PUNISHMENT METED OUT FOR ACQUITTALS: AN ANTITHERAPEUTIC JURISPRUDENCE ATROCITY

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In *The Brothers Karamazov*, Fetyukovich, Mitya's defense counsel, describing for the jury the effect of punishing the innocent, speaks the language of therapeutic jurisprudence:

> If you condemn him now, he will think: "These people have never done anything for me—they never helped me to grow up, to become a decent, educated man; they never fed me or gave me to drink; they never visited me in jail, and now they are sending me off to the penitentiary in Siberia. Well, so we are even now. I owe them nothing. Since they are spiteful, I will be spiteful too; since they are heartless, I will also be heartless." Yes, this is what he will say to himself, gentlemen of the jury. And I swear that, if you condemn him, you will only make it easier for his conscience, for he will end by cursing the man whose blood was spilled, instead of weeping for him! At the same time, you will destroy the man he could have been, because you will doom him to remain blind and embittered for the rest of his life.[1]

Fetyukovich understood something basic—that the law can "function as a kind of therapist or therapeutic agent" and that "legal procedures...constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences."[2] Most significantly, Fetyukovich, realizing that the sentencing

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1. FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 901–02 (Andrew R. MacAndrew trans., 1970) (1880).

2. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997). *See also* Dennis P. Stolle et al., *Integrating Preventative Law And Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17 (1997) ("Therapeutic jurisprudence is an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it

component of a criminal trial is indeed a "psycholegal soft spot,"[3] knew that it can either foster or curtail rehabilitation.

The United States Supreme Court, however, apparently does not share the understanding that Dostoevsky's advocate had over a century ago. In the recent consolidated decision, *United States v. Watts* and *United States v. Putra*,[4] the United States Supreme Court approved the federal sentencing procedure whereby judges punish defendants for offenses for which they have been acquitted. This decision, which dissenting Justice Stevens called "perverse,"[5] is disturbing for many reasons: for example, it is the demise of the reasonable doubt standard, the derogation of the right to a jury trial, and the violation of the spirit of double jeopardy protection. All and any one of these topics would make a fruitful critique. This Article, however, has a much narrower focus. In three sections, this Article examines just the anti-therapeutic consequences of the *Watts/Putra* atrocity.

Part I of this Article briefly sums up the provision of the Federal Sentencing Guidelines ("Guidelines")[6] that was involved in the *Watts/Putra* case. It also reviews the Supreme Court decisions in *Williams v. New York*,[7] *McMillan v. Pennsylvania*,[8] and *Witte v. United States*,[9] which are the primary precursors to *Watts/Putra*. The Guidelines and the cases cited as precedent for the *Watts/Putra* decision are antitherapeutic because they are based on the false assumption that sentencing proceedings are separate from and less significant than the guilt or innocence phase of trial.[10]

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affects.").

3. Stolle et al., *supra* note 2, at 42–43. According to Stolle et al., the "'psycholegal soft spot' is a [Therapeutic Jurisprudence] Preventive Law concept which grows out of the preventive law concept of the 'legal soft spot....'" *Id.* at 42. They explain that

> [w]hereas the concept of legal soft spots refers to factors in a client's affairs that may give rise to future legal trouble, the concept of psycholegal soft spots might include the identification of social relationships or emotional issues that ought to be considered in order to avoid conflict or stress when contemplating the use of a particular legal instrument.

Id. at 42–43.

4. 519 U.S. 148 (1997).

5. *Id.* at 164 (Stevens, J., dissenting). *See also* United States v. Watts, 67 F.3d 790 (9th Cir. 1995), *rev'd*, 519 U.S. 148 (1997); United States v. Putra, 78 F.3d 1386 (9th Cir. 1995), *rev'd*, 519 U.S. 148 (1997). *Accord* United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1989) ("A sentencing court should not be allowed...[to] mak[e] a finding of fact...under any standard of proof...that the jury has necessarily rejected by its judgment of acquittal."). *But see* William J. Kirchner, *Punishment Despite Acquittal: An Unconstitutional Aspect of the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 799, 823 (1992) (concluding that the "argument against the consideration of acquitted conduct is more of an emotional response to the seeming unfairness of the practice than a dispassionate legal disputation").

6. U.S. SENTENCING COMM'N GUIDELINES MANUAL § 1B1.3 (1998) [hereinafter GUIDELINES MANUAL].

7. 337 U.S. 241 (1949).

8. 477 U.S. 79 (1986).

9. 515 U.S. 389 (1995).

10. *See generally* Part I.

Part II deals with the *Watts* and *Putra* cases themselves. It describes the sentencing approach in the district court and commends the Ninth Circuit reversal. It then addresses the contrary approach of the United States Supreme Court and contrasts that with Justice Stevens' dissenting views.

Part III essentially isolates the serious antitherapeutic consequences of the *Watts/Putra* decision. That is, a procedure that allows a judge to trump a jury's acquittal by meting out punishment for that acquittal engenders in prisoners disrespect for the law, anger, helplessness, and disregard for human life.

The conclusion of this Article, revisiting the insights of Dostoevsky's Fetyukovich, suggests what is the overall pernicious effect of punishing defendants for their acquittal offenses.

I. THE BACKGROUND OF THE *WATTS/PUTRA* DECISION

A. Williams *and the Sentencing Guidelines*

In a 1949 decision in *Williams v. New York*,[11] the United States Supreme Court planted the seeds of the sentencing procedure that the *Watts/Putra* Court approved. A trial judge imposed the death penalty after a jury found the defendant guilty of first-degree murder and recommended life imprisonment.[12] In accordance with the New York law, the judge determined the defendant's sentence by factoring in his or her criminal record, reports based on mental examinations, and other information.[13]

On appeal, Williams argued that the use of that presentence report deprived him of his due process right to reasonable notice of the charges against him and an opportunity to examine adverse witnesses.[14] The United States Supreme Court, rejecting Williams' argument, found a historical basis for having different rules for trial and sentencing. The Court emphasized that the sentencer does not deal with just the "narrow issue of guilt."[15] Rather, the judge fashions the punishment after the fact finder has determined guilt. For this process, it is necessary for the judge to have "the fullest information possible concerning the defendant's life and characteristics."[16] The Court explained that the individualization of sentencing makes it important that "rigid adherence" to the trial evidence rules not hinder judges in gathering the relevant information.[17] The Court recognized that the "prevalent modern philosophy of penology" endorses punishments precisely tailored not to the offense, but to the offender.[18] According to the Court, the main objective of punishment is the

11. 337 U.S. 241 (1949).
12. *See id.* at 242.
13. *See id.* at 243.
14. *See id.*
15. *Id.* at 247.
16. *Id.*
17. *Id.*
18. *Id.*

defendant's rehabilitation, not retribution. This philosophy then comported with a need to preserve procedural distinctions between trial and sentencing.[19]

The Court was also of the view that its decision would not "mak[e] the lot of offenders harder."[20] Instead, it promoted the study of the offenders' lives and personalities to facilitate reformation and the return to society. The only way to accomplish this, according to the Court, was to let the sentencer have access to as much information as possible.[21] Otherwise, an information roadblock would be erected if only open court testimony subject to cross-examination could be used. The Court added that trial procedural requirements should not shackle even a judge "exercis[ing]...[the] awesome power of imposing the death sentence."[22]

Although the *Williams* decision incorporated the caveat that sentencing is, of course, not wholly "immune from scrutiny under the due process clause,"[23] in decisions in the wake of *Williams*, sentencers began to consider all sorts of information in any form.[24] The legislature, like the courts, also approved the *Williams* rule and in 1970 inserted it in 18 U.S.C. § 3577, which states that "[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."[25] That language went right into the Sentencing Reform Act of 1984 as well.[26]

In fact, the 1984 Sentencing Reform Act, which established the Federal Sentencing Commission to promulgate mandatory sentencing guidelines for federal

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19. *See id.* at 248–49.

20. *Id.* at 249.

21. *See id.* at 249–50.

22. *Id.* at 252. In a dissent, however, Justice Murphy expressed the view that "high commands of due process were not obeyed" because it was a capital case and the judge went "against the unanimous recommendation of a jury" and did so by using a report that would have been inadmissible at trial and was not subject to the defendant's examination. *Id.* at 253 (Murphy, J., dissenting).

23. *Id.* at 252 n.18.

