Notes

PUNISHMENT DESPITE ACQUITTAL: AN UNCONSTITUTIONAL ASPECT OF THE FEDERAL SENTENCING GUIDELINES?

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I. INTRODUCTION

Some people may find it surprising that under current federal sentencing law, a person can, in effect, be punished for certain acts even though acquitted of those acts by a jury. Imagine, for example, a woman who is arrested while sitting alone in a car belonging to another person. The police find 100 pounds of marijuana in the trunk and a pistol beneath the seat. The defendant is indicted on two counts under federal law. The first count is possession of marijuana with intent to distribute. This count carries, in this hypothetical, a sentence of between thirty-three and forty-one months.[1] The second count is the use and carrying of a firearm during the commission of a drug trafficking crime. This charge carries a mandatory five-year sentence.[2] Consequently, if convicted on both counts, the defendant faces nearly eight and one-half years in prison.

From the moment of arrest our hypothetical defendant admits possessing the marijuana, but she vigorously denies knowing of the gun's presence in the car. After a trial on both counts, the court instructs the jury that, if they find beyond a reasonable doubt that the defendant knew of the gun's presence, they must convict on the gun charge. The jury finds the defendant guilty on the marijuana charge but acquits her on the gun charge.

It would seem that on these facts the judge would simply select a sentence within the thirty-three to forty-one month range designated for the marijuana conviction. Instead, however, the judge sentences the defendant to fifty-one months, because, despite the jury's verdict of acquittal, the judge believes by a preponderance of the evidence that the defendant knew of the gun's presence in the car. Thus, although acquitted of the gun charge, the defendant spends an extra ten months in prison because of the gun's presence.

1. The actual sentence carried for this offense will vary according to the offender's "criminal history" and "relevant conduct." Relevant conduct is discussed *infra* at notes 57–68 and accompanying text. However, barring other factors, United States Sentencing Guidelines (hereinafter U.S.S.G.) § 2D1.1(c)(12) designates a base offense level of 20 for possession of 100 pounds of marijuana, which would produce a Guideline range of 33 to 41 months.

2. 18 U.S.C. § 924(c)(1) (1988).

Surprisingly, this result is encouraged, and most courts say mandated, by the Federal Sentencing Guidelines.[3]

This Note examines the question of whether, and under what circumstances, an offender's sentence should be increased on the basis of conduct for which the offender has been acquitted. The Note begins by providing a brief background of the history and structure of the Federal Sentencing Guidelines.[4] It then discusses the various types of "relevant conduct" that may affect an offender's sentence and the arguments for and against the policy of considering acquitted conduct[5] in sentencing.[6] Finally, this Note analyzes the circumstances under which courts should and should not be permitted to increase an offender's sentence on the basis of acquitted conduct.[7]

II. BACKGROUND OF THE FEDERAL SENTENCING GUIDELINES

Sentencing of federal criminal defendants changed dramatically when the Federal Sentencing Guidelines took effect in 1987.[8] Prior to enactment of the Guidelines, federal sentencing was largely discretionary, and for the most part, insulated from appellate review.[9] Although the Federal Rules of Criminal Procedure did provide for appeal of sentences,[10] most judges did not discuss their reasons for choosing a particular sentence. Consequently, it was rarely possible to know if a judge had considered acquitted conduct.[11]

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3. U.S.S.G. § 2D1.1(b)(1), cmt. 3.
4. *See infra* notes 8–31 and accompanying text.
5. As a shorthand reference, this Note uses "uncharged conduct" to refer to acts which, under the Guidelines, may increase an offender's sentence, but for which the offender was never charged or the charges were dropped prior to sentencing. In contrast, the term "acquitted conduct" refers to acts for which an offender was charged and found not guilty by the finder of fact at trial. Finally, "unconvicted conduct" refers to both uncharged and acquitted conduct.
6. *See infra* notes 133–232 and accompanying text.
7. *See infra* notes 232–36 and accompanying text.
8. Pub. L. No. 98-473, Title II, 98 Stat. 1987 (1984) § 235(a)(1), as amended by Pub. L. No. 99-217, §§ 2, 4, 99 Stat. 1728 (Dec. 26, 1985); Pub. L. No. 99-646, § 35, 100 Stat. 3599 (Nov. 10, 1986); Pub. L. No. 100-182, § 2, 101 Stat. 1266 (Dec. 7, 1987) (codified at 18 U.S.C. § 3551, historical note).
9. *See, e.g.*, United States v. Campbell, 684 F.2d 141, 154 (D.C. Cir. 1982), where the sentencing judge noted:

> After years of study, it is still not possible to identify precisely the factors that go into this decision. [citing A. CAMPBELL, LAW OF SENTENCING (1978); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER, 1973.] Indeed, as the dissenting opinion noted in *United States v. Grayson*, 438 U.S. 41, 55 [1978], problems of this sort are subject to appellate review "only because of the trial judge's laudable explication of his reasons for imposing the sentence in this case. In many cases it would be impossible to discern whether a sentencing judge had been influenced by [certain factors], since there is no requirement that the reasons be given."

See also United States v. Cardi, 519 F.2d 309, 312–13 (7th Cir. 1975); United States v. Bernard, 757 F.2d 1439, 1444 (4th Cir. 1985) (generally a sentence, if within the statutory limits is not subject to review); United States v. Lowrey, 335 F. Supp. 519, 521 (D.D.C. 1971) ("trial court has virtually absolute, if not unfettered discretion.").

10. "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner ...." United States v. Sweig, 454 F.2d 181, 181 n.1 (2d Cir. 1972) (quoting FED. R. CRIM. P. 35).
11. *See supra* note 9.

Although there was no uniform system of sentencing among all federal courts, some general patterns did exist.[12] One factor that courts often considered important was that the defendant would normally be eligible for parole after serving only one-third of the sentence.[13] Thus, the applicable statutes authorized much longer sentences than those normally served for a given crime. Accordingly, judges routinely sentenced offenders to much longer terms than they actually intended the offender to serve.[14]

After much debate and study,[15] Congress passed the Sentencing Reform Act of 1984.[16] One of the primary purposes of the Act was to restore honesty to the system by requiring courts to impose sentences that offenders are truly expected to serve rather than inflated sentences in anticipation of parole.[17] A second purpose was to eliminate the disparities that the old system often created between similarly situated offenders.[18] Prior to the Guidelines, offenders convicted of similar crimes were often sentenced to widely disparate terms merely because of differences in judges' sentencing philosophies.[19] Congress intended to correct these inequities by establishing uniform rules to guide all federal courts in sentencing.[20]

The Act created the United States Sentencing Commission and empowered it to devise a system of sentencing ranges for the federal courts.[21] Under the resulting system, determination of an offender's sentence normally begins with a probation officer's calculation of a recommended sentence that is included in the offender's pre-sentence investigation report.[22] This process

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12. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5-6 (1973).

13. One recent study noted that, during the years 1982–1986, the average time actually served by federal prisoners ranged from 44% to 45.9% of their total sentences. *See* Gerald Heaney, *The Realities of Guideline Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 177 n.51 (1991) (citing UNITED STATES DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, STATISTICAL REPORT, FISCAL YEAR 1986, at 12 (1987)).

14. Steven Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

15. *See generally*, William W. Wilkins & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

16. The Sentencing Reform Act of 1984 was passed as Pub. L. No. 98–473, tit. II, ch. 2, §§ 211–239, 98 Stat. 1837, 1976, 1987–2040 (codified principally at 18 U.S.C. § 3551–3625, 3673, 3742, and 28 U.S.C. §§ 991–998 (1988)).

17. *See* S. Rep. No. 225, 98th Cong., 2d Sess. at 56 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3239. Note, however, that the new system retained a "good time" allowance whereby a prisoner's sentence could be reduced by up to 54 days a year for good behavior. *See* 18 U.S.C. § 3624(b) (1988).

18. Congress expressly stated that one of its purposes was "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (1988). In 1989, the First Circuit noted:

> The purpose of the Guidelines is not to remove the discretion judges historically have exercised when determining the appropriate sentence for an individual offender, but rather to reduce the often "unjustifi[ed]" and "shameful" consequences of the indeterminate-sentencing system of the past, when similarly situated offenders frequently received greatly disparate sentences.

United States v. Mocciola, 891 F.2d 13, 15 (1st. Cir. 1989) (quoting Mistretta v. United States, 488 U.S. 361, 366 (1989), and S. Rep. No. 98–225 (1983)).

19. FRANKEL, *supra* note 12, at 21–22.

20. *See supra* note 18.

21. Comprehensive Crime Control Act of 1984, Pub. L. 98–473, § 217(a), 98 Stat. 1837, 2017–34 (codified as amended at 28 U.S.C. §§ 991–998 (1988)).

22. *See* Heaney, *supra* note 13, at 168.

involves determining the "base offense level"[23] for each count of conviction.[24] The base level is then adjusted for other "relevant conduct"[25] to arrive at a "combined adjusted offense level."[26] Then the probation officer examines the defendant's past criminal record and calculates her "criminal history points."[27] Next, the officer consults a matrix (reproduced below) and determines the recommended sentencing range.[28] The sentencing judge is then free to select a term from within the sentencing range.[29] The sentence, however, may not exceed the statutory maximum[30] for the crime of conviction, nor fall below the statutory minimum.[31]

After the probation officer completes the pre-sentence report, the court may hold a sentencing hearing to make factual determinations.[32] During the hearing counsel may argue whether the probation officer's initial range determinations were correct.[33] The sentencing judge[34] then decides which range is applicable.[35] Once the applicable range is determined, the judge usually must select a term from within that range. The judge may, however, depart from the range if the judge determines that there is sufficient reason to do so.[36] If the final sentence is within the applicable Guideline range, it is

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23. U.S.S.G. § 1B1.1(b).

24. To make this determination, the probation officer refers to the Guidelines Manual. *See, e.g.*, UNITED STATES SENTENCING COMM'N, FEDERAL GUIDELINES MANUAL, 1992 Edition (Nov. 1991) [hereinafter MANUAL].

25. See *infra* notes 57–68 and accompanying text for a discussion of relevant conduct.

26. MANUAL, *supra* note 24, at app. D, worksheets A and B.

27. Criminal history points reflect the offender's prior convictions. The more convictions the offender has had, the heavier the sentence will be. *See id.*, ch. 4, and worksheet C.

