderance of the evidence that that has been shown. And I do consider that in going over the guidelines in this matter*.

So for the fact that the guidelines don't properly—are so far out of scoring of 125, where 75 is the highest—but, more importantly, the fact that there was a death. *And the Court finds by a preponderance of the evidence that this gentleman did shoot the victim*.

The defendant appealed and challenged his convictions and sentences on multiple grounds, including that the trial court erred by increasing his sentence on the basis of conduct of which he had been acquitted. The Court of Appeals issued an unpublished opinion remanding for further sentencing proceedings (a *Crosby* remand)[3] under *People v Steanhouse*, 313 Mich App 1; 880 NW2d 297 (2015), aff'd in part and rev'd in part by *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017). *People v Beck*, unpublished per curiam opinion of the Court of Appeals, issued November 17, 2015 (Docket No. 321806). The defendant sought leave to appeal in this Court, which first held his application in abeyance for our decision in *Steanhouse*.[4] *People v Beck*, 884 NW2d 283 (Mich, 2016). After issuing our decision in *Steanhouse*, we ordered oral argument on the defendant's application and directed that it be heard at the same session as oral argument

[3] A *Crosby* remand is the remedy this Court adopted in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), for the Sixth Amendment violation that would occur when judicial fact-finding was used to score the mandatory sentencing guidelines. It involves a remand to the trial court for a determination of whether that court would have imposed a materially different sentence if its discretion had not been constrained by the guidelines. *Id*. at 399. This Court adopted the procedure from *United States v Crosby*, 397 F3d 103 (CA 2, 2005). *Lockridge*, 498 Mich at 395-398.

[4] Among other issues, the defendant challenged the reasonableness of his sentence, and this Court held in *Steanhouse* that

> the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the "principle of proportionality" set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), "which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." [*Steanhouse*, 500 Mich at 459-460.]

on the prosecution's application in *People v Dixon-Bey*, 501 Mich 1066 (2018). *People v Beck*, 501 Mich 1065, 1065-1066 (2018).[5]

II. LEGAL BACKGROUND

A. CONSTITUTIONAL AMENDMENTS

The defendant argues that the trial court's reliance on conduct of which he was acquitted to increase his sentence violates his constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution, as interpreted by the United States Supreme Court.[6] The Sixth Amendment of the United States Constitution provides in part:

> 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

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[5] Our order asking for oral argument on the application directed the parties to brief the following issues:

> (1) the appropriate basis for distinguishing between permissible trial court consideration of acquitted conduct, see *People v Ewing (After Remand)*, 435 Mich 443, 451-452 [458 NW2d 880] (1990) (opinion by BRICKLEY, J.); *id*. at 473 (opinion by BOYLE, J.); see also *United States v Watts*, 519 US 148 [117 S Ct 633; 136 L Ed 2d 554] (1997), and an impermissible "independent finding of defendant's guilt" by a trial court on an acquitted charge, see *People v Grimmett*, 388 Mich 590, 608 [202 NW2d 778] (1972), overruled on other grounds by *People v White*, 390 Mich 245, 258 (1973); see also *People v Fortson*, 202 Mich App 13, 21 [507 NW2d 763] (1993); and (2) whether the trial court abused its discretion by departing from the guidelines range, where the jury acquitted the defendant of murder, but the court departed based on its finding by a preponderance of the evidence that the defendant had perpetrated the killing. [*Beck*, 501 Mich at 1065.]

As in *Dixon-Bey*, we also invited the Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan to file amicus curiae briefs.

[6] The defendant has not independently challenged the trial court's reliance on acquitted conduct under the Michigan Constitution, so we do not address that issue here.

> the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation.

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. CASELAW INTERPRETING THOSE RIGHTS

1. UNITED STATES SUPREME COURT

As a general matter, the Fourteenth Amendment incorporates the Sixth Amendment right to a jury trial in state prosecutions. *Duncan v Louisiana*, 391 US 145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1968). And the Fourteenth Amendment right to due process includes "the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " *In re Winship*, 397 US 358, 363; 90 S Ct 1068; 25 L Ed 2d 368 (1970), quoting *Coffin v United States*, 156 US 432, 453; 15 S Ct 394; 39 L Ed 481 (1895).

The United States Supreme Court has issued a number of decisions potentially relevant to the issue presented here—whether a sentencing judge may rely on acquitted conduct when sentencing a defendant without violating due process or the right to a jury trial. In the first, *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986), the Court did not specifically address acquitted conduct. Rather, it considered whether a Pennsylvania statute that allowed sentencing courts to find by a preponderance of the evidence that the person "visibly possessed a firearm" during the commission of the

offense, resulting in a five-year mandatory minimum sentence, was constitutional. *Id*. at 81. That is, the statute permitted the court to find by a preponderance a fact the jury had not been asked to decide. The Court held that the statute did not violate the Due Process Clause of the Fourteenth Amendment or the jury-trial guarantee of the Sixth Amendment. *Id*. at 91-93. It explained that it saw no reason to "constitutionaliz[e] burdens of proof at sentencing." *Id*. at 92.

Next came *United States v Watts*, 519 US 148; 117 S Ct 633; 136 L Ed 2d 554 (1997). *Watts* did address a sentencing court's reliance on acquitted conduct, but in the context of a claim that the use of such conduct violated the Double Jeopardy Clause of the Fifth Amendment. Citing *McMillan*, the Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id*. at 157. The Court did not address the Fourteenth Amendment right to due process.

Around 1999, the United States Supreme Court's jurisprudence analyzing a defendant's due-process and Sixth Amendment rights underwent a sea change. In *Jones v United States*, 526 US 227, 232; 119 S Ct 1215; 143 L Ed 2d 311 (1999), and then *Apprendi v United States*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the Court established the following constitutional rule:[7] "[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." *Apprendi*, 530 US at 490. The Court further noted that its rule was grounded in the "Due Process Clause of the Fifth

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[7] *Jones* was decided on statutory-construction grounds, but the next term the *Apprendi* Court concluded that its rule was constitutionally mandated.

Amendment and the notice and jury trial guarantees of the Sixth Amendment" and that "[t]he Fourteenth Amendment commands the same answer in this case involving a state statute." *Apprendi*, 530 US at 476. The "*Apprendi* revolution," as it has been called, has wrought significant changes in sentencing practices in state and federal courts. See generally *Booker v United States*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005) (relying on *Apprendi*'s rule to strike down the mandatory federal sentencing guidelines and make them advisory only); *Lockridge*, 498 Mich at 399 (doing the same to Michigan's mandatory sentencing guidelines).

2. MICHIGAN SUPREME COURT

This Court has also addressed the use of acquitted conduct, albeit in a case with a fractured set of opinions in which it is not entirely clear what rule of law commanded a majority. In *People v Ewing (After Remand)*, 435 Mich 443; 458 NW2d 880 (1990), there were three substantive opinions:[8] Justice BRICKLEY's lead opinion, Justice ARCHER's opinion concurring in part and dissenting in part, and Justice BOYLE's concurring opinion (joined by Justices RILEY and GRIFFIN) that dissented in result. Justice BOYLE's opinion blessed the practice of sentencing courts relying on acquitted conduct as long as it was proven by a preponderance of the evidence. *Id*. at 473 (opinion by BOYLE, J.). Justice BOYLE relied primarily on *McMillan* and *Dowling v United States*, 493 US 342, 349; 110 S Ct 668; 107 L Ed 2d 708 (1990), to support that conclusion. *Ewing (After Remand)*, 435 Mich at 472-473 & n 15.

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[8] Justice CAVANAGH wrote a brief two-sentence concurring opinion that was silent on reasoning (joined by Justice LEVIN).

Justice BRICKLEY's lead opinion is harder to parse. He agreed with Justice BOYLE that "the mere fact of a prior acquittal of charges whose underlying facts are properly made known to the trial judge is not, without more, sufficient reason to preclude the judge from taking those facts into account at sentencing." *Id*. at 451 (opinion by BRICKLEY, J.). Yet his opinion proceeds to say that a judge's right to rely on such conduct might be limited under some circumstances not before the Court. *Id*. at 453-455. Among these caveats is the statement that "we are not presented with the issue whether a defendant may be punished for a crime for which no conviction was obtained; this is clearly unconstitutional." *Id*. at 454. Finally, Justice BRICKLEY agreed with the majority of justices who concluded a remand to the trial court was required to "test the accuracy of these allegations regarding his conduct." *Id*. at 446. Thus, the binding rule of law from *Ewing*, if any, is murky at best.[9]

III. ANALYSIS

The question whether the Sixth and Fourteenth Amendments permit the use of acquitted conduct to increase a defendant's sentence presents issues of constitutional

[9] Perhaps for this reason, this Court has never cited *Ewing* for any binding legal rule. Notwithstanding these questions, much of the dissent's argument relies on *Ewing* and treats it as binding precedent. For reasons we have explained, we disagree with the dissent's reading of *Ewing*. Moreover, it is worth noting that Justice BRICKLEY's lead opinion provided the fourth vote for the disposition in *Ewing*: a remand to the trial court for further development of the sentencing record; Justice BOYLE and the justices joining her opinion would have simply reinstated the trial court's sentence. Thus, even assuming that Justice BRICKLEY agreed with the dissent in some theoretical but undefined way about acquitted conduct, it is difficult to see how that agreement could equate to a binding legal rule given the difference in the votes as to the disposition of the case. "[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication[.]" *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985).

interpretation, which we review de novo. *Lockridge*, 498 Mich at 373. That means that we review the issues independently, with no required deference to the trial court. *Millar v Constr Code Auth*, 501 Mich 233, 237; 912 NW2d 521 (2018).

Federal courts that have addressed constitutional challenges to the use of acquitted conduct at sentencing have relied almost entirely on *McMillan* and *Watts* to reject both due-process and Sixth Amendment challenges. See, e.g., *United States v Horne*, 474 F3d 1004, 1006 (CA 7, 2007) (citing *McMillan* and *Watts* but not identifying the constitutional right at issue); *United States v Dorcely*, 372 US App DC 170, 175-177 (rejecting both due-process and Sixth Amendment arguments, citing *McMillan* and *Watts*); *United States v Faust*, 456 F3d 1342, 1347-1348 (CA 11, 2006) (finding no Sixth Amendment violation, discussing *Watts*); *United States v Boney*, 298 US App DC 149, 160-161; 977 F2d 624 (1992) (due process) (collecting cases). We see several problems with relying on those cases for due-process purposes,[10] and we address each of these concerns in greater detail below.

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[10] We decline to reach the defendant's argument that the use of acquitted conduct violates the Sixth Amendment right to a jury trial under *Apprendi* and its progeny. To our knowledge, although some federal district courts have opined that the use of acquitted conduct is unconstitutional and declined to consider it at sentencing, no appellate court in the country has accepted that argument. See, e.g., *United States v White*, 551 F3d 381, 384-385 (CA 6, 2008) (finding no Sixth Amendment problem with relying on acquitted conduct when sentencing a defendant under the *advisory* guidelines system because "[b]y freeing a district court to impose a non-guidelines sentence, *Booker* pulled out the thread that holds White's Sixth Amendment claim together"). But there has been persistent criticism of that uniformity. See, e.g., *White*, 551 F3d at 387 (Merritt, J., dissenting) (arguing that the defendant's sentence, as increased on the basis of acquitted conduct, "represents an as-applied violation of White's Sixth Amendment rights" under *Apprendi*).

A. *McMILLAN*

There are at least three problems with relying on *McMillan* as dispositive of claims that the use of acquitted conduct does not violate due process. First, *McMillan* did not involve the use of acquitted conduct. Second, its constitutional analysis rests on very shaky footing in light of intervening caselaw. Third, even if it is only *McMillan*'s Sixth Amendment analysis that has been abrogated, the intertwining nature of the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process makes it all but impossible not to view its due-process analysis as significantly compromised.