24. For example, about a decade after *Williams*, the Supreme Court approved the use of hearsay evidence at sentencing and did so even though the same evidence was not contained in the written sentencing report but merely was an oral pronunciation of the prosecutor. Williams v. Oklahoma, 358 U.S. 576 (1959). *See also* United States v. Grayson, 438 U.S. 41, 53–54 (1978) (relying on *Williams* to condone use of extra-conviction conduct at sentencing). *See generally* Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 320 (1992) (discussing how *Williams* is "widely cited as a statement of the Supreme Court's lackadaisical attitude toward due process in sentencing"); Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 316–17 (1994) ("Wide acceptance of *Williams* effectively closed the door to court challenges to the reliability of evidence at sentencing." *Id.* at 317.).

25. 18 U.S.C. § 3661 (1994) (the original 18 U.S.C. § 3577, Pub. L. No. 91-452, 84 Stat. 951, § 3577, was renumbered § 3661 by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984)).

26. *See id.* (Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551–3742, 28 U.S.C. §§ 991–98 (1994))).

judges (the "Guidelines"), also comprises the background for the *Watts/Putra* decision. Before the Act, there was a perception that the individualization of sentencing resulted in unfairness: specifically, those behind the Act believed that judicial discretion had no real bounds and that judges tended to impose disparate punishments on similarly situated offenders.[27] The goals behind the new Guidelines were proclaimed to be those of honesty, uniformity, and proportionality.[28]

The Guidelines solidified what the *Williams* decision had started—namely the exiling of sentencing proceedings from the protections that govern the guilt and innocence phase of trial. The Guidelines let judges consider conduct on the part of the defendant that was not proven at trial. Specifically, § 1B1.3, the "Relevant Conduct" provision permits the government to present at a presentencing hearing evidence of the defendant's prior criminal activity.[29] This can include even uncharged criminal activity.[30]

B. McMillan *and* Witte

The Sentencing Reform Act movement was percolating while the Supreme Court was deciding *McMillan v. Pennsylvania*,[31] another case that later affected the reasoning in the *Watts/Putra* case. This case eliminated reasonable doubt as the standard for establishing sentencing "factors."[32] *McMillan* dealt with Pennsylvania's Mandatory Minimum Sentencing Act,[33] which required judges to impose at least five years of imprisonment for certain enumerated felonies if they find by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the commission of the offense.[34] In challenging the constitutionality of Pennsylvania's Act, the *McMillan* petitioners argued that visible possession of the firearm was an

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27. *See* GUIDELINES MANUAL, *supra* note 6, at 2–3. *See generally* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 161–63 (1991); Richard Husseini, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1387–88 (1990); Kirchner, *supra* note 5, at 801; Joseph P. Sargent, *The Standard of Proof Under the Federal Sentencing Guidelines: Raising the Standard to Beyond a Reasonable Doubt*, 28 WAKE FOREST L. REV. 463, 463–69 (1993); Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CAL. L. REV. 419, 426–29 (1995); Young, *supra* note 24, at 300–02.

28. *See* GUIDELINES MANUAL, *supra* note 6, at 2–3.

29. *See id.* § 1B1.3(a).

30. *See generally* Lauren Greenwald, *Relevant Conduct and the Impact of the Preponderance Standard of Proof Under the Federal Sentencing Guidelines: A Denial of Due Process*, 18 VT. L. REV. 529, 542–43 (1994); Heaney, *supra* note 27, at 208–20 (discussing relevant conduct and the burden of proof); Kirchner, *supra* note 5, at 804–06 (discussing uncharged, unconvicted and acquitted conduct); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179 (1993) (discussing what conduct is relevant to sentencing); Sargent, *supra* note 27, at 469–71 (analyzing relevant conduct provision).

31. 477 U.S. 79 (1986).

32. *Id.* at 86.

33. 42 PA. CONS. STAT. ANN. § 9712 (West 1998).

34. *McMillan*, 477 U.S. at 81.

element of the crime and thus had to be proved beyond a reasonable doubt.[35] Alternatively, they asserted that even if visible possession was not an element, the preponderance of the evidence standard was nevertheless constitutionally infirm.[36]

The Supreme Court rejected both positions. In so doing, the *McMillan* Court relied primarily on its decision in *Patterson v. New York*,[37] in which it had said that a state legislature's definition of the elements of an offense can make the reasonable doubt standard inapplicable. The *McMillan* Court, embracing that language in *Patterson*, concluded that, because Pennsylvania's legislature had denominated the visible possession of a firearm as a "sentencing factor" and not as an "element," then the lower standard was acceptable.[38] The Court stressed that the Pennsylvania law neither discarded the presumption of innocence nor relieved the prosecution of the obligation of proving guilt.[39] That is, the law, as in *Williams*, came into play only after there was an actual conviction.[40] Also, the law did not alter the maximum penalty for the crime committed and did not create a separate offense with its own penalty. In the Court's view, the law "operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm."[41]

In discarding the petitioners' "subsidiary" point that due process requires proof of visible possession of the firearm by at least clear and convincing evidence,[42] the *McMillan* Court said that nothing in the Pennsylvania law "warrants constitutionalizing burdens of proof at sentencing."[43] In relying on *Williams*, the Court recited that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."[44]

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35. *See id.* at 83.

36. *See id.*

37. 432 U.S. 197 (1977). The *McMillan* Court focused on the *Patterson* Court's rejection of the argument that "whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." *McMillan*, 477 U.S. at 84 (quoting *Patterson*, 432 U.S. at 214).

38. *McMillan*, 477 U.S. at 85–86.

39. *See id.* at 87.

40. *See id.*

41. *Id.* at 88.

42. *Id.* at 91.

43. *Id.* at 92.

44. *Id.* at 91. Justice Stevens, dissenting in *McMillan*, stated that the "state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties." *Id.* at 96 (Stevens, J., dissenting). Others have been similarly critical of the *McMillan* decision. *See, e.g.*, Greenwald, *supra* note 30 (arguing that because the relevant conduct sentencing decisions have been more critical, the preponderance of the evidence standard that the *McMillan* Court deemed adequate no longer protects a defendant's right to due process); Herman, *supra* note 24, at 323 (arguing that *McMillan* "reached a questionable conclusion by undervaluing due process considerations"); Lear, *supra* note 30, at 1179 (arguing that the assumption underlying the *McMillan* decision is wrong); Michael P. Kopech, Casenote, *Criminal Law—Fourteenth Amendment Due Process Clause—Preponderance Standard Satisfies Due Process Where State Makes Visible Possession of Firearm Sentencing Factor Rather than Component of Crime*, 18 ST. MARY'S L.J. 543, 547–

Another case that influenced the decision in *Watts/Putra* was *Witte v. United States*,[45] which, unlike *McMillan*, dealt with the Federal Sentencing Guidelines. *Witte* was a double jeopardy challenge to the Guidelines' "relevant conduct provision," in which the defendant pleaded guilty to a federal marijuana charge.[46] The sentencer then calculated Witte's base offense level by aggregating the total quantity of drugs involved. The total quantity, however, included not just the drugs involved in the offense for which Witte was being convicted but also those involved in uncharged criminal conduct.[47] While the judge enhanced the sentence because of the additional drugs, the sentence still fell within the punishment range that would have been permissible even without consideration of the uncharged conduct.

The real problem arose later when the government indicted Witte for conspiring and attempting to import cocaine. In moving to dismiss the charges, Witte maintained that the government had already punished him for the cocaine offenses because the trial judge had treated the cocaine as part of his "relevant conduct" at his marijuana sentencing.[48] The district court agreed with Witte and concluded that prosecution for the cocaine offenses violated the double jeopardy prohibition against multiple punishments.[49]

The appellate court[50] and the Supreme Court[51] disagreed with the district court. The Supreme Court concluded that under the governing *Blockburger* test,[52] the second indictment did not create a double jeopardy violation because it did not charge Witte with the identical offense to which he had formerly pleaded guilty.[53] The *Witte* Court also relied on the premise behind *Williams*, repeating that the "Due Process Clause [does] not require 'that courts throughout the Nation abandon their age-old

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48 (1986) ("The Court's retreat from the policy considerations which formed the basis of its earlier holdings concerning the reasonable doubt standard resulted in a constriction of an accused's due process rights at trial.").

45. 515 U.S. 389 (1995).

46. *Id.* at 393.

47. *See id.* at 393–94.