28. If, for example, one examines the matrix for a crime with an offense level of 20, committed by an offender with a criminal history of level two, the matrix specifies a 37 month to 46 month sentencing range. *See* Appendix *infra.*

29. 28 U.S.C. § 994(b)(2).

30. Prior to the Guidelines, the federal criminal code prescribed only the maximum penalties that could be imposed for violations of various laws. When the Guidelines were adopted these "statutory maximums" were left in the code, and they still cap the sentence an offender may receive. For further discussion of statutory maximums, *see infra* notes 150–59, 188–99 and accompanying text.

31. *See* U.S.S.G. §§ 5G1.1(a), (b). *See also* United States v. Lawrence, 708 F. Supp. 461, 463 (D.P.R. 1989) (where sentencing range exceeds statutory maximum, statutory maximum prevails); United States v. Savage, 863 F.2d 595, 600 (8th Cir. 1988) (sentence may not fall below statutory minimum).

32. U.S.S.G § 6A1.3(a).

33. Note, however, that the court is not required to hold a full-fledged evidentiary hearing. *See* United States v. Prescott, 920 F.2d 139, 144 (2d Cir. 1990).

34. There is no requirement that the sentencing judge has to be the same judge who heard the trial. Therefore, a judge who has not heard the evidence at trial could, in effect, directly contradict the jury's verdict, based only upon the pre-sentence report. Moreover, pre-sentence reports often rely primarily upon prosecutors' files. *See* Heaney, *supra* note 13, at 172–73.

35. U.S.S.G. § 6A1.3(b)

36. "The court shall impose a sentence of the kind, and within the range" specified in the applicable Guideline, absent valid grounds for departure. 18 U.S.C. § 3553(b). For a discussion of grounds for departure see U.S.S.G. § 1A.4(b). *See also* U.S.S.G. § 5K2.0, p.s. ("[T]he sentencing court may impose a sentence outside the range established by the applicable Guideline, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission' ....").

reviewable on appeal[37] under a deferential standard.[38] However, sentencing decisions may be reviewed *de novo* in cases where the judge departs from the prescribed range.[39]

Importantly, Congress left for the Commission to decide whether sentences should be based solely upon the charge for which a defendant is convicted (a "charge offense" system)[40] or whether the sentencing judge ought to also consider other "relevant conduct" committed by the offender (a "real offense" system).[41] The Commission settled upon a compromise between these two positions.[42] The offense for which the defendant was convicted (the "charge offense") forms the starting point or "base level offense."[43] The judge then evaluates other relevant conduct[44] committed by the offender (the "real offense" element of the system) to determine if enhancement or reduction of the offense level is warranted. The "combined adjusted offense level"[45] thus reflects a blend of these two elements.

A. *Sentencing Practices Before the Guidelines*

The Commission based its system in part upon then-current federal sentencing practices because it intended for the Guidelines to reflect the patterns of earlier case law.[46] Therefore, the body of case law that courts developed before the Guidelines has profoundly influenced the resulting system.

Prior to the introduction of the Guidelines, judges rarely explained exactly what factors were used to set sentences.[47] However, in cases where judges did discuss sentencing factors, most concluded that a sentencing judge had almost unlimited discretion to consider various aspects of the defendant's background.[48] Over time courts developed a substantial body of case law holding that a sentencing judge could consider acts for which an offender had been neither charged nor convicted.[49] Moreover, most courts that addressed

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37. 18 U.S.C. § 3742.

38. *See, e.g.*, United States v. Juarez-Ortega, 866 F.2d 747, 748 (5th Cir. 1989) (review of a sentence within the applicable Guideline range will be done only for "gross abuse of discretion."); United States v. Mocciola, 891 F.2d 13, 16 (1st Cir. 1989) ("we will disturb only if clearly erroneous.").

39. *See, e.g.*, United States v. Restrepo, 884 F.2d 1294, 1295 (9th Cir. 1989) ("We review *de novo* the application of the Sentencing Guidelines.").

40. *See* MANUAL, *supra* note 24, at 4–5.

41. *Id.*

42. For further discussion of this subject, *see generally* Breyer, *supra* note 14.

43. *See supra* notes 23–24 and accompanying text.

44. See *infra* notes 57–68 and accompanying text for examples of the various types of relevant conduct.

45. MANUAL, *supra* note 24, at 699 (worksheet B).

46. The Commission based its system in part upon an analysis of over 10,000 actual presentence reports. MANUAL, *supra* note 24, at 3. *See also*, United States v. Ryan, 866 F.2d 604, 609 (3d Cir. 1989) (Commission intended for sentencing courts to continue to consider information that they could consider prior to Guidelines.)

47. *See, e.g.*, United States v. Sweig, 454 F.2d 181, 182 n.2 (2d Cir. 1972), where the judge explained, "I don't usually talk at great length about sentences. Long talks are certainly of no help to the defendant at such a time ...." In this case, however, the judge made a record of his considerations. *Id. See also supra* note 9.

48. A few constraints had been imposed. *See infra* note 192 and accompanying text.

49. United States v. Rodriguez-Gonzalez 899 F.2d 177, 182 (2d Cir. 1990) ("Traditionally, a sentencing judge exercised broad discretion in considering all relevant information in determining an appropriate sentence, including evidence of uncharged crimes,

the narrower issue of using acquitted conduct as a sentencing factor held that a judge may consider such conduct.[50]

The United States Supreme Court has not yet addressed the constitutionality of considering acquitted conduct as a sentencing factor.[51] A line of Supreme Court cases, however, leaves little doubt that the present Court would view the practice as constitutionally permissible.[52] In *Dowling v. United States*,[53] the Court held that acquitted conduct may be introduced as evidence in a subsequent trial of the same defendant on a different charge.[54] In rather broad language, the Court noted that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."[55] Justice Brennan, in dissent, pointed out with some dismay that such reasoning could apply as well to allow courts to consider evidence underlying a prior acquittal in order to enhance a defendant's sentence.[56]

III. UNCHARGED, UNCONVICTED AND ACQUITTED CONDUCT

Unconvicted conduct may affect an offender's sentence in two ways.[57] First, unconvicted conduct may be considered as "relevant conduct."[58] This term includes a number of acts that are related to the offense of conviction, but that need not be proven at trial. Included in this category[59] are actions taken in preparation for the offense or to avoid detection.[60] Relevant conduct also encompasses actions taken by co-conspirators[61] and behavior that is part of the same "course of conduct" or "common scheme" as the offense conduct.[62] A sentencing judge may also consider as relevant conduct a defen-

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dropped counts of a criminal indictment and criminal activity resulting in acquittal."). *See also* United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989) (citing United States v. Bernard, 757 F.2d 1439, 1444 (4th Cir. 1985)) ("It was well-settled prior to the enactment of the Guidelines that '[a]cquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant.'").

50. *See infra* note 160 and accompanying text.

51. The constitutionality of the Federal Sentencing Guidelines system was challenged in Mistretta v. United States, 488 U.S. 361 (1989), where the Court upheld the system against separation of powers and excessive delegation arguments.

52. *See also infra* note 203 and accompanying text.

53. 493 U.S. 342 (1990) (use of evidence under FRE 404(b) indicating that defendant committed a previous crime similar to that charged in the instant case did not violate the Double Jeopardy Clause even though the defendant was acquitted on the previous charges).

54. *Id.* at 342.

55. *Id.* at 349.

56. *Id.* at 363 (Brennan, J., dissenting). One could, however, argue that *Dowling* is distinguishable because it addresses only the admissibility of evidence at a subsequent trial on a different charge. Because sentencing involves the direct imposition of punishment, there is a logical reason for treating it differently. *See infra* note 204 and accompanying text.

57. Although a judge may consider unconvicted conduct in deciding what term to select within a Guideline range, that decision is essentially discretionary and is thus not within the scope of this discussion.

58. U.S.S.G. § 1B1.3.

59. For a more complete treatment of this subject, *see generally* Wilkins & Steer, *supra* note 15.

60. U.S.S.G. § 1B1.3(a)(1).

61. *Id.*

62. *Id.* at § 1B1.3(a)(2).

dant's post-arrest actions such as attempting to obstruct the prosecution[63] or acceptance of responsibility for the crimes.[64] The sentence enhancement for possession of a gun in the hypothetical at the beginning of this Note is an example of the use of relevant conduct.[65]

Second, a judge may use unconvicted conduct not specifically enumerated in the Guidelines to justify outright departure from the Guideline ranges.[66] The Guidelines allow a judge to impose a sentence outside the range if circumstances unforeseen by the Sentencing Commission exist.[67] Such circumstances may include unconvicted conduct not expressly set out in the Guidelines.[68] Brief examples of uncharged conduct and acquitted conduct are presented below to illustrate these concepts.

A. Uncharged conduct—United States v. Miller

In *United States v. Miller*,[69] the Sixth Circuit reviewed a case where uncharged conduct played an important role in determining an offender's sentence. The defendant Miller was charged with conspiracy to distribute cocaine.[70] Miller refused the services of a lawyer, adopted the prosecutor's description of his crime, and pleaded guilty to the charge.[71] The district judge accepted Miller's guilty plea on the charge of distributing approximately thirty-five grams of cocaine.[72] Heeding the judge's advice to cooperate with the probation officer, Miller disclosed during the course of the probation interview that he had dealt cocaine on other occasions.[73] From that conversation, the probation officer calculated that Miller had sold approximately 1,170 grams of cocaine rather than the thirty-five grams to which he pled guilty.[74] The court used this additional information in setting Miller's sentence.[75] Even after a reduction for his "acceptance of responsibility,"[76] and a *sua sponte*[77] downward departure by the court, Miller received a sixty-month sentence instead of one within the fifteen- to twenty-one-month range that he would have received on the basis of his guilty plea alone.[78]

The Sixth Circuit declined to find the sentencing judge's decision clearly erroneous and affirmed the sentence.[79] The court noted that the Guidelines

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63. *Id.* at § 3C1.1.
64. *Id.* at § 3E1.1.
65. *Id.* at § 2D1.1(b)(1) provides: "If a dangerous weapon (including a firearm) was possessed, increase by 2 levels." The Commission goes on to state, "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." MANUAL, *supra* note 24, at 83 n.3.
66. U.S.S.G. § 5K2.0.
67. *Id.*
68. MANUAL, *supra* note 24, at 5–6.
69. 910 F.2d 1321 (6th Cir. 1990).
70. *Id.* at 1322.
71. *Id.* at 1323.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 1323–24.
78. *Id.* at 1323.
79. *Id.* at 1327.

instruct a judge to consider uncharged conduct that is part of a common course of conduct with the offense.[80] The court, agreeing with earlier decisions in other circuits,[81] held that this provision of the Guidelines properly required a sentencing judge to consider the uncharged conduct.[82] Thus, a defendant may be subject to substantial penalties for conduct for which he was never charged and for which he never stood trial.