First problem: *McMillan* did not involve a trial court's reliance on acquitted conduct, and so it never addressed this unique question.[11] Thus, its general holding that it does not violate due process or the Sixth Amendment for the trial court to find facts by a preponderance of the evidence when imposing sentence is not obviously applicable.[12]

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[11] To the extent *McMillan*'s analysis is grounded in the general principle from *Williams v New York*, 337 US 241, 69 S Ct 1079; 93 L Ed 1337 (1949), that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all," *McMillan*, 477 US at 91, it is noteworthy that *Williams* itself limited the breadth of its holding by asserting that "[w]hat we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due-process clause," *Williams*, 337 US at 252 n 18; see also *Townsend v Burke*, 334 US 736, 741; 68 S Ct 1252; 92 L Ed 1690 (1948) (holding that sentencing a defendant on the basis of untrue assumptions about his criminal record violated due process).

[12] *McMillan* itself has language recognizing that its rule may not apply outside the particular question it addressed. See *McMillan*, 477 US at 91 (stating that "we have little difficulty concluding that *in this case* the preponderance standard satisfies due process") (emphasis added); *id*. at 92 (stating that "[w]e see nothing *in Pennsylvania's scheme* that would warrant constitutionalizing burdens of proof at sentencing") (emphasis added). Other courts have also recognized that *McMillan* and related Supreme Court cases, "while generally endorsing rules that permit sentence enhancements to be based on conduct not proved to the same degree required to support a conviction, have not embraced the concept

Acquitted conduct is, of course, different from uncharged conduct—acquitted conduct has been formally charged and specifically adjudicated by a jury. While it is true that *McMillan* declined to "constitutionaliz[e] burdens of proof at sentencing," *McMillan*, 477 US at 92, that disinclination was expressed in an answer to a different question than the one we answer now.

Acquitted conduct is already constitutionalized. Due process encompasses the requirement that the state prove the charges beyond a reasonable doubt, to be sure. But that's not all it guarantees.[13] See *Faust*, 456 F3d at 1352 (Barkett, J., concurring specially) (concluding that the use of acquitted conduct at sentencing violates "other aspects of 'the requirement of fundamental fairness' embodied in the constitutional right to due process of law"), quoting *Winship*, 397 US at 369 (Harlan, J., concurring). It also encompasses the presumption of innocence and the requirement of notice.

A defendant is entitled to a presumption of innocence as to all charged conduct until proven guilty beyond a reasonable doubt, and that presumption is supposed to do meaningful constitutional work as long as it applies. At least that's what we tell the accused[14] and the jury[15] about how it works. We can think of no reason that a jury's finding

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that those rules are free from constitutional constraints." *United States v Lombard*, 72 F3d 170, 176 (CA 1, 1995).

[13] See, e.g., *Faust*, 456 F3d at 1351 n 2 (Barkett, J., concurring specially) ("I address my disagreement with *McMillan* primarily in order to distinguish the due process claim rejected by the Supreme Court in that case from the very different and particular due process problem . . . that arises when a defendant is sentenced on the basis of charges of which he has actually been acquitted.").

[14] MCR 6.610(E)(3)(b)(*iv*); MCR 6.302(B)(3)(b) and (c).

[15] M Crim JI 1.9; M Crim JI 3.2.

the defendant not guilty of a charge undoes that guarantee. In fact, the jury's view that the state did not meet its burden of proof should cut the other way.

Hypotheticals are helpful. Imagine a judge sending a defendant acquitted of *all* the charges against him to prison because the judge believed the evidence supported some punishment. Or a judge in a bench trial acquits a defendant of some charges but convicts of others and then punishes him as if he had been convicted of all the charges.

The difference between acquitted conduct and uncharged bad acts presented at sentencing is critical and constitutional. Acquitted conduct shows up at sentencing in the company of the due-process protection of the presumption of innocence; uncharged conduct does not, says *McMillan*.

Due process also requires adequate notice. A defendant sentenced for conduct the jury acquitted him of surely has a notice complaint. See, e.g., *United States v Canania*, 532 F3d 764, 777 (CA 8, 2008) (Bright, J., concurring) (stating that the use of acquitted conduct at sentencing violates the due-process right to notice because "[i]t is not unreasonable for a defendant to expect that conduct underlying a charge of which he's been acquitted to play no determinative role in his sentencing"); see also *Ewing*, 435 Mich at 454 (opinion by BRICKLEY, J.) (stating that before acquitted conduct may be used to enhance a sentence, a defendant "should be able to test the accuracy of those allegations" so that the judge "may hear argument from the parties and decide how to view [acquitted conduct] testimony in light of the acquittal"). Because *McMillan* concerned uncharged conduct and not acquitted conduct, it does not address these constitutional due-process questions. Nor could it have—uncharged and therefore unconsidered-by-a-jury conduct is apples to acquitted conduct's oranges.

Second problem: *McMillan*'s continued vitality is significantly in question after *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013). At minimum, its Sixth Amendment analysis has been overruled in everything but name.[16]

Third problem: even if *McMillan*'s due-process analysis remains superficially viable, the complementary analysis of the Sixth Amendment jury-trial right and the Fourteenth Amendment due-process right necessarily calls it into question as a practical matter. See *Apprendi*, 530 US at 476 (stating that its rule is grounded in the notice and jury-trial rights of the Sixth Amendment as well as the Fourteenth Amendment); *Alleyne*, 570 US at 104 (opinion by Thomas, J.) (stating that it is the Sixth Amendment jury-trial right "in conjunction with the Due Process Clause" that requires that each element of a

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[16] The *Alleyne* Court did us no favors in that regard given that arguably, but only arguably, five justices said that *Alleyne* overruled *McMillan*. *Alleyne*, 570 US at 119-120 (Sotomayor, J., concurring, joined by Ginsburg and Kagan, JJ.) (noting that "Five Members of the Court" in *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), recognized that *McMillan*'s analysis was inconsistent with *Apprendi* and that *McMillan* survived *Harris* only because Justice Breyer could not "yet accept" *Apprendi*); see *id*. at 124 (Breyer, J., concurring in part and concurring in the judgment) (agreeing with overruling *Harris* because "the time has come to end this anomaly in *Apprendi*'s application" but not mentioning *McMillan*) (emphasis added); *id*. at 133 (Alito, J., dissenting) (characterizing the majority opinion as "cast[ing] aside" *McMillan* as well as *Harris*). But the evidence is mounting, and it suggests *McMillan*'s due-process analysis has become equally untenable. See *United States v Haymond*, 588 US ___; ___ S Ct ___; ___ L Ed 2d ___ (2019) (Docket No. 17-1672) (opinion by Gorsuch, J.); slip op at 9-10 (stating that *Alleyne* found "no basis in the original understanding of the Fifth and Sixth Amendments for *McMillan* and *Harris*" and "expressly overruled those decisions").

Several courts post-*Alleyne* have specifically stated that *Alleyne* overruled *McMillan*, even though the majority opinion in *Alleyne* did not explicitly do so. See, e.g., *Robinson v Woods*, 901 F3d 710, 715 (CA 6, 2018) (stating that "*Alleyne* was a watershed opinion, overruling two prior precedents—*Harris* . . . and *McMillan*"); *United States v Cassius*, 777 F3d 1093, 1095 (CA 10, 2015) (stating that in *Alleyne* "the Supreme Court explicitly overruled *Harris* and *McMillan*"); *Commonwealth v Hanson*, 623 Pa 388, 414; 82 A3d 1023 (2013) (characterizing *Alleyne* as having "overruled" *Harris* and *McMillan*).

crime be proved to the jury beyond a reasonable doubt). The interwoven nature of the United States Supreme Court's analysis of the Sixth Amendment and due-process rights makes it impossible to conclude that its analysis of the former has been repudiated but its analysis of the latter remains entirely viable.

That said, while we believe *McMillan* rests on an extremely shaky foundation, we leave to the United States Supreme Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v Shearson/American Express, Inc*, 490 US 477, 484; 109 S Ct 1917; 104 L Ed 2d 526 (1989). Thus, it is because *McMillan* did not involve acquitted conduct that we conclude that it does not answer the question here.

B. *WATTS*

Watts is in many ways the most difficult to dispense with, and also the most difficult to parse. *Watts* directly addressed a sentencing court's use of acquitted conduct at sentencing. But though its language was not always specific about the constitutional right it examined,[17] in a later case the Court made clear that *Watts* addressed only a double-jeopardy challenge to the use of acquitted conduct. Five justices gave it side-eye treatment

[17] The *Watts* Court at one point quoted *Dowling* for the proposition that " 'an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.' " *Watts*, 519 US at 156, quoting *Dowling*, 493 US at 349. *Dowling*, unlike *Watts*, was *both* a double-jeopardy *and* a due-process case. But it also involved a different question from the one presented here: the issue in *Dowling* was whether the trial court could admit other-acts evidence in a subsequent prosecution when that other-acts evidence involved conduct of which the defendant had previously been acquitted. It did not involve whether the trial court could punish the defendant more severely on the basis of that acquitted conduct. See also *People v Oliphant*, 399 Mich 472, 499-500; 250 NW2d 443 (1976) (similarly concluding, 14 years before *Dowling*, that the introduction of acquitted conduct as other-acts evidence did not violate double jeopardy, though not addressing due process).

in *Booker* and explicitly limited it to the double-jeopardy context. *Booker*, 543 US at 240 n 4 (observing that *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument," so it was "unsurprising that we failed to consider fully the issues presented to us in these cases").[18] As we must, we take the Court at its word. We therefore find *Watts* unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process.[19]

C. SO NOW WHAT?

Because we conclude that neither *McMillan* nor *Watts* requires us to reject the defendant's argument that the use of acquitted conduct to sentence a defendant more

[18] In a pre-*Booker* case, *Alabama v Shelton*, 535 US 654, 665; 122 S Ct 1764; 152 L Ed 2d 888 (2002), the United States Supreme Court cited *Watts* for the proposition (made in passing) that a sentencing court's reliance on acquitted conduct does not violate due process. We consider that dictum repudiated by *Booker*'s clear statement limiting *Watts* to the double-jeopardy context.

[19] We also find it significant that although *Watts* stated that the use of acquitted conduct at sentencing was not *constitutionally* barred by double-jeopardy principles, its analysis relied substantially on a statute that has no counterpart in Michigan law. In *Watts*, the Supreme Court quoted 18 USC 3661 as codifying the "longstanding principle that sentencing courts have broad discretion to consider various kinds of information." *Watts*, 519 US at 151. That statute provides:

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

harshly violates due process,[20] we address this question on a clean slate.[21] A few state courts have concluded that reliance on acquitted conduct at sentencing violates due process, grounding that conclusion in the guarantees of fundamental fairness and the presumption of innocence. See *State v Cote*, 129 NH 358, 375; 530 A2d 775 (1987) (concluding that "the presumption of innocence is as much ensconced in our due process as the right to counsel," citing *Coffin*); *State v Marley*, 321 NC 415, 425; 364 SE2d 133 (1988) (also citing *Coffin* in support of its conclusion that "due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder after the jury had acquitted defendant of first degree murder").

We agree. When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard.[22] But when a jury has specifically determined that the prosecution has not proven

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[20] The dissent claims that our holding directly contradicts existing precedent, but it primarily cites only federal circuit court cases that rely on *McMillan* and *Watts* to support its claim. But of course "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). And to the extent the dissent relies on *McMillan*, *Watts*, and our decision in *Ewing*, we have explained why we don't find these decisions persuasive or binding.