48. *See id.*

49. *See id.* at 395.

50. *See* United States v. Witte, 25 F.3d 250 (5th Cir. 1994).

51. *See Witte*, 515 U.S. at 389.

52. The test to determine when offenses are the same for double jeopardy purposes was originally formulated in *Blockburger v. United States*, 284 U.S. 299 (1932). The Court, however, significantly limited the scope of *Blockburger* in *Grady v. Corbin*, 495 U.S. 508 (1990). In *Grady*, the Supreme Court held that "if, to establish an essential element of an offense charged in that proseuction, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted, then double jeopardy operates as a bar." *Id.* at 510. About three years later, in *United States v. Dixon*, 509 U.S. 588 (1993), the Court overruled *Grady* and revived *Blockburger*. The *Dixon* Court explained that under *Blockburger*, if "each offense contains an element not contained in the other," they are not the same and double jeopardy does not apply. *Id.* at 696. *See generally* Amy D. Ronner, *Prometheus Unbound: Accepting a Mythless Concept of Civil In Rem Forfeiture with Double Jeopardy Protection*, 44 BUFF. L. REV. 655, 742–44 (1996) (discussing the *Blockburger* test in the context of how courts have avoided recognition that civil forfeiture proceedings that follow criminal convictions have double jeopardy protection).

53. *See Witte*, 515 U.S. at 395.

practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.'"[54] For the *Witte* Court, the relative informality of sentencing meant that matters merely considered in the sentencing context could be officially incorporated into a subsequent indictment.

Further, the *Witte* Court also stated point blank that the enhancement of a sentence is not punishment.[55] In part, the Court used the *McMillan* case as a way to support its view: that is, it stressed that in *McMillan* it had approved the sentencer's consideration of "offender-specific" conduct without the procedural protections that apply to trials.[56] The Court then construed such approval as a tacit recognition that enhancers are not punishers. Unfortunately, the Sentencing Guidelines and the faulty reasoning in *Williams*, *McMillan*, and *Witte* became the foundation upon which the Supreme Court built its antitherapeutic *Watts/Putra* decision.

II. THE *WATTS* AND *PUTRA* CASES

A. Watts *and* Putra *in the Courts Below*

In *Watts*, the police searched the defendant's house and found crack cocaine, loaded firearms, and ammunition.[57] After Watts confessed to ownership of the guns and drugs, the government indicted him for possession of cocaine base with an intent to distribute and for using a firearm in relation to a drug offense.[58] The jury convicted Watts of the narcotics offense but acquitted him of the weapons offense.

The district judge sentenced Watts to 262 months in prison and 60 months of supervised release.[59] The judge enhanced Watts' base level offense by two levels under the Guidelines because he, unlike the jury, thought that Watts had possessed a "dangerous weapon" during the conviction offense.[60]

On appeal in the Ninth Circuit, Watts argued that the sentence enhancement was improper because the jury had acquitted him of the weapons offense.[61] In

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54. *Id.* at 398 (quoting Williams v. New York, 337 U.S.241, 250–51 (1949)).

55. For this, the *Witte* Court relied on *Williams v. Oklahoma*, 358 U.S. 576 (1959), in which it had approved the sentencer's use of uncharged conduct to enhance a penalty to the death sentence. The *Williams* Court had concluded that such enhancement did not constitute punishment. *See id.* at 586. The *Witte* Court thus extrapolated that if an uncharged offense can spell death, then surely consideration of Witte's cocaine to enhance his marijuana sentence was not literally "punishment." *Witte*, 515 U.S. at 399–400.

56. *Witte*, 515 U.S. at 400–01.

57. United States v. Watts, 67 F.3d 790, 793 (9th Cir. 1995).

58. *See id.* The government indicted Watts for a violation of 21 U.S.C. § 841(a)(1) (1994) and 18 U.S.C. § 924(c) (1994).

59. *See Watts*, 67 F.3d at 793.

60. *See id.* at 796.

61. *See id. Watts* essentially relied on the Ninth Circuit decision in *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991), in which the Court prohibited a sentencer from increasing a punishment on the basis of facts that the jury must have rejected in issuing its acquittal. The *Brady* court said that any other rule would "pervert our system of justice" by "allow[ing] a defendant to suffer punishment for a criminal charge for which he or she was

agreeing, the Ninth Circuit adhered to its view that a sentencer could not reconsider facts that a jury had "necessarily rejected" when it acquitted the defendant on a particular count.[62] The appellate court further noted that the district court had actually remarked at Watts' sentencing that it believed that there was "a connection between the possession of the guns and the offense."[63] According to the court, such remarks showed that the judge essentially nullified the jury's acquittal.[64]

The *Putra* case involved three counts in an indictment.[65] One count charged Putra with "aiding and abetting in the possession with intent to distribute one ounce of cocaine on May 8, 1992."[66] Another charged Putra with "aiding and abetting possession with intent to distribute five ounces of cocaine on May 9, 1992."[67] The final count charged Putra with "conspiring knowingly and intentionally to distribute a quantity of cocaine in excess of 500 grams."[68] The jury convicted Putra on the May 8 aiding and abetting count but acquitted her of the other two offenses.[69]

At sentencing, however, the judge concluded that the government had shown by a preponderance of the evidence that Putra had been involved in both of the charged aiding and abetting transactions.[70] Consequently, the judge aggregated the cocaine amounts in both of the aiding and abetting counts to arrive at Putra's offense level. Without the additional drugs from the acquittal count, Putra's Sentencing Guidelines range would have been fifteen to twenty-one months. The extra amount increased the range to twenty-seven to thirty-three months, and the judge gave her a twenty-seven month sentence.[71]

Here, too, the Ninth Circuit reversed. The Ninth Circuit acknowledged the application note to the Guidelines that allowed the sentencer "to include the total quantity of narcotics involved regardless of the fact that the defendant has not been convicted of the multiple counts."[72] The court, however, deemed that language to be inapplicable to Putra's situation, in which the government had charged the defendant with another count and the jury actually acquitted the defendant on that count.[73]

In remanding the *Putra* matter for resentencing, the Ninth Circuit expressed concern that a contrary ruling, permitting sentencers to consider facts that a jury had rejected, would be quite destructive.[74] Such judges, at odds with the jury's result,

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acquitted." *Id.* at 851. Because the *Brady* decision predated the Supreme Court's decision in *Witte*, the dissent in *Putra* felt that *Brady* was no longer good law. United States v. Putra, 78 F.3d 1386, 1392–93 (Wallace, C.J., dissenting).

62. *See Watts*, 67 F.3d at 796 (citing *Brady*, 928 F.2d at 851).
63. *Id.* at 797.
64. *See id.*
65. *Putra*, 78 F.3d at 1387.
66. *Id.*
67. *Id.*
68. *Id.*
69. *See id.*
70. *See id.*
71. *See id.*
72. *Id.* at 1388 (citing GUIDELINES MANUAL, *supra* note 6, § 1B1. 3, cmt. n.3).
73. *See id.*
74. *See id.* at 1389. The Court essentially rehashed the policies behind its decision

could enhance a sentence and effectually punish defendants for offenses for which they had been found not guilty.[75] In fact, as the court pointed out, this was what happened in *Putra*: although the jury had "explicit[ly] reject[ed]...[Putra's]...involvement in [the May 9] transaction," the court expunged the jury verdict and punished Putra for the acquitted offense.[76] While the Ninth Circuit conceded that there was a different standard of proof for an acquittal and for sentencing, it emphasized that this difference could not serve as a pretext for a sentencer's revisitation of the facts behind the jury acquittal.[77]

B. Watts/Putra *in the Supreme Court*

Because the Ninth Circuit decisions in *Watts* and *Putra* conflicted with the decisions of every other federal appellate court, the United States Supreme Court granted certiorari.[78]

In reversing, the Court repeated that "possession of the fullest information possible concerning the defendant's life and characteristics" was "essential...to [the judge's] selection of an appropriate sentence."[79] The Court also focused on 18 U.S.C. § 3661, which codifies the principle that sentencers enjoy broad discretion in considering "the background, character and conduct" of the convicted defendant.[80] As the Court saw it, both the *Williams* premise and the statute authorized the *Watts* and *Putra* sentencers' approach in the trial court. Further, the Court said that the Sentencing Guidelines themselves approve reliance "on the entire range of conduct regardless of the number of counts that are alleged or on which a conviction is obtained."[81]

The *per curiam* decision then sharply criticized Justice Stevens' dissent and the Ninth Circuit. Specifically, Justice Stevens had said that Congress did not intend such an increase of a sentence based on offenses for which a defendant had been

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in *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991). *See supra* note 61.