B. Acquitted Conduct—United States v. Isom

United States v. Isom[83] provides an example of the use of acquitted conduct to enhance criminal penalties. The jury acquitted the defendant Isom of counterfeiting, but convicted him on a second count of dealing in counterfeit money.[84] Despite acquittal on the counterfeiting charge, the sentencing judge enhanced the range by six levels because he believed, by a preponderance of the evidence, that the defendant had actually printed the counterfeit money.[85] On this basis he meted out a sentence which was double the maximum allowable for the conduct of conviction alone.

On appeal, Isom contended that the judge's finding was improper because it directly contradicted the jury's verdict that Isom was not criminally responsible for printing the counterfeit money.[86] The Fourth Circuit, however, affirmed the sentence.[87] The court held that acquittal does not necessarily establish a defendant's innocence, and thus, a sentencing judge is not precluded from considering the "facts" underlying the acquittal in determining the appropriate base level for calculating the sentence.[88]

C. The State of the Case Law Today

A substantial number of cases have now been decided at the circuit court level in which acquitted conduct[89] has been used to enhance sen tences. The overwhelming number of these cases have held that consideration of acquitted conduct is proper.[90] However, in *United States v.*

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80. U.S.S.G. § 1B1.3 provides that the offense level shall be determined with regard to "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction ...."

81. *Miller*, 910 F.2d at 1327 (citing United States v. Frederick, 897 F.2d 490 (10th Cir. 1990)); United States v. Mocciola, 891 F.2d 13, 16 (1st Cir. 1989); United States v. Allen, 886 F.2d 143, 145 (8th Cir 1989)).

82. *Miller*, 910 F.2d at 1327.

83. 886 F.2d 736 (4th Cir. 1989).

84. *Id.* at 737.

85. *Id.* at 738. The district court explained that the enhancement was necessary because the "defendant was the actual printer of the counterfeit obligation." *Id.*

86. *Id.*

87. *Id.* at 739.

88. *Id.* at 738.

89. A similar question concerns conduct dismissed in plea agreements. At least one court has held that consideration of dismissed charges at sentencing is not permissible. *See* United States v. Faulkner, 934 F.2d 190 (9th Cir. 1991). *But see* United States v. White, 875 F.2d 427 (4th Cir. 1989) (court affirmed enhancement based upon gun possession even though the gun charge was dropped in a plea bargain).

90. *See, e.g.*, United States v. Coleman, 947 F.2d 1424 (10th Cir. 1991); United States v. Morrison, 946 F.2d 484 (7th Cir. 1991); United States v. Welch, 945 F.2d 1378 (7th Cir. 1991); United States v. Eberspacher, 936 F.2d 387 (8th Cir. 1991); United States v. Lawrence, 934 F.2d 868 (7th Cir. 1991); United States v. Moreno, 933 F.2d 362 (6th Cir. 1991); United

Brady,[91] a divided panel of the Ninth Circuit held that acquitted conduct may not be considered by a sentencing judge.[92]

The defendant, Brady, was charged with first degree murder and assault with intent to commit murder.[93] The jury convicted him of the lesser included offenses of voluntary manslaughter and assault with a dangerous weapon.[94] Although the Guidelines prescribed a sentence of fifty-one to sixty-three months, the judge explicitly departed from the Guidelines and sentenced Brady to 180 months. Thus, because the judge believed contrary to the jury's verdict that Brady had intentionally tried to kill his victims, he increased Brady's sentence three-fold.[95] On appeal, the *Brady* court held that a sentencing judge may not depart upward on the basis of facts that a jury must have rejected in order to reach acquittal.[96] The court vacated the sentence and remanded for a new sentencing hearing.[97]

The three-judge panel of the Ninth Circuit was divided in *Brady*.[98] The majority acknowledged that there was already a significant body of contrary precedent in other circuits, and attempted to distinguish some of those cases.[99] In addition, though, the majority stressed its belief that increasing an offender's sentence on the basis of acquitted conduct was at odds with the verdict of acquittal.[100]

The *Brady* majority took the position that, although the Guidelines permit a sentencing judge to consider some types of conduct beyond the counts of conviction, it does not necessarily follow that acquitted conduct may

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States v. Rivera-Lopez, 928 F.2d 372 (11th Cir. 1991) (per curiam); United States v. Averi, 922 F.2d 765 (11th Cir. 1991); United States v. Fonner, 920 F.2d 1330 (7th Cir. 1990); United States v. Duncan, 918 F.2d 647 (6th Cir. 1990); United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir. 1990); United States v. Dawn, 897 F.2d 1444 (8th Cir. 1990); United States v. Funt, 896 F.2d 1288 (11th Cir. 1990); United States v. Mocciola, 891 F.2d 13 (1st Cir. 1989); United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989); United States v. Ryan, 866 F.2d 604 (3d Cir. 1989).

91. 928 F.2d 844 (9th Cir. 1991).

92. *Id.* at 852.

93. *Id.* at 845.

94. *Id.* at 845–46. A lesser included offense is "[o]ne which is composed of some, but not all elements of a greater offense and which does not have any element not included in greater offense so that it is impossible to commit greater offense without necessarily committing the lesser offense." BLACK'S LAW DICTIONARY 902 (6th ed. 1990). In this case, defendant argued that the jury's verdict of voluntary manslaughter indicated that the jury believed that the defendant killed the victim, but that he did not do so with the intent required for first degree murder. *Brady*, 928 F.2d at 850.

95. *Id.* at 850.

96. The court stated:

> [O]ur decision simply limits the facts that a court may rely upon in imposing sentence. The Sentencing Guidelines themselves draw the curtain on certain sentencing facts. ... Here, we define one more category of facts that cannot be used by a district court in imposing sentence, i.e. facts that have been rejected by a jury's not guilty verdict.

Id. at 851 n.12.

97. *Id.* at 854.

98. Judges Pregerson and Nelson supported the proposition that acquitted conduct should not be considered at sentencing. Chief Judge Wallace dissented.

99. *Id.* at 851.

100. The court stated 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." *Id.*

be considered.[101] According to the court, allowing consideration of acquitted conduct would permit a judge to circumvent the jury's verdict.[102] The court noted that although the sentence was capped by the statutory maximum for the conduct of conviction, the maximums were enacted at a time when parole was available after a defendant had served one-third of his or her sentence.[103] Because parole is no longer available,[104] statutory maximums now have a different status than they had before the Guidelines were promulgated.[105]

In dissent, Chief Judge Wallace noted that before the Guidelines were enacted, sentencing courts were allowed to consider conduct other than the offense of conviction when setting a defendant's sentence.[106] He noted explicit language in the Act showing that Congress had no intention of changing this practice.[107] He believed that Congress implicitly authorized upward departures based on any relevant evidence.[108] The elimination of parole did not limit a judge's ability to impose a sentence up to the statutory maximum.[109] Finally, he cautioned against creating a split among the circuits.[110]

Although two other courts have suggested in dicta that they would not allow acquitted conduct to be considered at sentencing, they both later adopted the opposite view. The Seventh Circuit in *United States v. Perez*[111] stated that a sentencing judge may consider prior acquitted conduct so long as it is not used to enhance the sentence.[112] The court, however, retreated from this position only two years later. In *United States v. Fonner*[113] the court reinterpreted *Perez* and held that it did not preclude the use of acquitted conduct.[114] The *Fonner* court insisted that the statement in *Perez* only meant that because the acquitted conduct was not being used to enhance the defendant's sentence,[115] the court's ability to use acquitted conduct was not an issue in

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101. *Id.* at 851. Indeed, the Guidelines themselves do not specifically mention acquitted conduct as a basis for enhancement.

102. *Id.* at 851.

103. *Id.* at 852.

104. *Id.*

105. *Id.*

106. *Id.* at 855 (Wallace, C.J., dissenting).

107. "[N]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court ... may receive and consider for the purpose of imposing an appropriate sentence" *Id.* (quoting 18 U.S.C § 3661).

108. "[T]he recodification of this 1970 statute ... makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the [Guidelines]." *Id.* (quoting U.S.S.G. § 1B1.4, cmt.).

109. *Id.* at 856–57 (Wallace, C.J., dissenting).

110. *Id.* at 857 (Wallace, C.J., dissenting).

111. 858 F.2d 1272 (7th Cir. 1988).

112. Specifically, the court stated that acquitted conduct could be considered "as long as the acquittal is not relied on to enhance the sentence." *Id.* at 1277.

113. 920 F.2d 1330 (7th Cir. 1990).

114. *Id.* at 1333.