[21] While we disagree with the dissent's view that *Ewing* is binding on us, we agree with the dissent that our decision in *People v Grimmett*, 388 Mich 590; 202 NW2d 278 (1972), overruled in part on other grounds by *People v White*, 390 Mich 245; 212 NW2d 222 (1973), is not controlling here for the reasons the dissent gives.

[22] Unless, of course, those findings mandate an increase in the mandatory minimum or statutory maximum sentence. See *Apprendi*, 530 US 466; *Alleyne*, 570 US 99.

beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent.[23] "To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself." *Marley*, 321 NC at 425.

Unlike the uncharged conduct in *McMillan*, conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process. While we recognize that our holding today represents a minority position, one final consideration informs our conclusion: the volume and fervor of judges and commentators who have criticized the practice of using acquitted conduct as inconsistent with fundamental fairness and common sense. Regarding jurists, see, e.g., *Faust*, 456 F3d at 1349 (Barkett, J., concurring specially) ("I strongly believe . . . that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment"); *id*. at 1351-1352 & n 2; *Canania*, 532 F3d at 778 (Bright, J., concurring) ("I wonder what the man on the street might say about this practice of allowing a prosecutor and judge to

[23] We respectfully disagree with the dissent's view that this is an overbroad reading of the presumption of innocence. The fact that the prosecution has overcome this presumption as to one charge does not allow a court to ignore that it has *not* done so as to others. See generally *Estelle v Williams*, 425 US 501, 503; 96 S Ct 1691; 48 L Ed 2d 126 (1976) (stating that "[t]o implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process" and "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt"). Little would seem to more "undermine the fairness of the fact-finding process" than having the fact-finder render a not-guilty verdict yet allow the judge to impose a sentence based on his own conclusion that the defendant *did* commit the acquitted offense.

say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); *United States v Mercado*, 474 F3d 654, 662 (CA 9, 2007) (Fletcher, J., dissenting) ("Such a sentence has little relation to the actual conviction, and is based on an accusation that failed to receive confirmation from the defendant's equals and neighbors"); *United States v White*, 551 F3d 381, 392 (CA 6, 2008) (Merritt, J., dissenting) ("[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); *United States v Brown*, 892 F3d 385, 408 (CA DC, 2018) (Millett, J., concurring) ("[A]llowing courts at sentencing 'to materially increase the length of imprisonment' based on conduct for which the jury acquitted the defendant guts the role of the jury in preserving individual liberty and preventing oppression by the government.") (citation omitted); *id*. at 415 (Kavanaugh, J., dissenting in part) ("[T]here are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness . . . .").

Regarding commentators, for just a sampling, see Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can be Done About It*, 49 Suffolk Univ L Rev 1, 25 (2016) (quoting other sources for the proposition that "[t]he use of acquitted conduct has been characterized as, among other things, 'Kafka-esque, repugnant, uniquely malevolent, and pernicious[,]' 'mak[ing] no sense as a matter of law or logic,' and . . . a 'perver[sion] of our system of justice,' as well as 'bizarre' and 'reminiscent of *Alice in Wonderland*' "); Ngov, *Judicial Nullification of Juries: The Use of Acquitted Conduct at Sentencing*, 76 Tenn L Rev 235, 261 (2009) ("[T]he jury is essentially ignored when it disagrees with the prosecution. This outcome is nonsensical and in contravention of the thrust of recent Supreme Court jurisprudence."); Beutler, *A*

Look at the Use of Acquitted Conduct at Sentencing, 88 J Crim L & Criminology 809, 809 (1998) (observing that "[t]he use of acquitted conduct in sentencing raises due process and double jeopardy concerns that deserved far more careful analysis than they received" in *Watts* and noting "the fundamental differences between uncharged and acquitted conduct which trigger these constitutional concerns").

This ends here. Unlike many of those judges and commentators, we do not believe existing United States Supreme Court jurisprudence prevents us from holding that reliance on acquitted conduct at sentencing is barred by the Fourteenth Amendment. We hold that it is.

Because the sentencing court punished the defendant more severely on the basis of the judge's finding by a preponderance of the evidence that the defendant committed the murder of which the jury had acquitted him,[24] it violated the defendant's due-process protections.

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[24] The dissent spends most of its pages denying that this is what the trial court did, asserting that the court merely sentenced him as if he had caused a death while committing felon-in-possession as a fourth-offense habitual offender. But the judge's comments at sentencing are clear, as the dissent itself later concedes. Thus, to the extent the distinction the dissent wants to draw between sentencing a defendant more harshly based on the conclusion that the defendant committed an offense of which he was acquitted and sentencing a defendant "while considering conduct that supported the acquitted charge" is a meaningful one (and we are not convinced it is), this case plainly involves the former.

Finally, the dissent essentially says that trial courts are free to sentence defendants for all acquitted charges as long as the sentence imposed is statutorily permitted in connection with the convicted charge. Or, put differently, the court can't impose the statutory sentence for the acquitted charge if it's not a permissible sentence for the convicted charge. But that constraint is already established by the sentencing statutes. The dissent's constitutional rule therefore would apply to exactly zero cases.

IV. CONCLUSION

We hold that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted. Because the judge did exactly that in this case, we vacate the defendant's sentence for felon-in-possession and remand that case to the Saginaw Circuit Court for resentencing consistent with this opinion.

Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 152934

ERIC LAMONTEE BECK,

Defendant-Appellant.

VIVIANO, J. (*concurring*).

In every criminal trial, jurors are instructed, "What you decide about any fact in this case is final."[1] But if a judge may increase a defendant's sentence beyond what the jury verdict alone authorizes—here, based on the judge's finding that the defendant committed a crime of which the jury just acquitted him—a more accurate instruction would read: "What you decide about any fact in this case is interesting, but the court is always free to disregard it." Though I concur fully in the majority opinion, including its holding that due process precludes consideration of acquitted conduct at sentencing under a preponderance-of-the-evidence standard, I write separately to explain (1) why I believe that, because defendant's sentence would not survive reasonableness review without the judge-found fact of homicide, his sentence also violates the Sixth Amendment, and (2) why I believe

[1] M Crim JI 2.4(3). A similar instruction is given in every civil trial. See M Civ JI 2.03 ("Your decision as to any fact in this case is final.").

more generally that the consideration of acquitted conduct at sentencing raises serious concerns under the Sixth Amendment.

The Sixth Amendment enshrines the right to trial by jury: "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 . . . ."[2] As the majority recognizes, the United States Supreme Court has not addressed whether the use of acquitted conduct at sentencing is permissible under the Sixth Amendment. *United States v Watts*[3] was a Fifth Amendment decision. However, although the Supreme Court has not directly answered this question, I believe that its Sixth Amendment jurisprudence provides helpful guidance.

I. THE JURY MUST AUTHORIZE ALL FACTS NECESSARY TO PREVENT A SENTENCE FROM BEING SUBSTANTIVELY UNREASONABLE

In *Blakely v Washington*,[4] the Supreme Court stated, "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." In other words, as Justice Antonin Scalia explained in his dissent in *Oregon v Ice*, "[W]e have hitherto considered 'the central sphere of [the Supreme Court's] concern' to be facts necessary to the increase of the defendant's sentence beyond what the jury

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[2] US Const, Am VI. See also Const 1963, art 1, § 20 ("In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury . . . .").

[3] *United States v Watts*, 519 US 148; 117 S Ct 633; 136 L Ed 2d 554 (1997).

[4] *Blakely v Washington*, 542 US 296, 304; 124 S Ct 2531; 159 L Ed 2d 403 (2004), quoting 1 Bishop, Criminal Procedure (2d ed), § 87, p 55.

verdict alone justifies. 'If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.' "[5] This makes sense. "A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct."[6]

Even under *United States v Booker*'s[7] advisory guidelines, there can be instances where the jury's verdict alone does not authorize the punishment because the punishment would not be reasonable except for the judge's finding of fact. In his concurrence in *Rita v United States*, Justice Scalia offered two hypothetical situations that would pose such Sixth Amendment concerns:

> First, consider two brothers with similar backgrounds and criminal histories who are convicted by a jury of respectively robbing two banks of an equal amount of money. Next assume that the district judge finds that one brother, fueled by racial animus, had targeted the first bank because it was owned and operated by minorities, whereas the other brother had selected the second bank simply because its location enabled a quick getaway. Further assume that the district judge imposes the statutory maximum upon both brothers, basing those sentences primarily upon his perception that bank robbery should be punished much more severely than the Guidelines base level advises, but explicitly noting that the racially biased decisionmaking of

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[5] *Oregon v Ice*, 555 US 160, 178; 129 S Ct 711; 172 L Ed 2d 517 (2009) (Scalia, J., dissenting), quoting *Cunningham v California*, 549 US 270, 290; 127 S Ct 856; 166 L Ed 2d 856 (2007). See also *Alleyne v United States*, 570 US 99, 103; 133 S Ct 2151; 186 L Ed 2d 314 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

[6] *United States v Haymond*, 588 US ___; ___ S Ct ___; ___ L Ed 2d ___ (2019) (Docket No. 17-1672) (opinion of Gorsuch, J.); slip op at 6. See also *Blakely*, 542 US at 308 ("[T]he Sixth Amendment by its terms is . . . a reservation of jury power.").

[7] *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

> the first brother further justified his sentence. Now imagine that the appellate court reverses as excessive only the sentence of the nonracist brother. Given the dual holdings of the appellate court, the racist has a valid Sixth Amendment claim that his sentence was reasonable (and hence lawful) only because of the judicial finding of his motive in selecting his victim.
>
> Second, consider the common case in which the district court imposes a sentence *within* an advisory Guidelines range that has been substantially enhanced by certain judge-found facts. For example, the base offense level for robbery under the Guidelines is 20, which, if the defendant has a criminal history of I, corresponds to an advisory range of 33–41 months. If, however, a judge finds that a firearm was discharged, that a victim incurred serious bodily injury, and that more than $5 million was stolen, then the base level jumps by 18, producing an advisory range of 235–293 months. When a judge finds all of those facts to be true and then imposes a within-Guidelines sentence of 293 months, those judge-found facts, or some combination of them, are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence. His failure to find them would render the 293-month sentence unlawful. That is evident because, were the district judge explicitly to find *none* of those facts true and nevertheless to impose a 293-month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive.[8]

These hypotheticals illustrate that "for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant. *Every* sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment."[9] This is because, as stated above, "The Sixth Amendment requires that '[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts

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[8] *Rita v United States*, 551 US 338, 371-373; 127 S Ct 2456; 168 L Ed 2d 203 (2007) (Scalia, J., concurring) (citations omitted).

[9] *Id*. at 372.

established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.' "[10] As Justice Scalia explained in his dissenting statement in *Joseph Jones v United States*:

> The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, "requires that each element of a crime" be either admitted by the defendant, or "proved to the jury beyond a reasonable doubt." Any 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." 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.[11]

While the Supreme Court has not yet expressly adopted (or rejected) Justice Scalia's Sixth Amendment analysis,[12] it appears that the Supreme Court has been moving toward a

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[10] *Id*. at 370, quoting *Booker*, 543 US at 244.

[11] *Joseph Jones v United States*, 574 US ___, ___; 135 S Ct 8, 8; 190 L Ed 2d 279 (2014) (Scalia, J., dissenting) (citations omitted). Justice Scalia contended that the Court should "put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." *Id*. at ___; 135 S Ct at 9. While I do not necessarily disagree with Justice Scalia's criticism of *Alleyne*, *Alleyne*, 570 US at 124 (Roberts, C.J., joined by Scalia, J., dissenting), and of substantive reasonableness review, *Rita*, 551 US at 370 (Scalia, J., concurring in part), *Alleyne* and substantive reasonableness review are the law of the land. See *People v Lockridge*, 498 Mich 358, 388; 870 NW2d 502 (2015) (stating that "the rule from *Alleyne* applies" to Michigan's indeterminate sentencing scheme); *id*. at 392 (stating that departure sentences "will be reviewed . . . for reasonableness").