75. *See Putra*, 78 F.3d at 1389.

76. *Id.*

77. *See id.* The Ninth Circuit followed its own decision in *United States v. Brady*, 928 F.2d 844, 851 (9th Cir. 1991), in which it said that "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." In *Brady*, the court recognized that the preponderance of the evidence standard, not reasonable doubt, applies to sentencing. *Id.* at 855. The court, however, made it clear that its decision "ha[d] nothing to do with the standard of proof" but rather "limit[ed] the facts that a court may rely on in imposing sentence." *Id.* at 851 n.12. Specifically, the court forbade sentencers from relying on those facts that have been rejected by a jury's not guilty verdict, and the court felt that this ban was consistent with the Sentencing Guidelines themselves that "draw the curtain" on other sentencing facts, like race, sex, national origin, creed, religion, and socioeconomic status. *Id.*

78. United States v. Watts, 519 U.S. 148 (1997).

79. *Id.* at 151–52 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)) (emphasis in original). For a discussion of *Williams*, see *supra* Part I.A.

80. *Watts*, 519 U.S. at 151 (quoting 18 U.S.C. § 3661). *See also supra* notes 25, 26 and accompanying text.

81. *Watts*, 519 U.S. at 153 (quoting GUIDELINES MANUAL, *supra* note 6, § 1B1.3 cmt. background) (emphasis omitted).

acquitted.[82] The Court, dismissing Stevens' position, said that the statute was not "cast in restrictive or exclusive terms."[83] In attacking the Ninth Circuit's view of double jeopardy concepts, the Court turned to its own decision in *Witte v. United States*.[84] The Court saw *Witte* as based on the notion that sentencing enhancers do not punish defendants for crimes of which they are not convicted but rather merely augment sentences because of the manner in which defendants commit the crime.[85] Consequently, neither Watts' nor Putra's sentence amounted to punishment for acquittals.

The Court also faulted the Ninth Circuit for failing to grasp the real significance of an acquittal. For the Court, a jury acquittal merely means that the jurors found reasonable doubt as to the defendant's guilt.[86] As such, an acquittal does not equal innocence. The Court thus pointed out that the Ninth Circuit's reasoning was invalid because the jurors, in acquitting Watts and Putra, did not necessarily reject any facts.

Further, the Guidelines require the government to prove facts relevant to sentencing by a preponderance of the evidence.[87] For the Court, the Sentencing Guidelines thus authorize the court's reconsideration of an issue in a subsequent proceeding governed by a lower standard of proof.[88] With respect to Watts, the acquittal on the charge of using or carrying a firearm during or in relation to a drug offense did not prevent a preponderance of the evidence finding on the related issue during sentencing.[89] With respect to Putra, the jury verdict simply showed that the government "had not proved the defendant's complicity in the May 9 sale beyond a reasonable doubt."[90] That acquittal, like the one in Watts, did not prevent the prosecution from establishing Putra's participation in that May 9 transaction by a preponderance of the evidence during sentencing.

C. Watts/Putra *According to the Dissent*

Justice Stevens authored the primary dissenting opinion[91] in which, as a preliminary matter, he disagreed with the Court's analysis of the relationship between

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82. *See id.* at 154.
83. *Id.* (quoting United States v. Ebbole, 917 F.2d 1495, 1501 (7th Cir. 1990)).
84. 515 U.S. 389 (1995). *See generally* discussion *supra* Part I.B.
85. *See Watts*, 519 U.S. at 154.
86. *See id.* at 155.
87. *See id.* at 156.
88. *See id.*
89. *See id.* at 157.
90. *Id.*
91. Justice Kennedy also dissented. Although he felt that "[a] case [could] be made for summary reversal," he noted that "the per curiam opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted." *Id.* at 170 (Kennedy, J., dissenting). Justice Kennedy believed that the matter should be set for full briefing and oral argument. *Id.* at 171. Justices Scalia and Breyer each authored separate concurring opinions. In his concurrence, Justice Breyer noted that the Court's decision "pose[d] no obstacle to the Commission itself deciding whether or not to enhance a sentence on the basis of conduct that a sentencing judge concludes did take place,

18 U.S.C. § 3661 and the Sentencing Guidelines. Stevens reminded the Court that the objective of the Sentencing Reform Act was to cure disparities in punishments.[92] Therefore, the Guidelines mandate that for imprisonment "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months."[93] The rules are mandatory to the extent that they define the narrow range into which a particular sentence falls. However, according to Stevens, the judge retains broad discretion to set a particular sentence within the parameters of the defined range. In this sense, the Guidelines subsume § 3661, but do so only in the sentencing terrain in which the judge retains discretion.[94]

For Stevens, when judges are properly exercising their discretion, they may consider otherwise inadmissible evidence.[95] That is, when operating in the discretionary sphere judges can even consider evidence underlying an acquittal. Judges, however, may not apply that discretionary approach to the separate context of § 1B1.3 of the Guidelines, which defines "relevant conduct for the purposes of determining the Guidelines range within which a sentence can be imposed."[96]

Stevens also took a realistic look at the results in the *Watts* and *Putra* cases. Beginning with *Putra*, Stevens called the outcome "perverse" and pointed out that if the guilty verdict had been the sole basis for punishing Putra, the Guidelines would have mandated a range of fifteen to twenty-one months.[97] If, however, the jury had also found Putra guilty of participating in the May 9 transaction, the Guidelines would have defined a range of 27 to 33 months.[98] For Stevens, the perversity was quite obvious: Putra ended up punished for her acquittal.

Although Stevens saw that the situation in *Watts* was somewhat different from *Putra*, he refused to condone Watts' enhancement.[99] Justice Stevens, abiding by the government's position that the "use" of a firearm and its "possession" are not the same, did not believe that the fatal defect was that the increased sentence ensued from the judge's reliance on facts that the jury necessarily rejected.[100] Rather, what

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but in respect to which a jury acquitted the defendant." *Id.* at 158 (Breyer, J., concurring). He emphasized that the power to accept or reject the decision remains with the Commission. *Id.* at 159. Justice Scalia, however, disagreed with Justice Breyer's assertion because the Sentencing Guidelines must be consistent with § 3661 that provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." *Id.* at 158 (Scalia, J., concurring) (quoting § 3661). According to Scalia, the statute prohibits both the courts and the Commission from saying that certain information, even that pertaining to acquitted conduct, may not be considered in sentencing. *Id.*

92. *See id.* at 161 (Stevens, J., dissenting). For a discussion of the Sentencing Reform Act of 1984, see *supra* Part I.A.

93. *Watts*, 519 U.S. at 162 (Stevens, J., dissenting).

94. *See id.*

95. *See id.*

96. *Id.*

97. *See id.* at 163.

98. *See id.*

99. *See id.* at 163 n.2.

100. *See id.*

disturbed Stevens was that the increase of the base offense level rested on conduct that the judge had only found by a preponderance of the evidence.[101] According to Stevens, the conduct that bumped up the base offense level had to have been proved beyond a reasonable doubt.[102]

Justice Stevens also did not approve of the Court's own precedence. He pointed out that *Williams v. New York* was inapplicable because it "dealt with the exercise of the sentencing judge's discretion within the range authorized by law."[103] *Williams* did not bear on the issue in *Watts/Putra*, which involved an *unauthorized* exercise of discretion. Also, the *Williams* case did not deal with the question at the heart of *Watts /Putra*: namely, what burden of proof governs sentencing facts.[104] The Court, moreover, decided *Williams* during the reign of individualized sentencing, which differed from the governing philosophy of the Sentencing Guidelines.[105]

Stevens felt that *McMillan v. Pennsylvania* was also distinguishable.[106] In contrast to the situation in *Watts/Putra*, the approved sentence in *McMillan* fell within the range that the judge could have imposed without considering the enhancement factor. In *Watts/Putra*, the sentences exceeded those that the Sentencing Guidelines would have allowed without the added acquittal facts.[107]

For Stevens, who had also dissented in *Witte*, the *Witte* case was completely inapposite.[108] *Witte* was simply a double jeopardy decision and nothing more.[109] The challenges, however, in *Watts/Putra* did not raise a double jeopardy challenge but instead assailed the propriety of an initial punishment under the statute and the Constitution.[110]

Stevens also expressed difficulty squaring the Court's interpretation of the Sentencing Reform Act's treatment of "multiple offenses" with Congress' intent.[111]

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101. *See id.*

102. *See id.*

103. *Id.* at 165. For a discussion of *Williams v. New York*, 337 U.S. 241 (1949), see *supra* Part I.A.