115. The *Perez* court concluded that there was no evidence that the sentencing judge had used the prior conviction for any reason other than to discuss the defendant's lack of remorse. 858 F.2d at 1278.

that case.[116] The *Fonner* court then unequivocally held that a sentencing judge may consider acquitted conduct as a basis for sentence enhancement.[117]

Similarly, in dicta, the Eleventh Circuit suggested that acquitted conduct could not be considered at sentencing[118] but in later cases held to the contrary.[119] Thus, with the exception of the Ninth Circuit,[120] all the circuit courts of appeals are in agreement that a sentencing judge may consider acquitted conduct.[121]

A few district courts have taken positions similar to that expressed in *Brady*. In *United States v. Rodriguez*,[122] for example, the sentencing judge refused to apply a recommended enhancement for gun possession because the defendant had been acquitted on the gun charge. Without discussion, the judge ruled that consideration of acquitted conduct would violate the defendant's right to due process and the constitutional ban against double jeopardy.[123] Moreover, the judge believed that enhancement of the defendant's sentence for possessing a gun would be contrary to the rationale behind the Guideline,[124] which was intended to penalize the increased risk of violence posed by gun possession.[125] Because the jury's verdict indicated that it believed the defendant was unaware of the gun's presence, there could be no increased risk of violence.[126] For these reasons the judge declined to impose the enhancement.[127]

Other courts acknowledge that they have the authority to consider acquitted conduct but refuse to do so, recognizing its inequity. In *United States v. Guadagno*,[128] the court cited a number of cases holding that it is permissible to use acquitted conduct as the basis for enhancement, but the court rejected this course because of its unfairness.[129] Similarly, the court in *United States v.*

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116. *Fonner*, 920 F.2d at 1333.

117. *Id.* ("different burdens of proof allow a sentencing judge to enhance the penalty for a crime of which the defendant has been convicted after considering relevant conduct that did not support a verdict of guilt in an earlier trial.").

118. In United States v. Scroggins, 880 F.2d 1204 (11th Cir. 1990), the court stated, "We further note that had the appellant opted for a jury trial, a verdict of not guilty on count one would have prevented the district court from considering the conduct alleged in that count in fashioning the appellant's sentence on count two." *Id.* at 1211 n.18.

119. *See, e.g.*, United States v. Funt, 896 F.2d 1288, 1300 (11th Cir. 1990).

120. In 1992 the Ninth Circuit heard a case involving acquitted conduct, and hinted in an unpublished opinion that it would stand by its decision in *Brady*. However, the court decided the case on other grounds. United States v. Martinez-Villa, 958 F.2d 379 (9th Cir. 1992) (text in WESTLAW).

121. *See supra* note 90 and accompanying text. Moreover, as discussed *supra* note 52 and accompanying text, the Supreme Court case law on acquitted conduct supports the majority view.

122. 741 F. Supp. 12 (D.D.C. 1990).

123. Without discussion, the judge simply held that, "[t]o add at least 27 months to the sentence for a charge of which the defendant was found not guilty violates the constitutional principle of due process and the ban against double jeopardy." *Id.* at 14.

124. U.S.S.G. § 2D1.1(b)(1).

125. *Rodriguez*, 741 F. Supp. at 14.

126. *Id.*

127. *Id.*

128. 766 F. Supp. 617 (N.D. Ill. 1991).

129. "[T]he court is still troubled by the seeming unfairness of using evidence of an offense of which the defendant denied guilt and of which he was acquitted to enhance his sentence." *Id.* at 622.

Davis[130] also came to the conclusion that, although it had the power to consider acquitted conduct, doing so would unfairly override the jury's verdict and violate the Guidelines' goal of eliminating disparity in sentencing.[131]

IV. ANALYSIS OF THE ARGUMENTS FOR AND AGAINST USING ACQUITTED CONDUCT IN SENTENCING

Although most courts now agree that a judge may consider acquitted conduct at sentencing, the reasoning behind this counterintuitive outcome is worth examining. Courts considering this issue have formulated credible arguments on both sides of the question. Those arguments are examined in depth in this section.

A. The Argument in Favor of Permitting Courts to Consider Acquitted Conduct at Sentencing

Three factors combine to provide a rationale for allowing sentencing judges to consider acquitted conduct as a basis for sentence enhancement. These factors include (1) the lower standard of proof required for fact finding at sentencing hearings;[132] (2) the continuing presence of "statutory maximum" sentences;[133] and (3) the fact that the majority of pre-Guidelines cases on this subject held that consideration of acquitted conduct at sentencing was proper.[134] *McMillan v. Pennsylvania*,[135] decided by the United States Supreme Court in 1986, illustrates the importance of the first two factors. *McMillan* discusses the lower standard of proof and the statutory maximums in a slightly different setting.

The *McMillan* court examined a state statute that imposed a five-year minimum mandatory sentence if the sentencing judge determined that the defendant "visibly possessed" a firearm during commission of certain crimes.[136] The statute expressly provided that gun possession was not an element of the crime to be proven at trial.[137] Rather it was only a sentencing factor to be determined by the judge after a defendant was convicted of the underlying charge.[138] If the judge found that the defendant had visibly possessed a gun, she had no choice but to impose the minimum sentence of five years.[139] The *McMillan* Court narrowly upheld the statute's constitutionality in a five to four decision.[140]

1. The Lower Standard of Proof

Importantly, *McMillan* held that a legislature may make possession of a gun a "sentencing factor" rather than an "element of the crime," and that a

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130. 763 F. Supp. 645 (D.C. Cir. 1991).
131. *Id.* at 648.
132. *See infra* notes 141–49 and accompanying text.
133. *See infra* notes 150–59 and accompanying text.
134. *See infra* notes 141–49 and accompanying text.
135. 477 U.S. 79 (1986).
136. 42 PA. CONS. STAT. ANN. § 9712.
137. 42 PA. CONS. STAT. ANN. § 9712(b).
138. *Id.*
139. 42 PA. CONS. STAT. ANN. § 9712(a).
140. McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986).

lower standard of proof may be applied to such factors than is required at trial.[141] The Pennsylvania statute explicitly provided that the standard of proof for determining gun possession was to be only a preponderance of the evidence,[142] rather than beyond a reasonable doubt.[143] Although the petitioners argued that a higher standard was constitutionally mandated,[144] the *McMillan* Court rejected this assertion with little discussion.[145] The Court simply noted that sentencing judges have traditionally made findings of fact without any enunciated standard of proof, and concluded that proof by a preponderance of the evidence is enough to satisfy the requirements of due process for sentencing decisions.[146]

This lower standard of proof forms the basis for a convincing and widely used argument that a sentencing court is free to consider acquitted conduct. According to this view, the fact that a jury has acquitted the defendant of a crime does not mean that the defendant did not commit the crime, but merely that the evidence was insufficient to convince the jury of the defendant's guilt beyond a reasonable doubt.[147] A judge determining facts for the purpose of sentencing is not bound by the jury's conclusions because a different standard of proof is required. Therefore, a judge is free to come to a conclusion directly contrary to the jury's. Moreover, double jeopardy[148] is not implicated because the enhancement is not imposed for the acquitted conduct, but rather is merely an adjustment of the sentence for the crime of conviction within the otherwise permissible range defined by the statutory maximums.[149]

2. The Presence of Statutory Maximum Sentences

McMillan demonstrates another persuasive argument for the use of acquitted conduct as a basis for sentence enhancement. Before the Guidelines

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141. *Id.* at 92, 93.

142. 42 PA. CONS. STAT. ANN. § 9712(b).

143. Because the preponderance standard is easier to meet than the beyond a reasonable doubt standard, it is possible for a sentencing judge to find certain facts to exist even where a jury would find the opposite, due to the higher quantum of proof required of the jury. *See, e.g.,* United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989).

144. *McMillan*, 477 U.S. at 91–92.

145. *Id.* at 91–93.

146. Noting that a sentencing judge must make a number of express or implied findings of fact at sentencing, the Court declined to "constititutionaliz[e] burdens of proof at sentencing." *Id.* at 92 & n.8.

147. *See, e.g., Isom*, 886 F.2d 736, 738 where the court noted that "[a] verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence."

148. The Double Jeopardy Clause states, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ...." U.S. CONST. amend. V. One court described its purposes as:

> (1) to ensure the finality of judgement in criminal cases; (2) to minimize the defendant's exposure to the expense and emotional stress that a criminal proceeding entails; (3) to ensure that the government is not given an unfair opportunity to reformulate its case in light of what it learned during the first trial about the strengths of the defense and the weaknesses of its own case; (4) to protect the defendant's right to have his fate determined by the jury that was first empaneled and sworn; and (5) to ensure that multiple punishments are not imposed for the same offense.

United States v. Crotwell, 896 F.2d 437, 439 (10th Cir. 1990). *See also infra* note 201 and accompanying text.

149. *See also infra* note 158 and accompanying text.

came into existence, individual statutes specified the maximum permissible sentence for each federal crime.[150] The presence of these "statutory maximums" provided a limit and a unifying factor in sentencing all persons convicted under a given statute. The unifying factor stems from the guidance they provided for judges. Judges probably used these maximums as a yardstick to guide sentencing decisions,[151] as well as to set an upper limit on the total amount of punishment that could be imposed for a given infraction. However, when Congress enacted the Guidelines, it did not repeal the statutory maximums, and they continue to set the maximum allowable sentence for federal crimes.[152] Thus, it is arguable that in some sense Congress intended the statutory maximums, not the Guidelines, to be the ultimate limiting factor on the lengths of sentences. For this reason, many courts considering this issue have concluded that sentencing judges retain wide discretion to consider acquitted conduct so long as the sentence is below the statutory maximum for the offense of conviction.[153]

McMillan dealt with a Pennsylvania statutory minimum sentence.[154] Before it was enacted, the underlying offenses all carried maximum sentences far in excess of the five-year sentence mandated by the statute.[155] Thus by mandating a five-year minimum, the statute itself did not increase the possible sentence an offender could receive. It merely prescribed a floor within a range already available to the sentencing court.[156] The *McMillan* Court reasoned that such a statute more readily comports with due process than would one which expands the maximum sentence that a judge could otherwise impose.[157]

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150. Many individual statutes set their own maximum sentences. Others are set by class of offense. *See, e.g.*, 18 U.S.C. § 3581 (1988).

151. There is a dearth of information on exactly how pre-Guidelines judges determined sentences. In fact, the lack of any coherent formula for sentencing is the subject of an influential book by Judge Marvin E. Frankel. *See supra* note 12. (Although the Commission made an extensive study of sentences imposed by federal courts in 1985, that study did not focus on the rationales used by individual judges to select a given sentence. *See* UNITED STATES SENTENCING GUIDELINES COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS, June 18, 1987, n.64.) However, since the statutory maximum sentence gave judges an indication of how serious Congress considered the crime to be, this probably served to guide many sentencing decisions. For example, it would seem that an offender convicted of a crime carrying a 20-year maximum would probably receive a higher sentence than one convicted of a crime carrying a five-year maximum, although it was possible that they both could receive a four year sentence.