[12] Though, as Justice Scalia noted, the federal circuit courts have rejected this analysis. *Joseph Jones*, 574 US at ___; 135 S Ct at 9 (Scalia, J., dissenting) ("Nonetheless, the Courts of Appeals 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."), citing *United States v Benkahla*, 530 F3d 300, 312

more robust interpretation of the Sixth Amendment. In *McMillan v Pennsylvania*,[13] the Supreme Court summarily dismissed the defendant's Sixth Amendment challenges to judge-found facts affecting his sentence. However, after *McMillan*, the Supreme Court has found multiple penal schemes in violation of the Sixth Amendment.[14] As the majority notes, *McMillan* is now all but overruled.[15]

As the above discussion makes clear, "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.

(CA 4, 2008); *United States v Hernandez*, 633 F3d 370, 374 (CA 5, 2011); *United States v Ashqar*, 582 F3d 819, 824-825 (CA 7, 2009); *United States v Treadwell*, 593 F3d 990, 1017-1018 (CA 9, 2010); *United States v Redcorn*, 528 F3d 727, 745-746 (CA 10, 2008). This Court has not addressed this argument, which was not presented in either *Lockridge*, 498 Mich 358, or *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017).

[13] *McMillan v Pennsylvania*, 477 US 79, 93; 106 S Ct 2411; 91 L Ed 2d 67 (1986).

[14] *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000) ("Other 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."); *Blakely*, 542 US 296 (holding that the "exceptional" sentence that resulted from the judge-found fact violated the Sixth Amendment); *Alleyne*, 570 US at 112 ("[A] fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense."); *Haymond*, 588 US at ___ (opinion by Gorsuch, J.); slip op at 1 (holding that the mandatory minimum imposed after the defendant violated the conditions of his supervised release violated the Sixth Amendment).

[15] See *ante* at 15 n 16; *Haymond*, 588 US at ___ (opinion by Gorsuch, J.); slip op at 9-10 (stating that *Alleyne* found "no basis in the original understanding of the Fifth and Sixth Amendments for *McMillan* and *Harris* [*v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002),]" and "expressly overruled those decisions").

It *may not* be found by a judge."[16] As Justice Scalia seemed to recognize, the consideration of acquitted conduct at sentencing is particularly at odds with this rule.[17] Take, for example, the instant case: defendant was charged with open murder, carrying a firearm with unlawful intent, felon in possession of a firearm (felon-in-possession), and three counts of felony-firearm. Defendant was convicted, as a fourth-offense habitual offender, of felon-in-possession and second-offense felony-firearm, and acquitted of the other charges. But the judge found, by a preponderance of the evidence, that defendant "was the person who perpetrated the killing," and the judge imposed a prison sentence of 240 to 400 months, a sentence far in excess of the guidelines minimum sentence range of 22 to 76 months. Such a significant departure would clearly not be reasonable based only on the jury's verdict that defendant was guilty of felon-in-possession and felony-firearm.[18] Thus, the fact that defendant killed the victim was a "legally essential predicate for his imposition of the . . . sentence."[19] Because the finding that defendant committed homicide exposed him to a longer sentence, the Sixth Amendment requires that it be found by a jury or

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[16] *Joseph Jones*, 574 US at ___; 135 S Ct at 8 (Scalia, J., dissenting).

[17] *Id*. at ___; 135 S Ct at 9 (lamenting the Court's unwillingness to address the anomaly in its caselaw and noting that the case at hand was "a particularly appealing case" in which to do so "because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury *acquitted* them of that offense.").

[18] *Steanhouse*, 500 Mich at 459-460 ("[T]he proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), 'which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' ").

[19] *Rita*, 551 US at 372 (Scalia, J., concurring).

admitted by the defendant. Here, it was only found by a judge. Therefore, I would hold that the sentence at issue violates the Sixth Amendment.

II. CONSIDERATION OF ACQUITTED CONDUCT MORE GENERALLY

While the above analysis would be sufficient to resolve this case, I have serious concerns regarding whether acquitted conduct may ever be considered at sentencing without violating the Sixth Amendment. These concerns are based on the history of the jury and the Supreme Court's Sixth Amendment jurisprudence.

A. THE HISTORICAL IMPORTANCE OF THE JURY

"[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law."[20] As the Supreme Court explained in *Apprendi v New Jersey*:[21]

> We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears "that the jury right could be lost not only by gross denial, but by erosion." But 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 reasonable doubt.

Practice must adhere to these principles "[b]ecause the Constitution's guarantees cannot mean less today than they did the day they were adopted . . . ."[22] Thus, while some trial practices may have changed since the founding, a historical inquiry provides important

[20] *Ice*, 555 US at 170.

[21] *Apprendi*, 530 US at 483-484.

[22] *Haymond*, 588 US at ___ (opinion of Gorsuch, J.); slip op at 7.

evidence as to what "intelligible content"[23] we should give to the Sixth Amendment right to a jury.

As an initial matter, the importance of the jury cannot be overstated. Blackstone referred to the jury as the "sacred bulwark of the nation,"[24] and he described the trial by jury as

> a trial that hath been used time out of mind in this nation, and seems to have been co-eval with the first civil government thereof. Some authors have endeavoured to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is, that they were in use among the earliest Saxon colonies . . . . [Its] establishment however and use, in this island, of what date soever it be, . . . was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it.[25]

At the time of the founding, Alexander Hamilton noted, "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."[26] More recently, the Supreme Court has referred to the

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[23] *Blakely*, 542 US at 305 (noting "the need to give intelligible content to the right of jury trial"); *Apprendi*, 530 US at 499 (Scalia, J., concurring) ("And the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury,' has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.").

[24] *People v Cain*, 498 Mich 108, 129; 869 NW2d 829 (2015) (VIVIANO, J., dissenting), quoting 4 Blackstone, Commentaries on the Laws of England, p *350.

[25] 3 Blackstone, Commentaries on the Laws of England, pp **349-350.

[26] The Federalist No. 83 (Hamilton) (Hamilton ed, 1864), p 614. Or as Thomas Jefferson asserted, "I consider [trial by jury] as the only anchor ever yet imagined by man, by which

right to trial by jury " 'as the great bulwark of [our] civil and political liberties,' " intended " '[t]o guard against a spirit of oppression and tyranny on the part of rulers . . . .' "[27]

The role of juries in sentencing has evolved over time, such that modern sentencing is very different than it was at the time of the founding. Unlike modern juries, colonial juries played a role in sentencing. This was because several crimes were capital offenses, and thus, a guilty verdict necessarily dictated the punishment.[28] Consequently, practically, a judge often had no discretion in sentencing:

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a government can be held to the principles of its constitution." 3 Washington, *The Writings of Thomas Jefferson* (New York: Derby & Jackson, 1859), p 71.

[27] *Apprendi*, 530 US at 466, quoting 2 Story, Commentaries on the Constitution of the United States (4th ed), pp 540-541. See also *Haymond*, 588 US at ___ (opinion of Gorsuch, J.); slip op at 5 ("Together with the right to vote, those who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.' ") (citation omitted); *Sullivan v Louisiana*, 508 US 275, 281; 113 S Ct 2078; 124 L Ed 2d 182 (1993) (describing trial by jury as a " 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function"), quoting *Rose v Clark*, 478 US 570, 577; 106 S Ct 3101; 92 L Ed 2d 460 (1986) (alteration in original); Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), p 96 ("If we seek a paradigmatic image underlying the original Bill of Rights, we cannot go far wrong in picking the jury.").

[28] Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 Ohio St L J 935, 939 (2010) ("While scholars disagree about the details, it is reasonable to conclude that the colonial jury was a de facto and, to a degree, a de jure sentencer. It was a de facto sentencer because of the nature of the criminal law, on the one hand, and the process by which it was selected, on the other. Many crimes were capital offenses. The result was necessarily binary and easy to understand—guilt and death or not guilty and freedom. Scalable punishments, punishments involving a term of years, were not common until the end of the eighteenth century with the growth of penitentiaries."); Spooner, *An Essay on the Trial by Jury* (Boston: Bela Marsh, 1852), p 97 ("[T]he principle of Magna Carta, that a man should be *sentenced* only by his peers, was in force, and acted upon as law, in England, so lately as 1725, (five hundred years after Magna Carta,) . . . .").

> [W]ith respect to the criminal law of felonious conduct, "the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it)." As Blackstone, among many others, has made clear, "[t]he judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law."[29]

However, on the rare occasions when a penalty was not set by law, judges had discretion to take into account a wide variety of factors in sentencing.[30]

Though I am aware of no source or scholarship specifically addressing whether judges could consider acquitted conduct at sentencing, it is true that the Supreme Court "has repeatedly sought to guard the historic role of the jury . . . ."[31] But disregarding an

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See also *Williams v New York*, 337 US 241, 247-248; 69 S Ct 1079; 93 L Ed 1337 (1949) ("Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial.") (citation omitted).

[29] *Apprendi*, 530 US at 479-480 (citation omitted).

[30] *Williams*, 337 US at 246 ("[B]oth before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."); *Apprendi*, 530 US at 481 ("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.") (emphasis omitted).

[31] *Haymond*, 588 US at ___ (opinion of Gorsuch, J.); slip op at 21.

acquittal at sentencing "trivializes 'legal guilt' or legal innocence."[32] Unlike uncharged conduct, which the jury has only not "authorize[d]," consideration of acquitted conduct entails consideration of "facts of which the jury expressly disapproved."[33] In a related context, Justice Neil Gorsuch explained the impact of similar Sixth Amendment violations: "Nor did the absence of a jury's finding beyond a reasonable doubt only infringe the rights of the accused; it also divested the ' "people at large" '—the men and women who make up a jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments."[34] And the "people at large" perceive the slight. As one frustrated juror wrote:

> It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice, and it is a very noble cause as you know, sir. We looked across the table at one another in respect and in sympathy. We listened, we thought, we argued, we got mad and left the room, we broke, we rested that charge until tomorrow, we went on. Eventually, through every hour-long tape of a single drug sale, hundreds of pages of transcripts, ballistics evidence, and photos, we delivered to you our verdicts.

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[32] *United States v Pimental*, 367 F Supp 2d 143, 152 (D Mass, 2005); *United States v Ibanga*, 454 F Supp 2d 532, 541 (E D Va, 2006), sentence vacated and case remanded, 271 F Appx 298 (CA 4, 2008) ("A sentence that repudiates the jury's verdict undermines the juror's role as both a pupil and participant in civic affairs. The juror as pupil learns that the law does not value the results of his or her participation in the judicial process and may reject it at will. The disparity in the sentencing ranges with and without the inclusion of acquitted conduct effectively '[drives] a wedge between the community's sense of appropriate punishment and the criminal sanction inflicted.' ") (citation omitted).

[33] *Pimental*, 367 F Supp 2d at 152.

[34] *Haymond*, 588 US at ___ (opinion of Gorsuch, J.); slip op at 11.

> What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty. Had they shown us hard evidence, that might have been the outcome, but that was not the case. That is how you instructed your jury in this case to perform and for good reason.[35]

How can the jury continue to be " 'the great bulwark of [our] civil and political liberties' "[36] when an acquittal means only that a defendant will not formally be sentenced for the crime but may, in reality, spend far longer in prison because a judge finds by a preponderance of the evidence that the defendant, in fact, committed the crime of which he or she was acquitted by the jury?[37] Consideration of acquitted conduct at sentencing diminishes the historical role of the jury.

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[35] *United States v Canania*, 532 F3d 764, 778 n 4 (CA 8, 2008) (Bright, J., concurring) (quotation marks omitted).

[36] *Apprendi*, 530 US at 477 (citation omitted).