104. *See Watts*, 519 U.S. at 165 (Stevens, J., dissenting).

105. Justice Stevens felt that *Williams* was decided in a sentencing system that was based on the "subjective assessments of rehabilitative potential." *Id.* (quoting Saltzburg, *Sentencing Procedures: Where Does Responsibility Lie?*, 4 FED. SENT. REP. 248, 250 (1992)). The Guidelines, however, replaced the system that justified *Williams* with a "rigid" one. *Id.* Consequently, reliance on *Williams* is inappropriate in the present sentencing context.

106. *See id.* at 166. For a discussion of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), see *supra* Part I.B.

107. *See Watts*, 519 U.S. at 166 (Stevens, J., dissenting).

108. *See id.* at 167. For a discussion of *Witte v. United States*, 515 U.S. 389 (1995), see *supra* Part I.B. In *Witte*, Justice Stevens believed that the Court's holding weakened the Double Jeopardy Clause. *See Witte*, 515 U.S. at 408 (Stevens, J., concurring in part and dissenting in part). In Stevens' opinion, the Court had "fail[ed] to recognize the critical distinction between the character of the offender and the character of the offense,...fail[ed] to recognize the change in sentencing practices caused by the Guidelines," and misapplied precedent. *Id.* at 412.

109. *See Watts*, 519 U.S. at 167.

110. *See id.* at 168.

111. *Id.* at 168–69.

As he asserted, nothing supported the Court's reading of the statute as "authoriz[ing] an incremental penalty for each offense for which the defendant was indicted if she is convicted of at least one such offense."[112]

III. THE ANTITHERAPEUTIC EFFECT OF *WATTS/PUTRA*

Before delving into the antitherapeutic effect of the sentencing procedure that the Supreme Court approved in *Watts/Putra*, it is helpful to start with a workable definition of "therapeutic jurisprudence":

> Therapeutic jurisprudence is an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects. Therapeutic jurisprudence suggests that these positive and negative consequences be studied with the tools of the behavioral sciences, and that, consistent with considerations of justice and other relative normative values, law be reformed to minimize anti-therapeutic consequences and to facilitate achievement of therapeutic ones.[113]

When a judge punishes defendants for offenses for which a jury has issued an acquittal, serious detrimental psychological consequences affect not just the defendants themselves but also the entire system. One reason the *Watts/Putra* decision is so disturbing is that it sits upon a shaky foundation—namely, the Sentencing Guidelines and judicial precedent,[114] which themselves are flawed.

Specifically, the Sentencing Guidelines and cases in the genre of *Williams*, *McMillan*, and *Witte* are predicated on two intermeshed assumptions: first, that sentencing proceedings are separate from the guilt and innocence phase of the trial,[115] and second, that sentencing is of lesser importance.[116] Stated otherwise, the common message emanating from the Sentencing Guidelines and the judicial precursors to *Watts/Putra* is that once the jury has made its decision, the next phase that actually pronounces the punishment is relatively perfunctory, and thus, certain constitutional protections, like the reasonable doubt standard, vanish.

The Sentencing Guidelines and cases—*Williams*, *McMillan*, and *Witte*—are defective. In truth, sentencing is possibly the most significant phase of a criminal trial

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112. *Id.* at 169.

113. Stolle et al., *supra* note 2, at 17–18. *See also* LAW IN A THERAPEUTIC KEY xvii (David B. Wexler & Bruce J. Winick eds. 1996) (defining therapeutic jurisprudence); Winick, *supra* note 2, at 185 ("Therapeutic jurisprudence calls for the study of these consequences with the tools of the social sciences to identify them and to ascertain whether the law's antitherapeutic effects can be reduced, and its therapeutic effects enhanced, without subordinating due process and other justice values.").

114. For a discussion of the *Guidelines Manual* and of cases that influenced the decision in *Watts/Putra*, see *supra* Part I.

115. For a discussion of *Williams v. New York*, 337 U.S. 241 (1949), see *supra* Part I.A.

116. *See generally supra* Part I.

because it is what pronounces loss of life or liberty.[117] This phase sends the defendant off to prison, and it is basic that prisoners' perceptions of the fairness of the process itself will have a real impact on their rehabilitation.[118]

Conversely, while the Sentencing Reform Act sought to effectuate fairness by eliminating the disparity in sentences,[119] it spawned its own inequities. Also, while the *Williams*, *McMillan*, and *Witte* trilogy damaged procedural protections for defendants during punishment proceedings,[120] the Court should have inducted the Constitution as the unyielding despot of that sentencing kingdom. Instead, the criminal justice system now has punishments for acquittals with Supreme Court approval, and the antitherapeutic consequences abound: disrespect for the law, rage, helplessness, and disregard for human life.

A. Disrespect for the Law and Rage

Several scholars writing in the area of therapeutic jurisprudence have pointed out that when an individual participates in a judicial process, the actual outcome of their experiences is not what principally influences them.[121] What matters most is their evaluation of the fairness of the process itself. As Tyler explains:

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117. In *In re Winship*, 397 U.S. 358, 362–63 (1970), the case in which the United States Supreme Court officially constitutionalized the reasonable doubt standard, the Court emphasized that the reason we have the standard in a criminal case is because the accused is exposed to punishment—that is, stands to lose life or liberty. *See also* Mullaney v. Wilbur, 421 U.S. 684, 697 (1975) (rejecting the contention that in the post-guilt context the defendant's "critical interests in liberty and reputation [were] no longer of paramount concern..."); United States v. Wise, 976 F.2d 393, 409 (8th Cir. 1992) (Arnold, C.J., concurring in part and dissenting in part) ("For most defendants in the federal courts, sentencing is what the case is really about.").

118. *See generally* Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 864–65 (1993). Gould points out that "the psychological constructs with which an inmate enters the facility may have implications for behavior within the correctional institution as well as future behavior when the inmate is released from incarceration." *Id.* at 864–65. She states that "at least one study has found that persons involved in felony cases, who may be unfaily [sic] characterized as marginal adherents to society's value system (the poor, the poorly educated, minorities, or the unemployed) are most influenced by procedural fairness rather than the leniency of the sentence they receive." *Id.* at 865. Also, as Gould states, there are similar findings with respect to others who experience the legal system. *Id. See also* Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 435–39 (1992). According to Tyler, "people are not primarily influenced by the outcome of their experience, i.e. by whether they win or lose their case, whether they go to jail or go free, or whether they pay a large fine or nothing." *Id.* at 436. He states that "[w]hat does influence people is their assessment of the fairness of the case disposition process. People are most strongly affected by their evaluations of the procedure by which the outcomes are reached—i.e., by their evaluations of the judicial process itself." *Id.* at 437.

119. For a discussion of the Sentencing Reform Act of 1984, see *supra* Part I.A.

120. *See generally supra* Part I.

121. *See* Gould, *supra* note 118, at 865; Tyler, *supra* note 118, at 436–37.

> Studies suggest that if the socializing influence of experience is the issue of concern (i.e., the impact of participating in a judicial hearing on a person's respect for the law and legal authorities), then the primary influence is the person's evaluation of the fairness of the judicial procedure itself, not their evaluations of the outcome. Such respect is important because it has been found to influence everyday behavior toward the law. When people believe that legal authorities are less legitimate, they are less likely to be law-abiding citizens in their everyday lives.[122]

Professor Gould, similarly discussing studies of both people involved in felony cases and individuals who were not incarcerated, points out that with respect to both groups, those "who have experienced a legal procedure that they judged to be unfair...had less respect for the law and legal authorities and are less likely to accept judicial decisions."[123] Basically, this can "lead to a 'gradual erosion of obedience to the law.'"[124]

Ironically, one of the express purposes behind the sentencing statute is "promot[ing] respect for the law."[125] An interpretation of the Sentencing Guidelines, however, that allows a judge to punish a defendant for an acquittal offense impugns that very objective.[126]

Let us shift here by putting ourselves in Ms. Putra's shoes and also by assuming that Ms. Putra is a lay person of average intelligence. We likely know that the reasonable doubt standard presides over our case. While we might not be well versed in the seminal reasonable doubt cases, like *In re Winship*[127] and *Mullaney v. Wilbur*,[128] we understand that a jury must acquit when the prosecution fails to prove guilt beyond a reasonable doubt. We probably have some sense that this standard of proof is sacred and central to American criminal justice.[129]

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122. Tyler, *supra* note 118, at 437.