152. United States v. Brady, 928 F.2d 844, 852 (9th Cir. 1991).

153. *See, e.g.*, United States v. Juarez-Ortega, 866 F.2d 747, 748 (5th Cir. 1989) ("Juarez-Ortega's sentence on each of the two counts, although exceeding the Guidelines and the recommendation of the pre-sentence report, was within the statutorily permissible limits. This court will generally not review a sentence imposed within statutory limits ....").

154. McMillan v. Pennsylvania, 477 U.S. 79, 81 (1986).

155. Examples given by the *McMillan* Court included third-degree murder, robbery, kidnapping, rape, and involuntary deviate sexual intercourse which, under Pennsylvania law, carried statutory maximum sentences of 20 years in prison. Voluntary manslaughter and certain types of aggravated assault carried 10-year statutory maximums. *Id.* at 87.

156. For example, instead of being able to impose a sentence between zero and ten years as a judge might have otherwise been allowed, the statute narrowed the judge's options to between five and ten years.

157. The Court distinguished the Pennsylvania statute from the statute overturned in Mullaney v. Wilbur, 421 U.S. 684 (1975), which subjected the defendant to radically different sentences (between a nominal fine and life in prison) on the basis of the judge's post-trial

A similar argument can be made concerning the federal statutory maximums. There is a difference between a separate sentence, which would be unconstitutional if imposed without trial, and a sentence enhancement for a crime of conviction. The latter is simply a discretionary decision made by the sentencing court.[158] Courts routinely consider many factors in sentencing. For example, courts commonly impose higher sentences if an offender has had prior convictions. Yet this enhancement is certainly not punishment for the prior convictions, but is simply an augmentation of the punishment for the new crime based on salient characteristics of the offender's background.[159] In the same way, an enhancement based on conduct related to other charges of which an offender was acquitted is not a separate sentence and thus is not a double jeopardy violation. The verdict of guilt on the current charge exposes the offender to a sentence up to the statutory maximum. As long as the sentence does not exceed the maximum, the court is merely imposing a punishment within the permissible range for the crime. In choosing a specific sentence, courts have long been, and should continue to be, free to consider pertinent information without limitation.

3. The Body of Pre-Guidelines Case Law

Another argument for using acquitted conduct relies on pre-Guidelines cases that affirmed such use.[160] Proponents argue that the Guidelines were not intended to change that practice.[161] Prior to the enactment of the Sentencing Guidelines, most judges' reasons for choosing a certain sentence

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findings. *McMillan*, 477 U.S. at 87. The Court also distinguished the Pennsylvania statute from the one invalidated in Specht v. Patterson, 386 U.S. 605 (1967), because that statute increased the sentence an offender could receive from a maximum of 10 years to a possible life sentence, based on the sentencing judge's factual determinations. *McMillan*, 477 U.S. at 88. Because the Pennsylvania statute did not increase the possible sentencing range at all, the Court reasoned that its decision to uphold the statute was not in conflict with either *Mullaney* or *Specht*. *Id.* at 87–89.

158. For examples of the use of this argument to conclude that there is no double jeopardy violation, see United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181 (2d Cir. 1990); United States v. Mocciola, 891 F.2d 13 (1st Cir. 1989).

159. As the court pointed out in United States v. Bowdach, 561 F.2d 1160, 1175 (5th Cir. 1977), in discussing the use of prior convictions, "the defendant is not punished a second time for the same offense, but the repetition of criminal conduct aggravates his guilt and justifies heavier penalties when he is again convicted." *Id.*

160. United States v. Johnson, 823 F.2d 840 (5th Cir. 1987); United States v. Bernard, 757 F.2d 1439 (4th Cir. 1985); United States v. Ray, 683 F.2d 1116 (7th Cir. 1982); United States v. Morgan, 595 F.2d 1134 (9th Cir. 1979); United States v. Cardi, 519 F.2d 309 (7th Cir. 1975); United States v. Sweig, 454 F.2d 181 (2d Cir. 1972); Micelli v. LeFevre, 444 F. Supp. 1187 (S.D.N.Y. 1978). Other pre-Guidelines courts have stated in dicta that acquitted conduct is a permissible basis for sentence enhancement. *See, e.g.*, United States v. Billiteri, 541 F.2d 938 (2d Cir. 1976); United States v. Haygood, 502 F.2d 166, 171 n.16 (7th Cir. 1974); United States v. Atkins, 480 F.2d 1223 (9th Cir. 1973). *See also* United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982) (declining to hold that acquitted conduct may always serve as the basis for sentence enhancement, but nevertheless affirming a sentence based on acquitted conduct on the facts of the specific case). Only a few courts have stated that acquitted conduct may not be considered in sentencing. *See* United States v. Plisek, 657 F.2d 920 (7th Cir. 1981) (stating in dicta that it would be improper to enhance a sentence on the basis of a prior acquittal); Walker v. State, 47 A.2d 47 (Md. 1946) (trial court should not consider previous criminal charges of which accused was acquitted in passing sentence).

161. *See, e.g.*, United States v. Fonner, 920 F.2d 1330, 1333 (7th Cir. 1990) (citing pre-Guideline decisions and noting that "[w]e conclude that these decisions are as sound today as they were before the [G]uidelines."). *See also supra* note 160.

went undocumented and were, for the most part, not reviewable on appeal.[162] Because judges were not required to explain their sentencing decisions, there was simply no way to control what factors a judge used in sentencing.[163] However, in those cases where the sentencing courts did explain their decisions, only a few explicitly stated that they had considered a defendant's acquitted conduct.[164]

Pre-Guidelines appellate courts reviewing these sentences have generally held that acquitted conduct was a proper consideration for sentencing purposes.[165] The reasoning of these courts was similar to that used in the Guideline-era cases. Some reasoned that an acquittal did not necessarily establish the untruth of the evidence against the defendant.[166] Some courts also discussed the fact that a jury's inability to find a defendant guilty beyond a reasonable doubt should not preclude a judge from considering the underlying facts of the charge in her sentencing decision.[167] Moreover, enhancements based on acquitted conduct, similar to those based on prior convictions, were held not to offend the Double Jeopardy Clause because they simply modify a sentence imposed for the offense of conviction and are not a separate sentence for the conduct of which the offender was acquitted.[168]

Finally, some people have argued that Congress, in enacting the Guidelines, did not intend to diminish the scope of factors that a court may consider at sentencing.[169] Rather, it simply intended, among other things, to bring a degree of uniformity to the sentencing process. Thus, the passage of the Guidelines should not change the breadth of information available to a judge at sentencing.

B. The Argument Against Permitting Courts to Consider Acquitted Conduct in Sentencing.

The argument against allowing a sentencing court to consider acquitted conduct is more emotionally charged. This is because it springs more from a

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162. *See supra* note 9.

163. *See supra* note 9.

164. *See* cases cited *supra* note 160.

165. *See, e.g.*, United States v. Ryan, 866 F.2d 604, (3d Cir. 1989). There the court stated:

> Before the guidelines were promulgated, a court was permitted to consider evidence on counts of which a defendant was acquitted in sentencing the defendant. ... [T]he guidelines, as we read them, indicate that the Commission intended to permit sentencing courts to continue to consider such information in determining whether to depart from the applicable guideline.

Id. at 609 (citations omitted).

166. *See, e.g.*, United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972).

167. *See, e.g.*, People v. Griffin, 383 P.2d 432, 437 (Cal. 1963) ("An acquittal is merely an adjudication that the proof at the prior proceeding was not sufficient to overcome all reasonable doubt of the guilt of the accused.").

168. *See, e.g.*, United States v. Morgan, 595 F.2d 1134, 1135 (9th Cir. 1979) (citing United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977)). *See also supra* note 159 and accompanying text.

169. *See, e.g.*, United States v. Brady, 928 F.2d 844, 855 (9th Cir. 1991) (Wallace, C.J., dissenting); United States v. Mocciola, 891 F.2d 13, 16 (1st Cir. 1989).

common-sense recognition of the "unfairness" involved rather than from the legal fine points of precedent and statutory construction.[170]

Because there is little case law to support the position that acquitted conduct should not be considered, these arguments tend to be policy or constitutionally based. A general policy argument against overriding jury verdicts can be made. In addition, opponents of such use have also advanced Double Jeopardy arguments.[171] The policy argument and the Double Jeopardy argument are considered in depth in this section.

1. Use of Acquitted Conduct Circumvents a Jury's Verdict

Opponents of using acquitted conduct in sentencing argue that such use circumvents a jury's verdict.[172] While circumventing a verdict might appear desirable in cases where a jury reaches what appears to be the "wrong" verdict, it is fundamentally at odds with our system of justice.[173] Our criminal justice system gives a defendant the right to have her guilt or innocence determined by the finder of fact at trial.[174] Conducting a second inquiry into the same conduct under a lower standard of proof violates that right by allowing a judge to, in effect, find the defendant guilty and impose punishment for the same conduct upon which the jury acquitted. Thus, giving courts the right to enhance sentences on the basis of acquitted conduct enables the government to bypass the trial system[175] simply because a judge disagrees with the

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170. For these reasons, it also tends to rely more on emotionally laden phrases. *See, e.g.*, *Brady*, 928 F.2d at 851 ("[w]e would pervert our system of justice,"); United States v. Davis, 763 F. Supp. 645, 648 ("[enhancement on this basis] would be a gross violation of the Guideline's [sic] goal of eliminating unreasoned disparity in sentencing.").

171. Courts have also advanced Due Process rationales. *See, e.g.*, United States v. Restrepo, 946 F.2d 654, 663–64 (9th Cir. 1991) (Pregerson, J., dissenting), for an example of a due process argument that the reasonable doubt standard ought to apply at sentencing. However, due process arguments against the use of acquitted conduct run into several problems. Since defendants are given full adversarial hearings before sentencing, procedural due process concerns seem to be satisfied. Although one could argue that the application of the preponderance standard of proof is insufficient under *In re* Winship, 397 U.S. 358 (1970), this would contradict the *McMillan* Court's holding that application of the preponderance standard at sentencing satisfies due process concerns. *See supra*, note 145 and accompanying text. Of course, *McMillan* is distinguishable from federal cases because sentencing in Pennsylvania was not based on a guidelines system. *See infra* notes 178–81 and accompanying text. However, to advocate that all allegations involved in sentencing decisions should have to be proven beyond a reasonable doubt would run counter to almost all existing precedent. This would also require drastic change in the Guidelines, because they depend upon "relevant conduct" issues being established by a lower standard of proof at sentencing. Finally, to argue that the reasonable doubt standard should not apply to unconvicted conduct but ought to apply to acquitted conduct would create an obvious tautology, since wherever there is an acquittal, a jury has already decided the charges according to that standard by its verdict.