[37] It is worth noting that, although the federal circuits have yet to agree, see note 12 of this opinion, several judges and commentators have expressed their vigorous opposition to the consideration of acquitted conduct at sentencing on Sixth Amendment grounds. See, e.g., *Pimental*, 367 F Supp 2d at 152-153 (opinion of Gertner, J.) ("[W]hen a court 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. . . . To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense—as a matter of law or logic."); *Ibanga*, 454 F Supp 2d at 536 (opinion of Kelley, J.) ("Sentencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafka-esque result."); *United States v Faust*, 456 F3d 1342, 1350 (CA 11, 2006) (Barkett, J., concurring) ("Even though [the defendant]'s maximum possible sentence was not increased by the sentencing judge's independent findings—three separate findings of actual, criminal conduct—they certainly do change the quantity and quality of the stigma he faces. . . . [E]ven more importantly, "to consider acquitted conduct trivializes 'legal guilt' or 'legal innocence' . . . ."); *United States v White*, 551 F3d 381, 392 (CA 6, 2008) (Merritt, J., dissenting) ("[T]he use of

B. JURY NULLIFICATION

Another historical consideration also supports this conclusion. Juries have historically protected defendants from prosecutorial overreach. "The Framers envisioned the Sixth Amendment as a protection for defendants from the power of the Government."[38] As Chief Justice John Roberts stated: "The question here is about the power of judges, not juries. . . . [T]he historical understanding of the jury right [is] as a defense *from* judges,

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acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); *Canania*, 532 F3d at 777 (Bright, J., concurring) ("[T]he unfairness perpetuated by the use of 'acquitted conduct' at sentencing in federal district courts is uniquely malevolent."); *United States v Bell*, 420 US App DC 387, 389; 808 F3d 926 (2015) (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. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?"); *United States v Bagcho*, ___ US App DC ___, ___; 923 F3d 1131, 1141 (2019) (Millett, J., concurring) ("It stands our criminal justice system on its head to hold that even a single extra day of imprisonment can be imposed for a crime that the jury says the defendant did not commit."); Outlaw, *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 L Rev 189, 190 (2015); Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-Esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 Santa Clara L Rev 675, 721 (2014); Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn L Rev 235 (2009).

[38] *Alleyne*, 570 US at 124 (Roberts, C.J., dissenting); see also *Blakely*, 542 US at 308 ("[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury.").

not a defense *of* judges. See *Apprendi*, [530 US at 498 (Scalia, J., concurring)] ('Judges, it is sometimes necessary to remind ourselves, are part of the State')."[39]

Key to their role as "[p]opulist [p]rotectors,"[40] juries found both the facts and the law.[41] Chief Justice John Jay, in *Georgia v Brailsford*,[42] summarized the jury's power:

> It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of

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[39] *Alleyne*, 570 US at 129-130 (Roberts, C.J., dissenting).

[40] *The Bill of Rights: Creation and Reconstruction*, p 83.

[41] Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1193 (1991) ("[I]t was widely believed in late eighteenth-century America that the jury, when rendering a general verdict, could take upon itself the right to decide both law and fact."); Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L Rev 377, 446-448 (1996) ("In contrast to the traditional English jury, American juries were often granted the authority to resolve issues of law as well as issues of fact. This authority was recognized in constitutions, statutes, and judicial decisions following the Revolution. Furthermore, it was emphasized in a variety of celebrated eighteenth century cases involving political crimes during English rule of the colonies."); Warshawsky, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 Geo L J 191, 198 (1996) ("Although criminal juries in England . . . possessed the raw power to ignore the law as given by the judge, they never acquired the legal right to do so. In America, by contrast, the right of the jury independently to decide questions of law was widely recognized until well into the nineteenth century."); Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U Mich J L Reform 93, 95 (2006) ("The version of the jury adopted by the Founders largely mirrored the English archetype, but included a few structural modifications. While the division of labor between judge and jury remained the same, the American version added the general verdict and endowed jurors with law-finding powers. . . . The adoption of a hybrid jury—one concerned with both fact-finding and sentencing—reflected the Founders' vision that the jury should serve as a bulwark against government oppression and a check against an unresponsive central government.").

[42] *Georgia v Brailsford*, 3 US (3 Dall) 1, 4; 1 L Ed 483 (1794).

> jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.

An important way in which a jury might decide the law was by jury nullification. Jury nullification is "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness."[43] Juries used jury nullification to ameliorate the effects of what they perceived to be unjust laws:

> The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part.[44]

The power of jury nullification was held in high esteem at the time of the founding—Benjamin Franklin, John Adams, and Thomas Jefferson all spoke of jury nullification with

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[43] *Black's Law Dictionary* (11th ed); see also *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992) ("Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence.").

Jury nullification is sometimes also referred to as jury mitigation. See *Function Over Form*, 40 U Mich J L Reform at 100 ("Jurors were unashamed of using their powers of mitigation and frequently returned partial verdicts with a less serious charge . . . .").

[44] *Nathaniel Jones v United States*, 526 US 227, 245; 119 S Ct 1215; 143 L Ed 2d 311 (1999). See also *Apprendi*, 530 US at 480 n 5 ("[J]uries devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant.").

approbation.[45] The Founders took steps to further insulate American juries and ensure that they could practice jury nullification:

> [W]hen creating their own legal institutions, the colonists endorsed the roles played by the English jury—namely, mitigator of unduly harsh sentences and populist check on a potentially unresponsive central government—but cast aside its inelegant form. In so doing, the colonists helped to insulate the process of jury-based mitigation from criticism. In England, the blatant manipulation of facts by criminal juries led critics to target the jury's function as mitigator. But in the United States, such tensions were minimized through reliance on the general verdict and by granting the jury the power to determine the law.[46]

Understandably, there has been considerable debate about whether jury nullification is desirable.[47] Indeed, courts have consistently held that defendants are not entitled to a

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[45] Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 Washburn L J 379, 428 n 56 (2007) ("John Adams argued, 'It is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.' Benjamin Franklin's Pennsylvania Gazette commented that if jury nullification is not the law, 'it is better than law, it ought to be law, and will always be law wherever justice prevails.' Thomas Jefferson remarked, 'Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making [of] them.' ") (citations omitted; alterations in original).

[46] *Function Over Form*, 40 U Mich J L Reform at 103; see also Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U Penn L Rev 33, 36 (2003) ("This power to mitigate or nullify the law in an individual case is no accident. It is part of the constitutional design—and has remained part of that design since the Nation's founding.").

[47] Compare McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L Rev 1103, 1110 (2013), and *Opposing Jury Nullification*, 85 Geo L J 191.

jury instruction regarding nullification.[48] This Court stated in *People v Bailey*,[49] "The jury 'has the *power* to acquit on bad grounds, because the government is not allowed to appeal from an acquittal by a jury. But jury nullification [like the jury's ability to convict a defendant of a lesser crime than the evidence proves] is just a power, not also a right . . . .' "[50] Yet, though it is only a power, it is a well-established power that this Court has consistently recognized—"Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency."[51] Regardless of whether jury nullification is good policy, or

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[48] See, e.g., *Sparf v United States*, 156 US 51, 99; 15 S Ct 273; 39 L Ed 343 (1895); *United States v Krzyske*, 836 F2d 1013, 1021 (CA 6, 1988) ("The right of a jury, as a buffer between the accused and the state, to reach a verdict despite what may seem clear law must be kept distinct from the court's duty to uphold the law and to apply it impartially. . . . To have given an instruction on nullification would have undermined the impartial determination of justice based on law."); *Demers*, 195 Mich App at 208.

[49] *People v Bailey*, 451 Mich 657; 549 NW2d 325 (1996), amended on denial of reh'g 453 Mich 1204 (1996).

[50] *Id*. at 671 n 10, quoting *United States v Kerley*, 838 F2d 932, 938 (CA 7, 1988) (alterations in original). See also *People v Ward*, 381 Mich 624, 628; 166 NW2d 451 (1969) ("A jury may have the power but it has no right to disregard the court's instructions.").

[51] *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980); *Hamilton v People*, 29 Mich 173, 189-190 (1874) ("It is true that juries in criminal cases cannot properly find a conviction against their consciences. It is also true that they cannot be questioned or held responsible upon their verdict, nor called on to explain its reasons. Whether those reasons are based on a doubt or disbelief of evidence, or on a rejection of the exposition of law given by the court, they are equally beyond review."). See also *United States v Dougherty*, 154 US App DC 76, 473 F2d 1113 (1972) ("The pages of history shine on instances of the

whether there is a right to jury nullification, the fact remains that juries at the time of the founding and at present have the power to exercise jury nullification.

But this power is rendered nearly meaningless if consideration of acquitted conduct is permissible. If a jury finds a defendant guilty of a lesser offense and acquits him or her of a greater offense, such jury nullification loses nearly all practical effect if the judge can consider the acquitted conduct at sentencing. As Judge Gilbert Merritt explained:

> Allowing the use of acquitted conduct at sentencing also eviscerates the jury's longstanding power of mitigation, a close relative of the power of jury nullification. . . . A jury cannot mitigate the harshness of a sentence it deems excessive if a sentencing judge may use acquitted conduct to sentence the defendant as though he had been convicted of the more severe offense.[52]

Instead of acquitting a defendant of certain offenses and convicting of others, a jury would have to exercise jury nullification by the more extreme path of acquitting the defendant on all counts. Consideration of acquitted conduct at sentencing appears to conflict with the Founders' views on jury nullification, given that it would severely limit that check on the government's power.

C. DISTINGUISHING OFFENSE ELEMENTS FROM SENTENCING FACTORS

I also believe that the consideration of acquitted conduct at sentencing leads to anomalous results.[53] Specifically, it involves relabeling a particular fact from an element

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jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge.").

[52] *White*, 551 F3d at 394 (Merritt, J., dissenting).

[53] *Faust*, 456 F3d at 1351 (Barkett, J., concurring) ("The majority believes that, in a single proceeding, Faust's possession of ecstacy [sic] may be both an element of a crime and a

of a crime at the trial stage, which the jury must find beyond a reasonable doubt, to a mere "sentencing factor" at the sentencing stage, which the judge can find by a preponderance of the evidence. In *McMillan v Pennsylvania*,[54] the Supreme Court distinguished for the first time between an element of an offense and "a sentencing factor that comes into play only after the defendant has been found guilty . . . beyond a reasonable doubt." "Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."[55] And, as we have noted, "The failure to have the jury find an element establishing 'a distinct and aggravated crime,' not the resulting sentence, is the constitutional deficiency[.]"[56]

The United States Supreme Court has provided guidance on several occasions regarding how to distinguish between a sentencing factor and an element. The Supreme Court has looked to a variety of factors, including tradition, statutory structure, common practice, the risk of unfairness if a fact were to be decided by a jury, legislative history, and the effect the fact would have on the sentence. For example, in *Nathaniel Jones v United*

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sentencing fact provable by a mere preponderance of the evidence. This anomaly is hardly justified . . . .").

[54] *McMillan*, 477 US at 86.

[55] *Nathaniel Jones*, 526 US at 232. See also *Apprendi*, 530 US at 500 ("[I]n order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and . . . proved beyond a reasonable doubt). Thus, it is critical to know which facts are elements.") (citations omitted).

[56] *Lockridge*, 498 Mich at 384 (citations omitted).