123. Gould, *supra* note 118, at 865.

124. *Id.* (quoting Daniel W. Shuman & Jean A. Hamilton, *Jury Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 SMU L. REV. 449, 451 (1992)).

125. 18 U.S.C § 3553(a)(2)(A) (1994). *See* Gould, *supra* note 118, at 860 (suggesting that "[p]romoting respect for the law is apparently aimed at the public's perception of the law rather than that of the individual offender"). For a discussion of the goals behind the Sentencing Reform Act of 1984, see *supra* Part I.A.

126. *See* Gould, *supra* note 118, at 860–61. Gould believes "that it makes more sense to extract this goal [of promoting respect for the law] from its retributive neighbor-phrases and investigate the internalization of a defendant's moral respect and compliance with the legal system." What Gould aptly points out is that "[i]n turn, such an analysis could buttress the public's understanding and respect for the law...." *Id.* at 861.

127. 397 U.S. 358 (1970).

128. 421 U.S. 684 (1975).

129. *See generally* BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE" HISTORICAL PERSPECTIVES ON THE ANGLOAMERICAN LAW OF EVIDENCE (1991); Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665 (1987) (discussing how the Court and commentators have failed to focus on the federal constitutional right protected by the reasonable doubt rule); Jon O. Newman, *Beyond*

Our sentencing, however, shatters our whole concept of reasonable doubt. Although the jury has issued an acquittal, finding the existence of reasonable doubt, the judge has simply eradicated it and effectually replaced it with a conviction. As such, Ms. Putra perversely ends up with the very sentence she would have received had the jury not found reasonable doubt with respect to that charge.[130] The judge's conduct proclaims that the sacrosanct reasonable doubt rule does not matter and that the system does not really have to abide by its own rules.

Ms. Putra also likely knows about her right to a jury trial. This is something that the United States Constitution guarantees her.[131] As discussed more below, this is especially meaningful to her because she possibly feels an affinity with some or even all of the jurors.[132] The judge, however, tramples upon the jury system right before Ms. Putra's eyes. After all, Ms. Putra sat through a jury trial, saw the jury leave to deliberate, and then watched them return with an acquittal. In trumping that acquittal, the judge proclaimed that the right to a jury trial is a sham and that the system can cavalierly disregard it.

If Ms. Putra chose to testify at her own trial, the deleterious effect is magnified. While Ms. Putra might not be aware that Justice Thomas quite recently espoused that "a fundamental premise of our criminal trial system is that 'the jury is the lie detector,'"[133] she might have some sense that the jurors believed her testimony over and above that of the prosecution's witness or witnesses. In rejecting the jury's acquittal, the judge's implicit message is that its very function, that of assessing credibility, is meaningless.

"Reasonable Doubt", 68 N.Y.U. L. REV. 979, 980 (1993) (opining that "the time has come for American courts, especially federal courts, to move beyond 'reasonable doubt' as a mere incantation, to give renewed consideration to what reasonable doubt means and how it should be applied as a rule of law, so that the standard might serve as a more precise divider of the guilty from the innocent"); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 458 (1989) ("The reasonable doubt rule thus serves as the means of giving the presumption of innocence constitutional meaning."). *See also* Leland v. Oregon, 343 U.S. 790, 802–03 (1952) (Frankfurter, J., dissenting) (stating that the reasonable doubt burden is "basic in our law and rightly one of the boasts of a free society").

130. *See* United States v. Watts, 519 U.S. 148, 163 (1997) (Stevens, J., dissenting). For discussion of Justice Stevens' dissent, see *supra* Part II.C.

131. Article III, § 2 of the United States Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. CONST. art. III, § 2, cl.3. The Sixth Amendment of the Constitution provides in pertinent 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 the crime shall have been committed...." U.S. CONST. amend VI. *See also* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding Sixth Amendment right to jury trial applies to both the federal government and the states by incorporation into the Fourteenth Amendment).

132. *See generally infra* notes 136–41 and accompanying text.

133. United States v. Scheffer, 118 S. Ct. 1261, 1266 (1998) (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)).

Further, Ms. Putra probably has a rudimentary grasp of the concept of double jeopardy.[134] While she might not have the sophistication to parse the unwieldy *Blockburger* test,[135] she probably believes that once she is acquitted, double jeopardy forbids the government from trying the same thing again. The sentencer, however, demolishes Ms. Putra's whole notion of double jeopardy finality by putting her through what she perceives as an ostensible sua sponte re-trial in which her acquittal somehow mutates into an effectual conviction. While Ms. Putra, a non-lawyer, might understand that a different standard of proof applies to her sentencing, she probably does not appreciate why that justifies a second proceeding and a contrary result.

The double jeopardy doctrine is, of course, an important constitutional safeguard.[136] As the Supreme Court once elaborated:

> [An idea] that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[137]

Although likely not able to articulate such bedrock policies behind the Double Jeopardy Clause, Ms. Putra harbors some notion that the Clause aims not only to bring about closure but also to "[equalize] the adversary capabilities of grossly unequal litigants."[138] The sentencing procedure that ignores Ms. Putra's acquittal strangles finality and further deflates her by promoting "anxiety and insecurity" and substantiating what she feared all along—that "even though innocent [she] may be found guilty."[139]

As such, this one sentencing procedure, like a tsunami, has likely swept away Ms. Putra's belief in reasonable doubt, the jury system and double jeopardy. Ms. Putra

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134. The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend.V. *See generally* Ronner, *supra* note 52, at 663–70 (discussing the origin and purpose behind double jeopardy protection).

135. Blockburger v. United States, 284 U.S. 299 (1932). *See also* Ronner, *supra* note 52, at 742–52 (discussing the *Blockburger* test).

136. *See generally* Ronner, *supra* note 52, at 663–70 (discussing the purpose behind the Double Jeopardy Clause). *See also* JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY (1969); Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L. REV. 735, 770 (1983) (acknowledging that although "[t]he true intent of the framers may indeed be an exercise in speculation[,] the founders probably intended to erect a 'humane' or humanitarian shield against multiple punishments and prosecutions").

137. Green v. United States, 355 U.S. 184, 187–88 (1957).

138. Notes & Comments, *Twice In Jeopardy*, 75 YALE L.J. 263, 277–78 (1965) ("[D]ouble jeopardy is not simply res judicata dressed in prison gray. It was called forth more by oppression than by crowded calendars. It equalizes, in some measure, the adversary capabilities of grossly unequal litigants."). *See also* Ronner, *supra* note 52, at 667–69.

139. *Green*, 355 U.S. at 187–88.

is, moreover, inundated with a broader message—namely, that the law is ruled by one person, the judge. Within all of her tumult there is probably rage.

Not surprisingly, rage is a key issue in an intriguing treatise on criminal personality.[140] Drs. Yochelson and Samenow elaborate:

> The danger of anger as it occurs in the criminal is that it has more harmful consequences than anger in the noncriminal. An anger reaction in the criminal "metastasizes." It begins with an isolated episode, but spreads and spreads until the criminal has lost all perspective. Eventually, he decides that everything is worthless.[141]

Even if Ms. Putra was not prone to excessive anger before her encounter with the judicial system, the experience that absurdly eviscerated her victory likely engendered that "metastasized" rage.[142] This could have a considerable impact on her conduct in the prison and could then be detrimental upon her future release.[143]

B. Disregard for Human Life and Helplessness

For the person experiencing the judicial system, punishment for acquittal offenses also diminishes the importance of human life and spawns a sense of helplessness. It is here that we once again walk in Ms. Putra's shoes, but this time focus on her grasp of the role of the jury.