172. *See, e.g.*, *Brady*, 928 F.2d at 852.

173. As Justice Stevens said in his *McMillan* dissent, "[the state] may not advance the objectives of its criminal laws at the expense of the accurate factfinding owed to the criminally accused who suffer the risk of nonpersuasion." McMillan v. Pennsylvania, 477 U.S. 79, 102 (1986) (Stevens, J., dissenting).

174. United States v. Crotwell, 896 F.2d 437, 439 (10th Cir. 1990) ("The primary purposes of the Double Jeopardy Clause are ... to protect the defendant's right to have his fate determined by the jury that was first empaneled ...."). *See supra* note 148 for the complete list of purposes cited by the court.

175. An interesting policy consideration is the potential impact upon indictment decisions that allowing or forbidding the use of acquitted behavior could have. It seems that any such impact would cut both ways. In some cases, allowing acquitted conduct to be considered in

jury's findings.[176] This ability undermines the very foundations of our constitutionally mandated jury system.

2. *The Argument in Favor of Allowing Sentencing Courts to Consider Acquitted Conduct Is Flawed in Several Respects*

Opponents of using acquitted conduct in sentencing further note that proponents' arguments have several weaknesses.[177] These weaknesses are examined in this section.

a) *McMillan* Does Not Apply to Guideline Cases

One such weakness is that the *McMillan* decision, relied upon by proponents of the preponderance standard in sentencing, is not directly applicable to federal cases involving the use of acquitted conduct. *McMillan* did not involve the use of acquitted conduct,[178] and it did not involve a Guideline system. The Pennsylvania sentencing law was a traditional discretionary sentencing system where, in the absence of the mandatory minimum imposed by the statute, any conviction allowed the imposition of a sentence up to the statutory maximum.[179] This is not the case under the Federal Sentencing Guidelines system. Thus, where a sentencing judge's freedom is restricted by the Guidelines, the defendant has a liberty interest in a sentence within the Guideline range.[180] Therefore, the argument goes, a standard of proof higher than the preponderance standard ought to be applied to sentencing factors which go beyond that range.[181]

Moreover, the conduct at issue in *McMillan* was not a separate substantive offense.[182] Mere possession of a gun was not by itself illegal. It was seen by the *McMillan* Court as merely a "factor that has always been considered by sentencing courts to bear on punishment."[183] In contrast, where the

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sentencing could encourage prosecutors to indict suspects on charges despite poor prospects for conviction. Unscrupulous prosecutors might be motivated by the hope that, even if the defendant is acquitted by the jury, evidence presented in court might sway the judge for later sentencing purposes. Thus, because there would be no preclusion if the charges resulted in acquittal, the government would have less to lose by indicting on unprovable charges. This might force some defendants to face charges that otherwise would not be brought.

On the other hand, if acquittal resulted in preclusion, innocent defendants might be harmed in the opposite way. Knowing that a formal acquittal would prevent consideration of the alleged conduct, prosecutors could simply refrain from charging it, and then use it as unconvicted relevant conduct in arguing for a higher sentence. Thus, preclusion of acquitted conduct at sentencing would, in some cases, inhibit indictment, and replace trial, and all of the procedural safeguards entailed therein, with the prosecutor simply arguing the matter at the sentencing hearing. *See* Heaney, *supra* note 13, at 219.

176. *See, e.g., Brady*, 928 F.2d 844, for a case where the judge purposely overrode the jury's verdict because he disagreed with it.

177. *See, e.g., id.*; United States v. Restrepo, 946 F.2d 654, 665 (9th Cir. 1991) (Norris, J. dissenting).

178. The Pennsylvania statute provided that possession of a gun was not an element of the crime, and was therefore only to be determined by the judge as a sentencing factor. McMillan v. Pennsylvania, 477 U.S. 79, 81 n.1 (1986). Thus, none of the petitioners had been acquitted at trial.

179. *Id.* at 87.

180. *See, e.g., Restrepo*, 946 F.2d at 670–78 (Norris, J., dissenting).

181. *Id.* at 678.

182. *Id.* at 668.

183. *McMillan*, 477 U.S. at 89.

alleged conduct under consideration is a separate *crime* that has resulted in acquittal, such conduct has traditionally been considered to require proof at trial under a higher standard than a mere sentencing factor. Thus, the *McMillan* decision is distinguishable from Federal Guidelines cases where the acquitted conduct is itself a crime.

Finally, *McMillan* clearly supports the proposition that it is unconstitutional to use acquitted conduct to drastically enhance a sentence. The *McMillan* Court relied expressly on the fact that the enhancement in that case was not as large as in other cases where due process had been violated.[184] The Court implied, however, that where relevant conduct becomes "a tail which wags the dog of the substantive offense,"[185] that conduct must be proven by a greater standard of proof.[186] Thus, in those cases where the acquitted conduct would greatly enhance the resulting sentence, *McMillan* requires more than just the preponderance standard. If the enhancement is great enough to warrant considering the conduct an "element of the crime" then the state must prove it beyond a reasonable doubt.[187] Logically, this prevents its reconsideration at sentencing after being rejected by a jury under the same standard.

b) The Purpose of Statutory Maximums Has Changed

Another weakness in the argument for using acquitted conduct is that its rationale rests on the presence of statutory maximums. Yet the role of statutory maximums is now unmistakably different than when the maximum sentences were enacted.[188] The upper limit set by the statutory maximums no longer justifies the consideration of acquitted conduct. The wide latitude of sentencing judges has effectively been replaced by the Guidelines. In the pre-Guidelines era judges imposed sentences according to largely unspecified methods.[189] However, they were generally guided and limited by the statutory maximums.[190] Pre-Guideline methods were thus largely beyond review because appellate courts had no definite standards or benchmarks by which to adjudge their fairness.[191] Therefore, judges had wide discretion in sentencing decisions before the Guidelines, circumscribed only by the statutory maximums.[192]

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184. *See supra* note 157 and accompanying text.
185. *McMillan*, 477 U.S. at 88.
186. *See also* Heaney, *supra* note 13, at 217–19; United States v. Kikumura, 918 F.2d 1084, 1101 (3d Cir. 1990); United States v. Townley, 929 F.2d 365, 370 (8th Cir. 1991).
187. *In re* Winship, 397 U.S. 358 (1970).
188. *See* United States v. Brady, 928 F.2d 844, 852 (9th Cir. 1991).
189. *See supra* note 9.
190. *See supra* note 151 and accompanying text.
191. *See supra* note 9 and accompanying text.
192. A few other limitations had been imposed. *See, e.g.*, Townsend v. Burke, 334 U.S. 736 (1948) (prohibiting the careless use of patently inaccurate information as the basis for a sentence); United States v. Tucker, 404 U.S. 443 (1972) (prohibiting the use of prior convictions obtained in violation of the right to counsel). *See also* U.S.S.G. § 4A1.2, cmt. 6; United States v. Weston, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); United States v. Miller, 588 F.2d 1256 (9th Cir. 1978) (forbidding reliance on a pre-sentence report without amplification of the charges made within, unless the defendant chooses not to refute them). The constitutional prohibition against cruel and unusual punishment has, of course, also constrained sentencing.

The introduction of the Guidelines changed this situation. Now the Guidelines restrain much of a sentencing judge's freedom, and sentences have become reviewable on appeal. It is no longer within a judge's power to impose any sentence up to the statutory maximum.[193] Sentences are now regulated and constrained by the Guidelines. The statutory maximums function only to set the upper limits on the sentence that may, through a combination of factors, drive the Guidelines range that high.[194] Moreover, because the Guidelines reveal the inner workings of sentencing decisions, they are now readily subject to review.[195] Thus, where a person's constitutionally protected liberty is at stake, sentencing decisions based on acquitted conduct now can and should be subject to the limitations of the Double Jeopardy clause.[196]

It is also important that most statutory maximum sentences were enacted at a time when a prisoner was eligible for parole after serving one-third of the sentence. This is no longer the case. Congress, at the same time as it adopted the Guidelines, also repealed the federal parole system.[197] Thus, Congress clearly changed the purpose of the statutory maximums. These maximums no longer guide the sentencing judge, but now only limit the possible sentence that a person may receive upon conviction of a given offense. To believe that Congress intended for the statutory maximums to still guide sentencing calculations, one must presume that Congress intended to more than double the actual sentences for a given crime.[198] A much more plausible interpretation is that Congress intended the parole system to be replaced by the shorter determinate sentences that the Guidelines prescribe. It is thus unrealistic to give statutory maximums their pre-Guidelines effect when the possibility of parole has been removed.[199] A more realistic position is that the Guidelines now set the real limits, and acquittal should bar enhancement above the Guidelines range, despite the presence of statutory maximums which would seem to allow a higher sentence.

c) The Standard of Proof Is Irrelevant Because of Double Jeopardy Concerns

A third weakness of the argument favoring consideration of acquitted conduct at sentencing is its focus on the lower standard of proof for determining sentencing factors. While it may be appropriate to apply the preponder-

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193. United States v. Restrepo, 946 F.2d 654, 665 (9th Cir. 1991) (Norris, J., dissenting).

194. *See* authorities cited *supra* note 31.

195. Judges are now required to state their reasons for choosing a particular sentence. 18 U.S.C. § 3553(c)(1) (1988).

196. As noted legal historian David F. Currie stated in another context, "It is no answer that the sentence imposed ... is within the statutory maximum; it has long been established that government discretion may not be so exercised as to deny an independent constitutional right." DAVID F. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, 558 (1990).

197. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 2027 (1984); *see also* MANUAL, *supra* note 24, at 1 n.2.