States,[57] the question was whether serious bodily injury was an element defining an aggravated form of the underlying crime or a sentencing factor. The Court considered the structure of the statute as well as other provisions, reasoning that Congress likely did not intend for "serious bodily injury" to be an element in certain offenses but only a sentencing factor in the offense in the case at hand.[58] The Court also looked to similar state statutes, which used "serious bodily injury" as an element of an offense rather than as a sentencing factor.[59] Thus, the Court held that serious bodily injury was an element.[60] Similarly, in *Castillo v United States*,[61] the Court turned to the statutory structure, tradition, the risk of unfairness if decided by a jury, legislative history, and the effects that the factual finding would have on the sentence. Notably, as for tradition, *Castillo* noted that "[t]raditional sentencing factors often involve either characteristics of the offender, such as recidivism, or special features of the manner in which a basic crime was carried out (*e.g.*, that the defendant abused a position of trust or brandished a gun)."[62]

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[57] *Nathaniel Jones*, 526 US 227.

[58] *Id*. at 236.

[59] *Id*. at 236-237.

[60] *Id*. at 239, 251-252.

[61] *Castillo v United States*, 530 US 120; 120 S Ct 290; 147 L Ed 2d 94 (2000).

[62] *Id*. at 126. See also *Almendarez-Torres v United States*, 523 US 224, 228; 118 S Ct 1219; 140 L Ed 2d 350 (1998) ("We therefore look to the statute before us and ask what Congress intended. Did it intend the factor that the statute mentions, the prior aggravated felony conviction, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment? In answering this question, we look to the statute's language,

The Court further refined the definition of an element in *Apprendi v New Jersey*[63] and *Alleyne v United States.*[64] In *Apprendi*, the Supreme Court noted the link between an element of the crime and punishment: "Other 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."[65] In *Alleyne*, the Supreme Court extended *Apprendi*'s holding to judge-found facts that increased the mandatory minimum, not just the maximum as *Apprendi* had held—"a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense."[66] But *Alleyne* noted that it did not restrict fact-finding necessary to exercising discretion in setting a sentence within legal limits; it only required that facts that increase the penalty be

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structure, subject matter, context, and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text.").

[63] *Apprendi*, 530 US 466.

[64] *Alleyne*, 570 US 99.

[65] *Apprendi*, 530 US at 490. See also *Nathaniel Jones*, 526 US at 252 (Stevens, J. concurring) ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."); *id*. at 253 (Scalia, J., concurring) ("I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed."); *Apprendi*, 530 US at 503 (Thomas, J., concurring) (determining that the value of stolen property "was an element [of larceny] because punishment varied with value"); *Blakely*, 542 US at 304 ("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,' Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.").

[66] *Alleyne*, 570 US at 112. See also *Apprendi*, 530 US at 501 (Thomas, J., concurring) ("This authority establishes that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment . . . .").

submitted to a jury—"Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."[67]

At the trial stage, each charged crime consists of its requisite elements. These elements must be found by a jury beyond a reasonable doubt.[68] But, when acquitted conduct is considered, the rug is pulled out from under a defendant at the sentencing stage. The defendant then discovers that the elements that the jury found were *not* established beyond a reasonable doubt are still going to be considered against him or her; they are suddenly no longer elements but now reappear as sentencing factors.[69]

In other words, if the prosecutor fails to establish a fact as an element at trial, the prosecutor gets a second bite at the apple: if the prosecutor can establish the fact by a preponderance of the evidence, then the fact can still dramatically affect the defendant's sentence. Take, for example, the instant case—though defendant was acquitted of open murder, the judge found by a preponderance of the evidence at sentencing that defendant had killed the victim, i.e., had committed the homicide. And on that basis, the trial court sentenced him to 240 to 400 months in prison, i.e., a minimum sentence more than three times greater than the upper limit of his guidelines minimum sentence range of 76 months.

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[67] *Alleyne*, 570 US at 103.

[68] *Nathaniel Jones*, 526 US at 232.

[69] I note that the Supreme Court has rejected attempts to evade the Sixth Amendment by merely changing a label. *Haymond*, 588 US at ___ (opinion of Gorsuch, J.); slip op at 12 ("Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a 'sentencing enhancement.' ").

But treating a finding that defendant killed the victim as a sentencing factor is counterintuitive. Applying the analysis from *Nathaniel Jones* and *Castillo*, it cannot seriously be contended that killing the victim, i.e., causing the victim's death, would be a mere sentencing factor. Unsurprisingly, tradition[70] and common practice[71] indicate that causing the death of the victim is an element of a crime. And as is evidenced by the fact that the jury was already tasked with deciding whether defendant had committed open murder, it does not risk unfairness to have a jury decide whether the defendant killed the victim. All these considerations support the rather uncontroversial notion that killing the victim is an element of a crime rather than a mere sentencing factor. The important distinction that the United States Supreme Court has identified between offense elements and sentencing factors is much ado about nothing if a prosecutor can convert an offense

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[70] Blackstone defined manslaughter as "the unlawful killing of another without malice, either express or implied; which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act," and murder as " 'when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied.' " 4 Blackstone, *Commentaries on the Laws of England*, pp **191, 195 (citation omitted).

[71] Many states have adopted the Model Penal Code in whole or in part. Under the Model Penal Code, criminal homicide—which can constitute murder, manslaughter, and negligent homicide depending on a defendant's *mens rea*—occurs when a person "causes the death of another human being," i.e., kills another human being. Model Penal Code, § 210.1 (2018); *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "kill," in relevant part, as to "cause the death of"). Also, our Legislature and Supreme Court have deemed killing an element of any of the forms of murder or manslaughter for which defendant could have been convicted. MCL 750.316 (defining first-degree murder); *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003) (defining second-degree murder under MCL 750.317 as including, in relevant part, "(1) death, (2) caused by defendant's act"); *id*. at 535 (defining voluntary manslaughter, in relevant part, as " '[t]he act of killing' ") (citation omitted); *id*. at 536 (defining involuntary manslaughter to include "killing").

element (requiring proof beyond a reasonable doubt) to a sentencing factor (requiring proof by a preponderance of the evidence), resulting in a sentence similar to the one the defendant would have received if he or she had been convicted of the greater crime.[72] This, too, counsels against consideration of acquitted conduct at sentencing.

D. DIFFERENT BURDENS OF PROOF DO NOT RENDER CONSIDERATION OF ACQUITTED CONDUCT COMPATIBLE WITH AN ACQUITTAL

Proponents of the use of acquitted conduct argue that a judicial finding of guilt is not necessarily incompatible with a jury acquittal because different burdens of proof are involved in each determination. In other words, the proponents argue that acquittals are not proclamations of innocence but only findings that there was not proof of guilt beyond a reasonable doubt.[73] I find this argument unpersuasive. First, while an acquittal might mean that a jury was convinced by a preponderance of the evidence but not beyond a reasonable doubt, that is not certain; it is also possible that a jury acquitted believing that the evidence did not meet even the lower preponderance-of-the-evidence standard.[74] The

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[72] This is contrary to the statement that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration . . . ." *Nathaniel Jones*, 526 US at 232.

[73] See, e.g., *post* at 3-4 ("To the extent that the majority's position implies that a sentencing court's consideration of conduct underlying an acquitted charge directly contradicts a jury's acquittal decision, there is no logical anomaly in the trial court making a factual finding that may have been rejected by the jury at trial. An acquittal means only that the jury held a reasonable doubt as to the defendant's guilt of that crime, not that the underlying conduct did not occur."); *Watts*, 519 US at 156-157.

[74] Doerr, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 Colum Hum Rts L Rev 235, 261-262 (2009) ("Allowing a judge to enhance a defendant's sentence because the jury 'has not said that the defendant is innocent, either' eviscerates the policy and purpose of the Sixth Amendment jury-trial guarantee, especially

prosecutor should not receive the benefit of this ambiguity. Second, the logic that there might be evidence beyond a preponderance but not beyond a reasonable doubt skirts the issue. As Judge Patricia Millett explained:

> The problem with relying on that distinction in this setting is that the whole reason the Constitution imposes that strict beyond-a-reasonable-doubt standard is that it would be constitutionally intolerable, amounting "to a lack of fundamental fairness," for an individual to be convicted and then "imprisoned for years on the strength of the same evidence as would suffice in a civil case." *In re Winship*, [397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970)]. In other words, proof beyond a reasonable doubt is what we demand from the government as an indispensable precondition to *depriving an individual of liberty for the alleged conduct*. Constructing a regime in which the judge deprives the defendant of liberty on the basis of the very same factual allegations that the jury specifically found did not meet our constitutional standard for a deprivation of liberty puts the guilt and sentencing halves of a criminal case at war with each other.[75]

For this reason, finding elements of a crime only by a preponderance of the evidence is unconstitutional, even if there is a possibility that it is logically consistent with an acquittal.

Moreover, it is important to keep in mind the practical reality of sentencing. According to the Supreme Court, "The dispositive question . . . 'is one not of form, but of effect.' "[76] The reality is that when judges find by a preponderance of the evidence that a defendant committed the conduct for which he was acquitted, that defendant can, and often

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because an acquittal is the only action a jury can take to absolve a defendant of guilt. . . . The proper solution to this problem is not to ignore the fact that a jury's verdict of acquittal is ambiguous and punish the defendant by interpreting that verdict as 'maybe innocent.' ").

[75] *Bell*, 420 US App DC at 391 (Millett, J., concurring).

[76] *Ring v Arizona*, 536 US 584, 602; 122 S Ct 2428; 153 L Ed 2d 556 (2002), quoting *Apprendi*, 530 US at 494.

does, serve a longer prison sentence because of it.[77] But this seems counterintuitive—"In effect, juries rule on 'legal guilt, guilt determined by the highest standard of proof we know, beyond a reasonable doubt. And when a jury acquit[s] a defendant based on that standard, one would have expected no additional criminal punishment would follow.' "[78] In addition to a longer sentence, the defendant will also face additional stigma.[79] Regardless of whether an acquittal and consideration of acquitted conduct are logically inconsistent, the practical reality of sentencing calls into question the constitutionality of relying on acquitted conduct.

III. CONCLUSION

Although I agree with the majority that due process precludes consideration of acquitted conduct at sentencing under a preponderance-of-the-evidence standard, I believe it important to point out that defendant's sentence also violates the Sixth Amendment

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[77] *Bell*, 420 US App DC at 392 (Millett, J., concurring) ("The other explanation commonly proffered is that, as long as the final sentence does not exceed the statutorily authorized maximum length of incarceration for the offense of conviction, the defendant is only being sentenced for the crime he committed. That blinks reality when, as here, the sentence imposed so far exceeds the Guidelines range warranted for the crime of conviction itself that the sentence would likely be substantively unreasonable unless the acquitted conduct is punished too.").

[78] *Pimental*, 367 F Supp 2d at 150 (alteration in original).

[79] *Faust*, 456 F3d at 1350-1351 (Barkett, J., concurring) ("[T]the reasonable doubt standard is warranted when imputations of criminal conduct are at stake not only 'because of the possibility that [an individual] may lose his liberty upon conviction,' but also 'because of the *certainty* that he would be stigmatized . . . .' Even though Faust's maximum possible sentence was not increased by the sentencing judge's independent findings—three separate findings of actual, criminal conduct—they certainly do change the quantity and quality of the stigma he faces.") (citations omitted; alterations in original).

because it would not be reasonable but for the judge-found fact that defendant committed the conduct for which he was acquitted. Finally, for the above reasons, I have serious concerns regarding whether the consideration of acquitted conduct can ever comply with the Sixth Amendment.

David F. Viviano

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 152934

ERIC LAMONTEE BECK,

Defendant-Appellant.

CLEMENT, J. (*dissenting*).

The majority concludes that the trial court violated defendant's due-process rights during sentencing when it found by a preponderance of the evidence that defendant had caused a death—despite defendant's acquittal of the charge of open murder—and, relying on this finding, imposed a sentence above the recommended guidelines range. I dissent because I believe that the sentencing court properly considered all "circumstance[s] which aid[ed] the sentencing court's construction of a more complete and accurate picture of . . . defendant's background, history, or behavior . . . ." *People v Ewing (After Remand)*, 435 Mich 443, 472; 458 NW2d 880 (1990) (opinion by BOYLE, J.).