Here, as is typical, an accused enduring the ordeal of trial tends not to identify with the judge, who is someone perceived of as elite.[144] Instead, the accused will feel an affinity with the jurors and even see them as protectors against both the prosecutor and the judge.[145] In fact, the nexus between an individual faced with loss of life or liberty and the community of her peers is the essence of the Sixth

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140. *See* SAMUEL YOCHELSON & STANTON E. SAMENOW, THE CRIMINAL PERSONALITY (1976).

141. *Id.* at 268. *Cf.* Gould, *supra* note 118, at 863 ("It seems likely that inmates with mental disorders may express anger, fear and disillusionment in maladaptive ways.").

142. *See* YOCHELSON & SAMENOW, *supra* note 140, at 268.

143. *See generally* Gould, *supra* 118, at 864–65 ("[T]he psychological constructs with which an inmate enters the facility may have implications for behavior within the correctional institution as well as future behavior when the inmate is released from incarceration.").

144. *See generally* CRIME AND JUSTICE (Leon Radzinowicz & Marvin E. Wolfgang ed. 1971). This compilation of data on the differences in the backgrounds of American judges suggests that most judges can be described as part of the establishment. In Stuart S. Nagel, *Types of Judges*, *in* 2 CRIME AND JUSTICE 476 (1971), the author explains that most judges formerly held occupations like "prosecuting attorney, legislator, corporation counsel, businessman, teacher, public administrator, attorney general, and regulatory agency attorney." As such, in most situations a defendant in the criminal system will sense that the judge is part of an elite world—nothing like his or her own.

145. *See generally* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.").

Amendment jury trial guarantee.[146] The identification factor is in fact inherent in landmark jury cases, like *Strauder v. West Virginia*,[147] which have deemed it to be an equal protection violation for the state to put defendants through a trial before a jury from which members of their own race have been purposefully excluded:

> [T]he constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.[148]

What underlies *Strauder* is the recognition of how important it is for the accused to be able to look over at the jury box and to feel identification with the jurors, who are peers or equals. Specifically, with respect to Ms. Putra, she may feel estranged, uncomfortable and even alien in the world of the court room, but it is likely that when she looks over to the jury box there is a modicum of relief: that is, she sees at least some people of the same gender, race, age, and social class. Stated otherwise, of all the players on the stage the jurors are the ones most like herself.

It is Ms. Putra's connection with the jurors that compounds the psychic injury of the judge's erasure of the acquittal, which is, after all, the fruit of the jurors' labor. Ms. Putra is aware that the jurors, people somewhat like herself, have sacrificed time from their own lives. Some of them have given up work responsibilities and have been torn away from their family and friends. While it may not have occurred to Ms. Putra to liken jury service to voting or glorify it into passionate participation in democracy,[149] she surely understands that sitting on the jury is service and indeed serious work. Also, perhaps within earshot of Ms. Putra, the judge in her case may have even lectured the jury or potential jurors on the virtues of jury service.[150]

In the course of her trial, Ms. Putra is aware that these individuals sat through days or weeks or months of evidence and then went to work on deliberations. All of this labor gave birth to a verdict, one that included her precious acquittal. When

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146. *See supra* note 131.

147. 100 U.S. 303 (1879).

148. *Id.* at 308. *See also* Batson v. Kentucky, 476 U.S. 79 (1986) (prosecutor may not challenge potential jurors solely on account of their race or assume that black jurors will be unable to impartially decide a case against a black defendant); Williams v. Florida, 399 U.S. 78, 87 (1970) (explaining the "long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement"). *See generally* Lisa Kern Griffin, *"The Image We See Is Our Own": Defending the Jury's Territory at the Heart of the Democratic Process*, 75 NEB. L. REV. 332 (1996) (examining how the jury functions within the criminal justice system).

149. *See generally* JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995). *See also* Griffin, *supra* note 148, at 336–38 (discussing the democratic ideals behind the concept of a jury).

150. Quite a few judges make a practice of doing this. By way of example, during my own clerkship, the late federal district court judge, Eugene P. Spellman, told the potential jurors before jury selection about the jury system and why it was an honor to serve on a jury.

the sentencer simply embraced the part that of the result that he agreed with and dispensed with the rest, he relayed the message that the jurors' labor was all for naught. Specifically, the judge effectually trivialized the sacrifice and labor of Ms. Putra's "neighbors, fellows, associates, persons having the same legal status in society...."[151] On one level, the message transmitted was that the establishment does not truly value such a human enterprise.[152]

Here, however, the message sinks painfully deeper because of Ms. Putra's instinctive affinity with some or all of the jurors. For Ms. Putra, the judicial denigration of the "community of peers" seems personal and possibly feels like a denigration of the accused herself. She hears it, perhaps not even on a conscious level, as a syllogism that goes something like this—because your equals are nothing, then you are nothing as well.

The overall effect of this procedure is to contribute to what Yochelson and Samenow see as an attribute of the criminal personality, which they call "the zero state"[153] and has three incestuous facets:

> the basic view of oneself as a nothing, a self-deception in that it does not conform to the facts; "transparency," in which the criminal believes that everyone else shares his view that he is worthless; and permanence, in which the criminal believes that his state of being a nothing will last forever and will never change.[154]

As such, punishments for jury acquittals can nurse or even aggravate what, as Yochelson and Samenow point out, is not infrequently an aspect of the criminal psyche—namely, that abysmally low self esteem.

Undoubtedly, there is a ligature between "the zero state" and what has been labeled "learned helplessness."[155] In his study, Martin Seligman, a psychologist, defines the interlocking ingredients of such learned helpless: "[f]irst, an environment in which some important outcome is beyond control; second, the response of giving up; and third, the accompanying cognition: the expectation that no voluntary action can control the outcome."[156] Most disturbing are Seligman's accounts of experiments on animals that were subjected to pain that they could neither control nor avoid. Unlike those in the comparison group with a means of escaping the agonizing stimuli, the helpless subjects eventually stopped eating or became limp and apoplectic.[157]

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151. *Strauder*, 100 U.S. at 308.

152. *See generally* Duncan v. Louisiana, 391 U.S. 145, 156 ("Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.").

153. YOCHELSON & SAMENOW, *supra* note 140, at 265–68.

154. *Id.* at 266.

155. MARTIN E.P. SELIGMAN, HELPLESS: ON DEPRESSION, DEVELOPMENT AND DEATH xvii (1992) (discussing "learned helplessness").

156. *Id.* at xvii.

157. *See, e.g., id.* at 42–43 (describing how uncontrollable shock produced more anxiety in rats and resulted in the "breakdown of a well-trained appetitive discrimination"). *See also id.* at 44 ("In summary, helplessness is a disaster for organisms capable of learning that

The analogy between "learned helplessness" in animals and the human condition is not at all strained.[158] When human institutions or procedures mimic the laboratory environment that sires learned helplessness, they too inspire "the expectation that no voluntary action can control the outcome."[159] In fact, a legal procedure can basically endorse "giving up."[160]

Ms. Putra's experience at sentencing constitutes the very recipe for learned helplessness. It instructs her that the outcome or Ms. Putra's own fate is not merely beyond *her* control, but even lies outside the realm of the jurors to whom the legal system has assigned control. The sentencer's effectual nullification of the jury verdict urges giving up and submitting to what is a seductive thanatotic dirge: there is nothing we can do to change our lives.

IV. CONCLUSION

Unfortunately the path leading up to the *Watts/Putra* decision was itself tortured.[161] The Sentencing Guidelines and decisions in *Williams*, *McMillan*, and *Witte* were based on some fictitious notion that sentencing proceedings were sui generis and thus undeserving of certain constitutional protections.[162] In *Williams*, the Supreme Court relaxed the evidentiary standards at sentencing.[163] The *McMillan* Court did away with reasonable doubt as the standard for establishing sentencing "factors."[164]

In fact, that chasm between sentencing and the guilt and innocence phase of trial expanded after the passage of the Sentencing Reform Act of 1984 and the promulgation of the Sentencing Guidelines that allowed sentencers to consider conduct that was not proved at trial.[165] The post-Sentencing Guidelines decision in

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they are helpless. Three types of disruption are caused by uncontrollability in the laboratory: the motivation to respond is sapped, the ability to perceive success is undermined and emotionality is heightened.").

158. *See id.* at 31 (discussing how helplessness "is a general characteristic of several species, including man").

159. *Id.* at xvii.