198. Prior to the Guidelines, federal prisoners served, on average, less than one-half of their nominal sentence. *See supra* note 13. Since the parole system has been repealed, prisoners must serve virtually their entire sentence.

199. United States v. Brady, 928 F.2d 844, 852 (9th Cir. 1991).

ance standard for determining other sentencing factors,[200] no standard of proof is appropriate for *relitigating* facts settled by a previous acquittal because of double jeopardy concerns. Addressing this matter in terms of "standard of proof" simply sidesteps the basic issue of whether it is ever permissible to reconsider an acquitted person's guilt or innocence for purposes of imposing punishment.

Facts relating to a prior acquittal should be seen as a special category that is protected by the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause precludes both relitigation of acquittals and multiple punishments after a conviction.[201] Surely, if a second trial is precluded by the Double Jeopardy Clause, the punishment that would result therefrom must likewise be disallowed.[202] The Framers of this Amendment perceived the unfairness of allowing the government, with its superior resources, to repeat prosecutions and eventually wear down the defendant and obtain a conviction.[203] Permitting settled facts to be litigated again (this time at a lower standard of proof) for the express purpose of imposing punishment upon the defendant[204] is in direct contradiction to the Framers' intent. Because the purpose of the Double Jeopardy Clause is to prevent the reconsideration of settled verdicts, sentence enhancement based on acquittals falls squarely within its prohibition. This means that such facts should not be reconsidered at all for purposes of imposing punishment regardless of what standard of proof is applied.[205]

Despite this argument most courts considering the double jeopardy issue have held that the use of acquitted conduct does not offend the Double

200. *But see* Heaney *supra* note 13, at 208–20 for an analysis concluding that all relevant conduct should have to be proven beyond a reasonable doubt at trial.

201. The Supreme Court has summarized the purposes of the Clause in these terms: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted). *See also supra* note 148.

202. "Why is it that, having been tried and found guilty, [a person] can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being found a second time guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." Ex parte Lange, 85 U.S. (1 Wall.) 163, 173 (1873).

203. United States v. DiFrancesco, 449 U.S. 117, 130 (1980).

204. This may be distinguished from other cases such as Dowling v. United States, 493 U.S. 342 (1990). *See supra* note 53. *See also* United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). In *Dowling* the Supreme Court held that acquittal does not bar the use of facts underlying an acquittal as prior bad act evidence in a trial of the same defendant on a different charge. In *89 Firearms* the Court held that the facts underlying a prior acquittal may be relitigated in a civil forfeiture proceeding. *Id.* at 366. However, the *89 Firearms* Court was careful to explain that the Double Jeopardy Clause was not applicable in that case because the sanction of civil forfeiture was not intended as punishment. *Id.* at 362. Here, unlike in *Dowling* or *89 Firearms*, we are concerned directly with the punishment of an individual, and that punishment is inflicted expressly because of the conduct for which the person was previously acquitted.

205. As the Court has concluded in another context, "we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision." Burks v. United States, 437 U.S. 1, 16 (1978).

Jeopardy Clause.[206] These courts have reached this conclusion by relying upon the distinction between a "sentence" and a "sentence enhancement."[207] Simply put, this reasoning asserts that although the Double Jeopardy Clause would not allow courts to impose a separate sentence for acquitted conduct, it does not prevent them from expanding a sentence for a separate conviction on the basis of acquitted conduct.

Opponents of using acquitted conduct argue that this analysis is fallacious for several reasons. The most significant defect is that it circumvents the plain intent of the Double Jeopardy Clause.[208] The Framers' intent should prevail over technicalities.

Other constitutional considerations also constrain sentencing decisions. For example, prior to the introduction of the Guidelines it was well established that a sentencing judge could not consider a prior conviction obtained in violation of the trial right to counsel.[209] The reason for this rule was to effectuate the policies behind the Sixth Amendment.[210] In the same way, the policy behind the Double Jeopardy Clause requires that acquitted conduct should also be viewed as an impermissible consideration in sentencing.[211]

The argument favoring the use of acquitted conduct in sentencing rests on an imaginary distinction between a sentence and a sentence enhancement. While this distinction makes an interesting academic exercise, the two are

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206. *See e.g.* United States v. Mocciola, 891 F.2d 13, 17 (1st Cir. 1989); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181 (2d Cir. 1990). *See also* United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990) (court rejecting a collateral estoppel argument).

207. *Mocciola*, 891 F.2d at 17; *Rodriguez-Gonzalez*, 899 F.2d at 180.

208. The Supreme Court in Ex parte *Lange* used a similar argument while considering the applicability of the Clause's restriction against imposition of a second sentence for a single conviction. The court reasoned that:

> if, after judgement has been rendered on the conviction, and the sentence of that judgement executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

Ex Parte Lange, 85 U.S. (1 Wall.) 163, 173 (1873). While the subject here is the expansion of an otherwise proper sentence, rather than the imposition of a second sentence for the same crime, the spirit of the Clause would be "as much violated" by a sentence enhancement based on acquitted conduct as it was in the situation examined by the *Lange* Court.

209. *See supra* note 192 and accompanying text.

210. This was the rule developed in *Tucker*. *See supra* note 192 and accompanying text. The Guidelines make an end run around this rule. U.S.S.G. § 4A1.2, cmt. 6 provides that:

> sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted [toward determination of the defendant's criminal history score.] Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History Category).

Thus, while seeming to follow the rule, the Guidelines allow its circumvention.

211. Note that if the *Tucker* rule has survived the introduction of the Guidelines, *see supra* note 192, allowing consideration of acquitted conduct would result in a constitutional anomaly. A defendant's prior conviction could not be used for sentencing if it resulted from a flawed trial. Presumably the rationale is to protect the defendant from added punishment resulting from a conviction which, but for the constitutional violation, might have been an acquittal. Yet it would be permissible to use conduct underlying an actual acquittal. Clearly, these two rules must stand or fall together.

indistinguishable to a defendant facing sentencing.[212] With either a separate sentence or a sentence enhancement the offender endures additional punishment, and the Guidelines make it obvious that the punishment is imposed for the acquitted conduct. Thus, during the enhancement period, the prisoner remains incarcerated despite her constitutional right not to be punished for the conduct which is the basis for that additional time. Although there is a technical distinction between a sentence and a sentence enhancement, it should not be allowed to serve as the basis for nullifying a constitutional guarantee. And even though courts could seldom have prevented this result in the pre-Guideline era, they now can and should do so.

It is of course true that in some cases a judge cannot impose as much additional prison time through a sentence enhancement as she could based upon a separate conviction.[213] However, this limitation does not validate imposition of punishment based on acquitted conduct. The Double Jeopardy Clause does not allow imposing a sentence directly upon an acquitted count simply because that sentence is lower than it otherwise would be. Similarly, the Double Jeopardy Clause must also forbid increasing a different sentence simply because the increase is lower than a separate sentence would be.[214]

A third flaw in the argument favoring consideration of acquitted conduct at sentencing is its reliance on the statutory maximums. The fact that an enhanced sentence falls below the statutory maximum does not overcome the constitutional prohibition against double jeopardy. The Guidelines, and not the statutory sentences, now set the real term that a prisoner must serve.[215] Thus, the imposition of additional prison time is not simply an expansion within a permissible range. Judges are no longer permitted to expand a sentence above the Guidelines range without justification, even though such expansion might remain below the statutory maximum.[216] The argument that the Double Jeopardy Clause is not violated implies that judges are free to impose any sentence below the statutory maximum. Such unfettered discretion, however, is no longer a judge's prerogative. If it were, it would defeat the whole purpose of the Guidelines system. Consequently, the argument that a sentence

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212. Of course it may be argued that the viewpoint of the prisoner is irrelevant. However, courts are constitutionally required to consider their perspective, and not just that of society at large:

> Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of the courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.

McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).

213. For example, in the hypothetical at the beginning of this Note, a conviction on the gun charge by itself would have carried a mandatory five-year sentence under 18 U.S.C. § 924(c)(1) (1988), while the enhancement based upon the same conduct after acquittal only increased the sentencing range by nine to ten months. However, in other cases, particularly drug offenses, an identical sentence can result regardless of whether a defendant is acquitted or convicted of some charges. *See, e.g.*, United States v. Riviera-Lopez, 928 F.2d 372 (11th Cir. 1991).

214. The Supreme Court has stated: "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." Burks v. United States, 437 U.S. 1, 11 n.6. (1978).

215. 18 U.S.C. § 3553(b) (1988).

216. *Id.*

enhancement based on acquitted conduct is not a double jeopardy violation because it is simply an expansion of an otherwise permissible sentence is at odds with the current reality of sentencing law.

d) The Body of Pre-Guidelines Case Law Is Small, Unpersuasive and Distinguishable

Despite implications to the contrary by several courts,[217] few pre-Guidelines cases squarely held that acquitted conduct may be considered at sentencing.[218] Of those courts that did so hold, few explained their conclusion in any detail. One of the few federal courts to lay out its reasoning was the Second Circuit in *United States v. Sweig*.[219] The *Sweig* court's rationale for allowing consideration of acquitted conduct relied implicitly on the lower standard of proof required for sentencing decisions.[220] The court reasoned that evidence presented in a trial was probably more dependable than some other types of evidence relied upon in sentencing.[221] The court went on to suppose that the acquittal in that case might well have resulted because some essential element of a charge remained unproven in the jury's mind, rather than because the jury did not believe the evidence.[222] Thus, the court concluded, an acquittal does not establish the untruth of the evidence, and such evidence may be considered in sentencing.[223] The court did not mention or consider a double jeopardy analysis at all.

Because *Sweig* forms the basis for so much of the pre-Guideline case law on this subject, its limitations are particularly important. The *Sweig* rationale clearly did not and could not support considering facts of the type which a jury logically must have rejected in order to arrive at an acquittal. Moreover, it does not answer double jeopardy concerns regarding such use. Thus, the fact that most other pre-Guidelines cases considering this question simply quoted the *Sweig* conclusion without any independent analysis or discussion implicates a real weakness within this body of law.[224]

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217. *See, e.g.*, United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989) ("It was well settled prior to the enactment of the Guidelines that 'acquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant.'"). *See also* United States v. Mocciola, 891 F.2d 13, 16 (1st Cir. 1989); United States v. Ryan, 866 F.2d 604, 608–09 (3d Cir. 1989); United States v. Fonner, 920 F.2d 1330, 1333 (7th Cir. 1990).