In Michigan, sentencing is "a matter for the exercise of judicial discretion [which] requires an individualized factual basis" of the defendant's personal, criminal, and mental history, as well as the circumstances of the crime. *People v Lee*, 391 Mich 618, 639; 218 NW2d 655 (1974). See also MCL 771.14 (requiring preparation of a presentence investigation report that "inquire[s] into the antecedents, character, and circumstances of the [defendant]" to aid the trial court in its sentencing determination). This individualized

consideration guides the sentencing court in imposing a sentence within the range of punishments set by the Legislature that is proportionate to the manner in which the particular offense was committed and to the background of the defendant. See *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990) ("[T]he Legislature, in setting a range of allowable punishments for a single felony, intended persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior record are less threatening to society."). Today, the majority restricts a sentencing court's access to information, a restriction that is not mandated by federal or state law and that is antithetical to this state's tradition of providing the broadest range of information to consider at sentencing. See *Lee*, 391 Mich at 639. In so doing, the majority endorses an overbroad reading of the presumption of innocence and rejects this Court's decision in *Ewing* without adequate justification.

The majority declares that the presumption of innocence prevents a trial court from considering at sentencing conduct underlying a charge for which the defendant was acquitted. This declaration expands the presumption of innocence beyond its function. The presumption of innocence is rooted in constitutional due process, and it requires that the government prove beyond a reasonable doubt every element of a criminal offense. *McMillan v Pennsylvania*, 477 US 79, 85; 106 S Ct 2411; 91 L Ed 2d 67 (1986). The presumption of innocence mandates only that a defendant cannot be *convicted and sentenced* for a crime unless the elements of that crime were proved beyond a reasonable doubt. Once the prosecutor overcomes the presumption of innocence by obtaining a conviction, the presumption does not prevent the trial court from considering the defendant's relevant conduct when imposing a sentence, even if that same conduct

supported an acquitted charge. The presumption *does* limit the trial court's sentencing discretion to the statutory penalties set by the Legislature for the convicted offenses, preventing the trial court from sentencing the defendant as if he had been convicted for the crime of which he was acquitted. Specifically, the trial court may not impose an additional concurrent or consecutive sentence for the acquitted charge and may not leave the confines of the continuum of sentences available for the convicted offenses. Accordingly, the trial court does not violate the presumption of innocence by considering conduct underlying an acquitted charge when sentencing the defendant for convicted offenses because the defendant is not being sentenced as if he had been *convicted* of the acquitted crime; it is merely a valid consideration of the manner in which the defendant committed the offenses for which he was convicted. See *Milbourn*, 435 Mich at 651.

To the extent that the majority's position implies that a sentencing court's consideration of conduct underlying an acquitted charge directly contradicts a jury's acquittal decision, there is no logical anomaly in the trial court making a factual finding that may have been rejected by the jury at trial. An acquittal means only that the jury held a reasonable doubt as to the defendant's guilt of that crime,[1] not that the underlying conduct

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[1] As stated in *Ewing (After Remand)*, 435 Mich at 452 (opinion by BRICKLEY, J.):

> Any number of reasons not related to the defendant's factual guilt or innocence may be hypothesized to explain a jury's decision to acquit. For example, a jury may acquit a factually guilty defendant because the prosecution was, for one reason or another, unable to present its best evidence, as would be the case where a strong witness died or disappeared before trial, yet sufficient evidence remained to persuade the prosecutor to proceed to trial. To take another example, it is also true, unfortunately, that

did not occur.[2] At sentencing, the standard of proof is lower, requiring only that the facts considered by the trial court are supported by a preponderance of the evidence. Because of this lower standard of proof, the trial court can properly make a finding at sentencing that may have been rejected by the jury at trial.

Here, the trial court was statutorily empowered to sentence defendant to any term of years up to life imprisonment for defendant's conviction of being a felon in possession of a firearm (felon-in-possession). Although felon-in-possession is generally punishable by up to five years' imprisonment, MCL 750.224f(5), defendant's status as a fourth-offense habitual offender, MCL 769.12(1)(b), raised his maximum potential sentence to life imprisonment. The guidelines minimum sentence range for defendant's felon-in-possession conviction was calculated to be 22 to 76 months' imprisonment. But at sentencing, the trial court found by a preponderance of the evidence that defendant had, while committing felon-in-possession, caused the death of Hoshea Pruitt. On the basis of this finding regarding the manner in which defendant committed felon-in-possession, the trial court sentenced defendant to 240 to 400 months' imprisonment. This sentence was within the range of permissible sentences for felon-in-possession authorized by the Legislature in MCL 750.224f(5) and MCL 769.12(1)(b). Contrary to the majority's

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a jury may acquit a factually guilty defendant because of confusion with regard to the judge's instructions.

[2] I have chosen to avoid referring to such conduct as "acquitted conduct" within this opinion because I believe that label is misleading. A jury may acquit the defendant of a criminal charge, but—absent the use of a special verdict form—the jury does not acquit the defendant of the underlying conduct. Accordingly—and although I acknowledge that the United States Supreme Court has used the term "acquitted conduct" as well—I believe that it is more precise to use the phrase "conduct underlying an acquitted charge."

position, defendant was not sentenced as if he had been convicted of the crime of murder, but rather as if he had been convicted of felon-in-possession as a fourth-offense habitual offender with the trial court further determining by a preponderance of the evidence that defendant had caused a death while doing so. There is no doubt that a sentencing court may generally consider facts relevant to how the defendant committed the offense, and there is no basis in the law to distinguish this particular factual finding from all other information relevant to the manner in which defendant committed felon-in-possession.

I suspect that, in this case, the majority feels like defendant is being sentenced for an offense he was acquitted of committing because the offense for which defendant was convicted has the same maximum penalty as the offense for which defendant was acquitted. The fact that MCL 769.12(1)(b) increases defendant's available maximum punishment for felon-in-possession to life imprisonment—the same maximum punishment available for murder—may make it seem like defendant is being sentenced for an offense for which he was acquitted.[3] But this is not an accurate observation. Consider instead a situation wherein a defendant is acquitted of murder, but convicted of second-degree home invasion. In this scenario, the recommended minimum sentence range for the particular defendant is 22 to 36 months' imprisonment. The trial court is not bound to follow this advisory range, *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015), but it is restricted by the statutory penalty for the convicted offense of second-degree home invasion. Second-degree home invasion may be punished by up to 15 years' imprisonment, MCL

[3] To the extent that some may find this troubling, the solution lies with the Legislature to narrow statutory penalties for crimes or to alter the substantial increase of statutory penalties in repeat-offender statutes like MCL 769.12.

750.110a(6), although MCL 769.34(2)(b) prohibits the trial court from imposing a minimum sentence that exceeds two-thirds of the statutory maximum sentence—as applied here, 10 years' imprisonment. In considering what sentence to impose in this 15-year continuum, the trial court is not prohibited from making factual findings regarding the manner in which defendant committed home invasion, even if those facts may have supported the acquitted charge of murder. As long as a preponderance of the evidence supports its conclusions, the trial court could find that the defendant killed a person in the course of committing home invasion and rely on this information to impose the highest sentence possible—10 to 15 years' imprisonment, as established by MCL 750.110a(6) and MCL 769.34(2)(b). The presumption of innocence does not prohibit this. The presumption of innocence only prevents the trial court from sentencing the defendant as if he had been convicted of murder, which carries a maximum penalty of life imprisonment.[4] As long as the trial court imposes a sentence within the 15-year statutory maximum of second-degree home invasion whose minimum does not violate MCL 769.34(2)(b), it is inaccurate to say that the defendant was sentenced as if he had committed murder.

In sum, I disagree with the majority that the presumption of innocence prevents the trial court from considering at sentencing conduct that supported charges for which the defendant was acquitted.[5] There is a precise difference between sentencing a defendant as

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[4] Specifically, first-degree murder "shall be punished by imprisonment in the state prison for life without eligibility for parole," MCL 750.316(1), and second-degree murder "shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same," MCL 750.317.

[5] I would also have held that the consideration of such conduct does not violate a defendant's Sixth Amendment rights, a conclusion that is consistent with the decision of

if he had been convicted of a crime for which he was acquitted and sentencing a defendant for a convicted offense while considering conduct that supported the acquitted charge, as this Court acknowledged nearly 30 years ago in *Ewing*. In concluding otherwise, the majority inaccurately dismisses *Ewing*'s holding as "murky at best,"[6] concluding that although Justice BOYLE's opinion provided three votes supporting the practice of

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every federal circuit court. See, e.g., *United States v Gobbi*, 471 F3d 302, 314 (CA 1, 2006), abrogated in part on other grounds as stated in *United States v Nagell*, 911 F3d 23, 31 n 8 (CA 1, 2018); *United States v Vaughn*, 430 F3d 518, 525-527 (CA 2, 2005); *United States v Hayward*, 177 F Appx 214, 215 (CA 3, 2006); *United States v Ashworth*, 139 F Appx 525, 527 (CA 4, 2005); *United States v Farias*, 469 F3d 393, 399-400 (CA 5, 2006); *United States v White*, 551 F3d 381, 383-384 (CA 6, 2008); *United States v Price*, 418 F3d 771, 787-788 (CA 7, 2005); *United States v High Elk*, 442 F3d 622, 626 (CA 8, 2006); *United States v Mercado*, 474 F3d 654, 655-656 (CA 9, 2007); *United States v Magallanez*, 408 F3d 672, 684-685 (CA 10, 2005); *United States v Duncan*, 400 F3d 1297, 1304-1305 (CA 11, 2005); *United States v Dorcely*, 372 US App DC 170; 454 F3d 366, 371 (2006).

[6] The majority also criticizes *Ewing* on the basis that this Court has never cited it for a binding legal rule. While this is correct, I would note that the Court of Appeals *has* repeatedly done so in its published decisions. See, e.g., *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007) ("A trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence."); *People v Granderson*, 212 Mich App 673, 679; 538 NW2d 471 (1995) ("A majority of the justices of our Supreme Court . . . subscribe to the view that a prior acquittal, without more, is not sufficient reason to preclude the court from taking into account the facts underlying that acquittal at sentencing."); *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994) ("A sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and acquittals."); *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991), overruled on other grounds *People v Randolph*, 466 Mich 532, 586 (2002) ("A sentencing judge may also consider the facts underlying uncharged offenses, pending charges, and acquittals."). And this Court has never released an opinion or order undermining this Court's decision in *Ewing*.

considering acquitted conduct at sentencing, Justice BRICKLEY's lead opinion did not similarly bless the practice.[7]

I disagree. In *Ewing*, when sentencing the defendant for first-degree criminal sexual conduct, the trial court found that the defendant " 'ha[d] carried on a course of conduct involving attacks on young women over a periods [sic] of five years.' " *Ewing (After Remand)*, 435 Mich at 466 (opinion by BOYLE, J.). In so doing, the trial court relied on information that supported pending charges, prior convictions, and uncharged offenses against the defendant that had been presented in the presentencing information report and during a *Golochowicz*[8] hearing. *Id*. at 465-467. Justice BRICKLEY, along with three other justices, agreed to remand the case to the trial court with the following instruction:

> On remand, the sentencing judge should indicate with greater specificity which facts he relied on in imposing sentence. If the judge determines that he relied on allegations against the defendant which did not result in a conviction, then the defendant must be afforded an opportunity to challenge the accuracy of those allegations. If the judge then determines that the accuracy of those facts has not been determined by a preponderance of the evidence, the defendant should be resentenced. Finally, if a resentencing is ordered, *the judge will be entitled to rely on testimony containing facts underlying an acquittal which was obtained after the original sentencing in this case, subject to the defendant's right to dispute the accuracy of that testimony.* [*Id*. at 446 (opinion by BRICKLEY, J.) (emphasis added).][9]

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[7] Justices LEVIN and CAVANAGH would not have reached the merits of the decision; Justice ARCHER would have concluded that conduct underlying acquitted charges could not be considered.