160. *See generally* Gould, *supra* note 118, at 873 (discussing EDWARD L. DECI, INTRINSIC MOTIVATION (1975), and EDWARD L. DECI, THE PSYCHOLOGY OF SELF-DETERMINATION 140 (1980)). Gould explains that "[t]he amotivational system takes over when a person perceives 'that there is no relationship between behaviors and rewards on outcomes. Perceived competence, self determination and self esteem tend to be extremely low. People who are amotivational feel helpless, incompetent and out-of-control.'" *Id.* at 873 (quoting Bruce Winick, *The Side Effects of Incompetency Labeling and the Implications of Mental Health Law*, *in* LAW IN A THERAPEUTIC KEY, *supra* note 113, at 26). Gould concludes that "[i]f inmates feel demoralized by the procedural injustice they experience under the guidelines, and continue to feel this way upon entering the correctional institution, then subsequent maladaptive behavior and the inability to follow correctional directives may be expected pursuant to the operation of the inmate's amotivational response system." Gould, *supra* note 118, at 873–74.

161. *See generally supra* Part I.

162. *See id.*

163. *See* discussion *supra* Part I.A.

164. *See* discussion *supra* Part I.B.

165. For discussion of the Sentencing Reform Act of 1984, see *supra* Part I.A.

Witte was especially harmful.[166] The *Witte* Court concluded that matters treated as sentence enhancers in one case could become the very basis for formal charges in a subsequent indictment.

The main thrust of these stepping stone developments was to create in sentencing a kind of "wild west" atmosphere where just about anything can happen. Specifically, the decisions and the Sentencing Guidelines are disingenuous. The *McMillan* Court, dodging the venerable reasonable doubt standard, invites legislatures to simply take an element and re-name it a factor. The *Witte* Court euphemistically evades the Double Jeopardy Clause by denying that identical offenses are the same and that enhancing punishment is punishment. More generally, the most heinous prevarication is that sentencing, the very proceeding that spells loss of life or liberty, does not deserve to have certain constitutional safeguards.

Justice Stevens was right when he called the decision in *Watts/Putra* "perverse."[167] In *Watts/Putra*, the Supreme Court stretched too far by putting its seal of approval on a procedure that lets judges expunge jury acquittals and treat them as convictions. What makes it more toxic than *McMillan* and *Witte* is that the sentences imposed on Watts and Putra escalated into the next offense level range.[168] As such, the plain truth in *Watts/Putra* is that both defendants ended up saddled with the very sentences they would have had if the jury had not acquitted them of certain charges.

As discussed above, the procedure condoned in *Watts/Putra* is the epitome of antitherapeutic jurisprudence. It, thwarting the literal goals of the Sentencing Guidelines, may promote disrespect for the law by riding roughshod over the reasonable doubt standard, the right to a jury trial, and the spirit behind the double jeopardy clause.[169] Further, it may spawn rage and encourage disregard for human life.[170] Most disturbing, the *Watts/Putra* sentencing mechanism may foster "the zero state"[171] and "learned helplessness."[172] In truth, punishment for acquittals may actually nourish criminal behavior: it can reinforce lawlessness and create a disincentive to reform.

Admittedly, sentencing does and can subsume objectives other than rehabilitation. Professor Jeffery, a criminologist, calls these "models" and isolates three:

> A retribution model is based on past conduct and the sentence must fit the crime. A deterrence and incapacitation model is based on an

166. *See* discussion *supra* Part I.B.

167. United States v. Watts, 519 U.S. 148, 163 (1997) (Stevens, J., dissenting).

168. In *Watts*, the judge gave Watts 262 months in prison and 60 months of supervised release by enhancing Watts' base offense level by two levels under the Guidelines. United States v. Watts, 67 F.3d 793 (9th Cir. 1995). In *Putra*, without the additional drugs from the acquittal count, Putra's range would have been 15 to 21 months. United States v. Putra, 78 F.3d 1386, 1837 (9th Cir. 1996). The extra amount bumped her range up to 27 to 33 months. *Id. See also* discussion *supra* Part II.A.

169. *See generally* discussion *supra* Part III.

170. *See generally* discussion *supra* Parts III A, B.

171. *See* YOCHELSON & SAMENOW, *supra* note 140, at 265–68.

172. SELIGMAN, *supra* note 155, at xvii.

> assessment of punishment on the future conduct of the criminal and/or potential criminal. The rehabilitation model is based on an assessment of the psychological and social needs of the defendant, and a suitable program of treatment for each criminal.[173]

In the United States, one of the ways we evaluate the effectiveness of a particular sentencing model, be it retribution, rehabilitation, or deterrence and incapacitation, is to determine its impact on recidivism, which, as one criminal justice expert, has pointed out, is practically a national obsession:

> In the United States, the "bottom line" in assessing crime control programs is the impact on crime rates and recidivism. Did the level of reported crime go down following the implementation of a new policy? Was there a decrease in the number of arrests for members of a particular target group (e.g., career criminals)?[174]

How can we possibly say that the fabric of sentencing has no place for at least a rehabilitative strand when we are so worried about recidivism.[175] That is, unless

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173. C. RAY JEFFERY, CRIMINOLOGY: AN INTERDISCIPLINARY APPROACH 141 (1990). Jeffrey points out that "[t]he crime and not the criminal is the object of the sentence for the deterrence and retribution models, and the purpose of the sentence is to punish rather than reform." *Id. See also* Gould, *supra* note 118, at 857–58 (discussing the goals of sentencing). Gould points out that "[i]t is generally accepted that there are four purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation. Throughout history, one or the other of these purposes has dominated sentencing theory and practice." *Id.* at 857 (citing Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L & CRIMINOLOGY 883, 887 (1990)).

174. WILLIAM L. SELKE, PRISONS IN CRISIS 63 (1993). *See also* ROMAN TOMASIC & IAN DOBINSON, THE FAILURE OF IMPRISONMENT 1, 3 (1979) (discussing how "[the failure of imprisonment] has been one of the most noticeable features of the current crisis in criminal justice systems in advanced industrial or post-industrial societies," and pointing out that "[i]t has become clear that prisons have failed to achieve the objectives of rehabilitation, deterrence and reform that their proponents have seen them as fulfilling"); EDWARD GLOVER, THE ROOTS OF CRIME 329 (1960) ("In the eyes of the law the recidivist is regarded as in some degree a 'hardened' criminal on the way to becoming an 'incorrigible rogue,' who cannot be spared the more severe penal and deterrent disciplines at the disposal of the court."); JEFFERY, *supra* note 173, at 389–91 (discussing the concept of the career criminal and that "criminologists have noted that a small number of offenders commit many of the more serious crimes"). PROGRAM EVALUATION DIV., OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., RECIDIVISM OF ADULT OFFENDERS: A PROGRAM EVALUATION REPORT (1997), is also an interesting study, tracking 1879 offenders released in 1992 and 6791 offenders sentenced to probation in 1992 and examining recidivism for exactly three years from the date of release or the date of the probationer's sentencing. According to the study, "[o]verall,...about 59 percent of the offenders released from prison in 1992 were arrested for a new felony or gross misdemeanor in Minnesota within three years, and an additional 5 percent were rearrested for a felony or gross misdemeanor outside of Minnesota during the three-year follow up period." *Id.* at 48. Also, "[d]uring the three years, 45 percent were convicted of a new offense in Minnesota, and 40 percent were imprisoned for new offenses or technical violations of their supervised release." *Id.* Those felons who were sentenced to probation, however, had "lower recidivism rates." *Id.*

175. *See* JEFFERY, *supra* note 173, at 141 (defining the rehabilitative ideal as focused on assessing the needs of the defendant and providing suitable treatment).

our system evolves into one in which an automatic life term is given for *any* violation of the law, there has to be some concern with the kind of person who will at some point emerge from a finite period of incarceration.

As discussed above, studies suggest that when individuals participate in the legal system it is their assessment of the fairness of the proceeding itself that is a main factor that affects their conduct not only in prison but also when they get out.[176]

This Article opened with Dostoevsky's sagacious advocate who admonishes that what happens in sentencing and the way it happens is crucial. He points out the flip side of the coin, the potential salutariness of sentencing and its capacity to "save [Mitya's] soul and regenerate him."[177] Surely the United States Supreme Court should also consider the antitherapeutic consequences of forcing defendants to serve additional time in prison for the very offense for which the jury acquitted them.

176. *See supra* notes 117–24 and accompanying text.
177. DOSTOEVSKY, *supra* note 1, at 902.