218. In several of the pre-Guidelines cases where courts noted that acquitted conduct may be used, the statement was made in dicta. *See, e.g.*, Billiteri v. Board of Parole, 541 F.2d 938, 944 (2d Cir. 1976); United States v. Haygood, 502 F.2d 166, 171–72 n.16 (7th Cir. 1974); United States v. Ray, 683 F.2d 1116, 1120 (7th Cir. 1982); United States v. Atkins, 480 F.2d 1223, 1224 (9th Cir. 1973). In these four cases, the defendant had not been acquitted of the conduct considered at sentencing. *See also supra* note 160.

219. 454 F.2d 181 (2d Cir. 1972).

220. *Id.*

221. *Id.*

222. *Id.* at 184.

223. *Id.*

224. *See, e.g.*, Billiteri v. Board of Parole, 541 F.2d 938, 944 (2d Cir. 1976); United States v. Bernard, 757 F.2d 1439, 1444 (4th Cir. 1985); United States v. Cardi, 519 F.2d 309, 314 n.3 (7th Cir. 1975); United States v. Haygood, 502 F.2d 166, 171–72 n.16 (7th Cir. 1974); United States v. Atkins, 408 F.2d 1209, 1224 (D.C. Cir. 1967); United States v. Campbell, 684 F.2d 141, 152 (D.C. Cir. 1982).

The exception to this pattern was *United States v. Morgan*.[225] In *Morgan*, the Ninth Circuit did articulate some reasoning for concluding that acquitted conduct may be considered in sentencing.[226] *Morgan* relied partially on *Sweig*,[227] but it also cited the wide discretion historically accorded to sentencing judges.[228] The court noted, however, that under the facts of that particular case, it was not clear whether the acquitted conduct had in fact resulted in reduction or enhancement of the sentence.[229]

Thus, although most pre-Guidelines cases on this subject hold that judges were allowed to consider acquitted conduct at sentencing, there is little support for this conclusion. Furthermore, the authority that does exist does not support the unfettered use of acquitted conduct which most Guidelines-era courts now endorse. *Sweig* endorsed the use of facts that the jury did not necessarily consider in reaching its decision to acquit. Therefore, the *Sweig* rationale can only support the consideration of those types of facts.

In addition to the limited scope of the reasoning behind the pre-Guidelines case law, it is also clear that much of that case law is simply inapplicable because of the changes wrought by the Guidelines. The discretion of sentencing judges is now severely diminished.[230] Considerations which before went largely unexpressed are now spelled out with mathematical precision. Thus, there is every reason to break with the practices of the past because of the drastic changes in the sentencing process.

V. Suggested Resolution

It is clear that substantial arguments can be made both for and against the use of acquitted conduct as a basis for sentence enhancement. Perhaps the stronger argument is the one favoring such use. It is certainly in agreement with most precedent, and it arguably supports the goals and policies of the Commission and Congress. 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. Clearly, most of the circuit courts of appeals have concluded that the argument in favor should prevail,[231] and several decisions of the Supreme Court suggest that it would probably concur.[232]

The emotional reaction against such use, however, is a real one, and is supported by the purposes and policies behind the Double Jeopardy Clause of the Fifth Amendment. Use of acquitted conduct has the unfortunate effect of creating the continual appearance of injustice. Defendants acquitted of criminal charges are forced to repeat their defense at sentencing. Its use results in actual injustice where the sentences of people who are innocent of the con-

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225. 595 F.2d 1134 (9th Cir. 1979).
226. *Id.* at 1136–37.
227. *Id.* at 1137.
228. *Morgan*, 595 F.2d at 1136. *See also* Williams v. New York, 337 U.S. 241, 246 (1949).
229. *Morgan*, 595 F.2d at 1137.
230. *See supra* notes 192–96 and accompanying text.
231. *See supra* note 89 and accompanying text.
232. *See supra* notes 52–56, 204, and accompanying text.

duct in question are erroneously enhanced.[233] The use of acquitted conduct also conflicts with the Guidelines' goal of reducing sentence disparities.

Instead of the unlimited use of acquitted conduct now espoused by the federal courts, a superior rule would be one which accords a preclusive effect in the clearest instances of double jeopardy. This protection should be limited to those facts which were disputed by the defendant, rather than facts which were uncontested.[234] In addition, the preclusive effect should be accorded only to those facts which the court determines must have been resolved in the defendant's favor in order for the jury to have reached the acquittal.[235] The burden of persuasion should be placed upon the defendant, as the proponent of preclusion.[236] Facts not denied by a defendant, or facts which the jury could have resolved in more than one way should remain, as are other facts, within the province of the sentencing judge to determine by a preponderance of the evidence.

This resolution promotes harmony between the trial and the sentencing process by not reopening questions settled by a previous adjudication. It also has a minimum impact on a judge's sentencing discretion because many facts involved in an acquittal fall outside the precluded area. And yet it also brings fairness to those cases where the contradiction between the jury's acquittal and the judge's finding is most glaring, and which now seem most palpably unfair. Such a rule demonstrates respect and deference for juries' verdicts and prevents wrongfully punishing people for conduct of which they are not guilty. Finally, it effectuates the policy goals of the Double Jeopardy Clause of protecting people from the risk of punishment for charges which have been decided in a previous adjudication.

VI. CONCLUSION

Although the federal sentencing Guidelines system combines elements of both a "real offense system" and a "charge offense system" there is great dispute about whether sentencing courts may consider conduct of which an offender has previously been acquitted. The argument concluding that such consideration is permissible is premised on the difference between a sentence and a sentence enhancement. While a separate sentence would be prevented

233. "Whenever a defendant is forced to relitigate the facts underlying a prior offense for which he has been acquitted, there is a risk that the jury erroneously will decide that he is guilty of that offense. That risk is heightened because the jury is required to conclude that the defendant committed the offense only by a preponderance of the evidence." Dowling v. United States, 493 U.S. 342, 361 (1990) (Brennan, J. dissenting).

234. From a certain perspective this can be seen as impinging on a defendant's right to remain silent because failure to present evidence (often necessitating taking the stand) disputing aggravating facts could result in sentence enhancement later despite acquittal. However, this is not unlike other decisions that a defendant is required to make.

235.

> [W]here a previous judgment of acquittal was based on a general verdict, courts must "examine the record of [the] prior proceeding, taking into account the pleading, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration."

Dowling, 493 U.S. at 350 (citing Ashe v. Swenson, 397 U.S. 436, 444 (1970)).

236. This placement of the burden is consistent with existing case law. "The Courts of Appeals have unanimously placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Id.*

by the Double Jeopardy Clause, the enhancement of a sentence for a count of conviction is not forbidden. The fact that a jury is unable to find a defendant guilty beyond a reasonable doubt does not mean that the underlying facts are necessarily untrue. Because only a preponderance of the evidence is required at sentencing, a judge should not be bound by the jury's verdict. Thus, according to this view, there is no reason why a sentencing court may not weigh the facts surrounding a previous acquittal at sentencing, so long as the final sentence falls below the statutory maximum for the crime of conviction.

Opponents of using acquitted conduct downplay the distinction between a sentence and a sentence enhancement. In both cases the offender suffers additional punishment, and due to the mathematical precision of the Guidelines, it is clear that the basis for this punishment is conduct of which the offender is legally not guilty. To say that sentence enhancement is simply an expansion within the permissible range is fundamentally at odds with the current reality of sentencing under the Guidelines. Moreover, the question is not one of whether the standards of proof are different at trial and sentencing, but rather whether the facts of an acquittal may be reconsidered under any standard. Where additional punishment is at stake, the policy underlying the Double Jeopardy Clause must prevent the relitigation of settled issues of guilt or innocence.

The majority view holds that courts are allowed to consider acquitted conduct at sentencing. Only the Ninth Circuit has held that acquitted conduct may not be considered. Recent decisions of the United States Supreme Court indicate that the Court would be likely to permit such consideration.

This Note suggests the adoption of an intermediate position. Preclusive effect should be accorded only to those facts which were necessarily decided in the defendant's favor, and the defendant should bear the burden of persuasion. This rule would have the effect of eliminating the most conspicuous appearances of injustice, as well as affording to defendants the protection envisaged by the Double Jeopardy Clause of the Fifth Amendment.

APPENDIX

Sentencing TABLE (in months of imprisonment)

UNITED STATES SENTENCING COMM'N, FEDERAL GUIDELINES MANUAL 280 (Nov. 1991)

	Criminal History Category (Criminal History Points)					
Offense Level	I 0 or 1	II 2 or 3	III 4, 5, 6	IV 7, 8, 9	V 10, 11, 12	VI 13 +
1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	1–7	2–8	4–10	8–14	12–18	15–21
8	2–8	4–10	6–12	10–16	15–21	18–24
9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
11	8–14	10–16	12–18	18–24	24–30	27–33
12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24	21–27	27–33	33–41	37–46
15	18–24	21–27	24–30	30–37	37–46	41–51
16	21–27	24–30	27–33	33–41	41–51	46–57
17	24–30	27–33	30–37	37–46	46–57	51–63
18	27–33	30–37	33–41	41–51	51–63	57–71
19	30–37	33–41	37–46	46–57	57–71	63–78
20	33–41	37–46	41–51	51–63	63–78	70–87
21	37–46	41–51	46–57	57–71	70–87	77–96
22	41–51	46–57	51–63	63–78	77–96	84–105
23	46–57	51–63	57–71	70–87	84–105	92–115
24	51–63	57–71	63–78	77–96	92–115	100–125
25	57–71	63–78	70–87	84–105	100–125	110–137
26	63–78	70–87	78–97	92–115	110–137	120–150
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327

Sentencing TABLE
(Continued)

Criminal History Category (Criminal History Points)

Offense Level	I 0 or 1	II 2 or 3	III 4, 5, 6	IV 7, 8, 9	V 10, 11, 12	VI 13 +
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–40	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life