[8] *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982).

[9] The majority relies on the fact that Justice BRICKLEY provided the fourth vote for the disposition of a remand to support its conclusion that Justice BRICKLEY's approach to the consideration of acquitted conduct at sentencing was not consistent with the approach of Justices BOYLE, RILEY, and GRIFFIN (the dissenting justices who would have instead

The order expressly permits the trial court to rely on the defendant's conduct underlying charges for which, by the time of the resentencing, the defendant had been acquitted. Moreover, Justice BRICKLEY "agree[d] with Justice BOYLE and a number of federal decisions that the mere fact of a prior acquittal of charges whose underlying facts are properly made known to the trial judge is not, without more, sufficient reason to preclude the judge from taking those facts into account at sentencing." *Id*. at 451.

Yet, the majority asserts that Justice BRICKLEY's opinion is "hard[] to parse." The majority specifically cites Justice BRICKLEY's statement that this Court was "not presented with the issue whether a defendant may be punished for a crime for which no conviction was obtained; this is clearly unconstitutional," *id*. at 454, for support of its argument. But the context of that statement demonstrates that Justice BRICKLEY was not reneging on his earlier assertions supporting the consideration of conduct underlying acquitted charges at sentencing. In that portion of the opinion, Justice BRICKLEY sought to establish that the opinion did not hold "that the sentencing judge may rely on the mere *fact* that the defendant was once acquitted of, and therefore had necessarily been bound over on, criminal charges." *Id*. at 453. He emphasized that the trial court in the case at hand made factual findings based on testimony from the *Golochowicz* hearing and trial rather than the fact of the charges themselves. *Id*. at 453-454. He then stated that the Court was "not presented

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reinstated the trial court's sentence). This difference in disposition does not undermine the fact that Justices BOYLE, RILEY, GRIFFIN, and BRICKLEY agreed that consideration of conduct underlying an acquitted charge is appropriate. The divergence between the dispositions concerned whether the defendant in that particular case had already received sufficient opportunity to refute the information on which the trial court based its sentence, an issue with which we are not presently faced.

with the issue whether a defendant may be punished for a crime for which no conviction was obtained"—referring to this concept of punishment based on the fact of pending or acquitted charges only—and immediately thereafter concluded that sentencing courts "may, in the exercise of the broad discretion conferred upon them in our sentencing scheme, consider relevant and reliable facts about offenders when selecting appropriate punishment within the legislatively established range for offenses whose commission has been proven beyond a reasonable doubt." *Id*. at 454.

Justice BRICKLEY endorsed the same distinction that I have made here: a defendant cannot be punished as if the jury had found the defendant guilty of the acquitted charge, but the trial court can consider the defendant's conduct underlying such a charge when sentencing the defendant for convicted offenses.[10] Further, given that Justice BRICKLEY's opinion clearly set forth how the trial court was to consider the defendant's conduct

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[10] Insofar as the majority states that I "want[] to draw [a distinction] between sentencing a defendant more harshly based on the conclusion that the defendant committed an offense of which he was acquitted and sentencing a defendant 'while considering conduct that supported the acquitted charge,' " I do not. I, in fact, agree with the majority that the trial court in this case found by a preponderance of the evidence that defendant had committed murder. My choice of phrase—"as if [defendant] . . . had caused a death" rather than "as if defendant had committed murder"—is used to emphasize that the trial court did not *convict* defendant of the criminal charge of murder. The jury found defendant guilty of felon-in-possession, and the trial court was empowered to consider conduct related to this conviction at sentencing when considering the continuum of available sentences that it could impose. The trial court's finding that defendant committed murder was not a finding that defendant was guilty of murder beyond a reasonable doubt but instead a finding regarding the manner in which defendant committed felon-in-possession.

supporting the acquitted charges,[11] it is baffling to me how the majority can conclude that the rule of law from *Ewing* is "murky at best." Justice BRICKLEY and Justice BOYLE, joined by Justices RILEY and GRIFFIN, clearly supported the consideration of conduct underlying acquitted charges at sentencing, establishing a rule of law that this Court is bound to follow.[12] See *People v Feezel*, 486 Mich 184, 212; 783 NW2d 67 (2010) ("[T]his Court

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[11] In the same section of the opinion, Justice BRICKLEY set forth the proper procedure for the trial court's consideration of conduct supporting the defendant's acquitted charges at sentencing:

> As noted above, . . . on remand the defendant should be able to test the accuracy of th[e] allegations [for which the defendant was acquitted]. . . . The defendant should not, however, be able to preclude the judge from basing his sentence on this testimony. Since the judge on remand will be aware that a prior jury declined to find the defendant guilty beyond a reasonable doubt in th[at] case . . . , he may hear argument from the parties and decide how to view this testimony in light of the acquittal. Moreover, because of the double jeopardy bar, the defendant will be unlikely to feel pressure not to effectively challenge the accuracy of the allegations underlying what will be, in the event of resentencing, a prior acquittal. [*Ewing (After Remand)*, 435 Mich at 454 (opinion by BRICKLEY, J.).]

[12] Justice BRICKLEY's opinion also provides the key to an issue raised by the parties on appeal but left unaddressed by the majority: how to harmonize the ruling in *Ewing* with this Court's prior ruling in *People v Grimmett*, 388 Mich 590; 202 NW2d 278 (1972), overruled in part on other grounds *People v White*, 390 Mich 245 (1973). In *Grimmett*, the defendant and two others robbed a Detroit grocery store; the robbery resulted in the death of the grocery store's owner and the wounding of a customer. *Id*. at 594. The defendant was found guilty of assault with intent to murder as to the customer. *Id*. at 596. At sentencing, the trial court found that the defendant " 'is certainly the same person who murdered the other grocer' "—referring to the murder charges filed, but not yet tried, against the grocery store's owner, *id*. at 608—and sentenced the defendant to life imprisonment pursuant to that finding. *Id*. at 596. This Court held that the trial court had "acted improperly in assuming defendant was guilty of the murder charge when he sentenced defendant on the assault charge" and remanded the case to the trial court for resentencing. *Id*. at 608. *Grimmett* is not inconsistent with *Ewing*, and this Court need not overrule it. *Grimmett* forbids the *assumption* of guilt based on the fact that the defendant was charged with a crime. The trial court's factual findings must instead be supported by

should respect precedent and not overrule or modify it unless there is substantial justification for doing so.”).

Finally, I would also note that the majority has adopted a standard that may be problematic in application: “that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted.” Left unexplained are the parameters of what constitutes acquitted conduct. Is acquitted conduct defined only as the exact conclusion that the defendant committed the acquitted charge? This would certainly apply to the present case, in which the trial court expressly found that defendant had committed murder despite his having been acquitted of the crime of murder. But does acquitted conduct extend beyond this ultimate conclusion to all facts that supported a charge for which a defendant was acquitted? Could the trial court here have safely found that defendant possessed a weapon and initiated a confrontation that caused Pruitt’s death as long as it stopped short of the ultimate conclusion that defendant murdered Pruitt? What if it is unclear why the jury acquitted the defendant of the particular crime? For example, when a defendant is acquitted of a charge of felon-in-possession, it is possible that the jury could not find beyond a reasonable doubt that the defendant possessed a weapon or that he was a felon or both. If there is no indication as to which element the jury found lacking, is the sentencing court prohibited from considering the facts underlying either element?

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a preponderance of the evidence—the mere fact of a charge, whether pending or acquitted, does not meet that evidentiary standard.

The majority's holding may be difficult to apply, and it directly contradicts existing precedent.[13] The presumption of innocence does not prohibit the trial court from

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[13] Federal circuit courts have repeatedly held that the consideration of conduct underlying an acquitted charge does not violate constitutional authority, relying on the United States Supreme Court cases *McMillan* and *United States v Watts*, 519 US 148; 117 S Ct 633; 136 L Ed 2d 554 (1997), to support their conclusions. See, e.g., *United States v Swartz*, 758 F Appx 108, 111-112 (CA 2, 2018); *White*, 551 F3d 381, 384-385; *United States v Horne*, 474 F3d 1004, 1006 (CA 7, 2007); *United States v Jamerson*, 674 F Appx 696, 699 (CA 9, 2017); *United States v Maddox*, 803 F3d 1215, 1220-1222 (CA 11, 2015); *United States v Settles*, 382 US App DC 7, 10; 530 F3d 920 (2008).

In *McMillan*, 477 US at 85-86, the Court held that the Due Process Clause's requirement of proof beyond a reasonable doubt extends only to elements identified by the state legislature as an element of the offense and not to sentencing factors. Though the majority is correct that *McMillan* did not involve conduct underlying an acquitted charge, its conclusion that the finding of sentencing factors by a preponderance of the evidence does not violate due process is certainly relevant to the issue at hand.

Also relevant is the Court's holding in *Watts*, 519 US at 157, that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." The majority relies on the Court's statements regarding *Watts* in *United States v Booker*, 543 US 220, 240 n 4; 125 S Ct 738; 160 L Ed 2d 621 (2005), to declare *Watts* unhelpful to the issue at hand. In *Booker*, in which the Court was presented with a Sixth Amendment issue, the Court reasoned that *Watts* was not applicable *to the Sixth Amendment issue* because *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause . . . ." *Id*. But *Booker* did not overrule *Watts* and did not indicate that *Watts* was irrelevant to a due-process challenge. (The *Watts* decision not only rejected the defendants' double-jeopardy challenge to the use of facts underlying acquitted charges at sentencing, but also recognized the Court's earlier holdings "that application of the preponderance standard at sentencing generally satisfies due process" in order to conclude that a sentencing court may consider conduct underlying acquitted charges. *Watts*, 519 US at 156-157.) And, post-*Booker*, federal circuit courts have cited *Watts* in holding that due process does not prevent the sentencing court from considering conduct underlying acquitted charges. See, e.g., *Swartz*, 758 F Appx at 111-112; *Settles*, 382 US App DC at 10.

Even if the majority is correct in its additional criticism of *McMillan* and *Watts*, these cases have not been overruled, and this Court is bound to follow them (although a plurality opinion of the United States Supreme Court has recently stated that *McMillan* was

considering conduct underlying acquitted charges when sentencing a defendant for convicted offenses as long as the conduct is relevant and supported by a preponderance of the evidence. The contrary conclusion is belied by the majority's failure to cite any supporting precedent for its conclusion. Accordingly, I dissent from this Court's reversal of the judgment of the Court of Appeals. I would have affirmed the holding of the Court of Appeals that the trial court did not err by considering conduct underlying defendant's acquitted charge but reversed insofar as the Court of Appeals remanded this case for a *Crosby*[14] hearing. Pursuant to this Court's decision in *People v Steanhouse*, 500 Mich 453, 460-461; 902 NW2d 327 (2017), I would have instead remanded this case to the Court of Appeals so that it could determine whether the trial court abused its discretion by violating the principle of proportionality.

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overruled by *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), see *United States v Haymond*, 588 US ___, ___; ___ S Ct ___; ___ L Ed 2d ___ (2019) (Docket No. 17-1672) (opinion by Gorsuch, J.); slip op at 9-10, *Alleyne* affected what is considered an element of a crime and what is considered a sentencing factor; it did not undermine *McMillan*'s conclusion that sentencing factors may be proven by a preponderance of the evidence). Further, even if *McMillan* and *Watts* could be effectively distinguished from the case at hand without contradicting United States Supreme Court precedent, the majority's conclusion still directly contradicts this Court's decision in *Ewing*.

[14] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).