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“DOING TIME” . . . *AFTER* THE JURY  
ACQUITS:

RESOLVING THE POST-*BOOKER*  
“ACQUITTED CONDUCT” SENTENCING DILEMMA

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## I. INTRODUCTION

The “sentencing revolution,” occasioned by the Supreme Court’s reinvigoration of the Sixth Amendment right to jury-found facts in *Apprendi v. New Jersey*<sup>1</sup> and *Blakely v. Washington*,<sup>2</sup> caused the Court to overturn mandatory Federal Sentencing Guidelines and to reconfigure the Guidelines as an advisory-only system in *United States v. Booker*.<sup>3</sup> For the past three years, post-*Booker* cases have revealed deep contradictions between three important, but directly competing, constitutional-policy imperatives: (a) defining the limits of Congress’ power to establish uniform sentencing policy and procedures in order to eliminate or reduce apparent disparities in sentencing *between* judges; (b) re-establishing the system of individuated, case-specific sentences by permitting broader judicial discretion in sentencing and (c) protecting the Sixth Amendment right to jury-found facts as a bulwark against governmental over-reaching in the context of judicial decision-making.<sup>4</sup>

Recently, the Court decided *Rita v. United States*<sup>5</sup> and *Gall v. United States*,<sup>6</sup> which go a long way toward sorting out the proper relationship between the first two policy imperatives above. However, the proper relationship between judicial discretion in sentencing and the Sixth Amendment right to jury-determined facts in sentencing established in *Apprendi* and *Blakely* has yet to be definitively addressed by the Court, post-*Booker*.<sup>7</sup> Given the importance of Sixth Amendment jury fact-finding as a “bulwark” against judicial excess animating all members of the Court in *Apprendi*, *Blakely* and *Booker*, together with recent indications by members of the Court that the Sixth Amendment issues underlying *Booker* have yet to be resolved,<sup>8</sup> indicate that further resolution of this issue must soon be on the Court’s agenda.<sup>9</sup>

This article examines the unresolved, post-*Booker* contradiction between judicial discretion in sentencing and the Sixth Amendment right to

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<sup>1</sup> 530 U.S. 466 (2000).

<sup>2</sup> 542 U.S. 296 (2004).

<sup>3</sup> 543 U.S. 220, 245 (2005).

<sup>4</sup> See *id.* at 239 (citing *Apprendi*, 530 U.S. at 477)..

<sup>5</sup> 127 S. Ct. 2456 (2007).

<sup>6</sup> 128 S. Ct. 586 (2007).

<sup>7</sup> *Rita*, 127 S. Ct. at 2475 (Scalia, J., concurring in part); *Gall*, 128 S. Ct. at 602–03 (Scalia, J., concurring).

<sup>8</sup> *Gall*, 128 S. Ct. at 602–03 (Scalia, J., concurring), 610 (Alito, J., dissenting); *Rita*, 127 S. Ct. at 2475 (Scalia, J., concurring in part).

<sup>9</sup> This issue was before the Court in *United States v. Hurn*, 496 F.3d 784 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1737 (2008).

jury-found facts by considering the circumstance in which the contradiction is most plain—the judicial use of “acquitted conduct” to impose a sentence based on facts the jury has considered and rejected in an acquittal.<sup>10</sup> This article advances the position that the minority view expressed in lower court cases—that “acquitted conduct” may *never* be used by sentencing courts in light of *Apprendi* and *Blakely* (at least with respect to facts related to proof of the elements of the acquitted offense)—is essentially correct as a matter of principle and simple logic.<sup>11</sup> However, the broad discretion entrusted to the sentencing court by the remedial measures described in *Booker*, *Rita* and *Gall* requires principled line-drawing<sup>12</sup> to ensure the jury

<sup>10</sup> “Acquitted conduct” refers to conduct related to offenses of which the defendant has been acquitted by a jury and differs fundamentally from facts which the jury has *not* considered. This was the issue in *Blakely v. Washington*, when the Court held that the judge wrongfully imposed an additional ninety-month sentence which went beyond the statutory maximum and was based on judge-found facts rather than jury-found facts. *Blakely*, 542 U.S. at 304. A compendium of articles that have discussed the issue include: Anne Bowen Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. CIN. L. REV. 1 (1989); William Kirchner, Note, *Punishment Despite Acquittal: An Unconstitutional Aspect of The Federal Sentencing Guidelines?*, 34 ARIZ. L. REV. 799 (1992); Joshua M. Webber, Case Note, *United States v. Brady: Should Sentencing Courts Reconsider Disputed Acquitted Conduct for Enhancement Purposes Under the Federal Sentencing Guidelines*, 46 ARK. L. REV. 457 (1993); Elizabeth A. Parsons, Note, *Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines* 29 VAL. U. L. REV. 417 (1994); David S. Rudstein, *Double Jeopardy and the Fraudulently-Obtained Acquittal*, 60 MO. L. REV. 607 (1995); Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153 (1996); Amy Baron-Evans, *Supreme Court OKs Acquitted Conduct, Sentencing Commission Invites Comment on Alternatives*, 21 CHAMPION 62 (Mar. 1997); Marvin Sprouse, Note, *A Sentence for Acquittal: The Supreme Court Holds that Sentences May Be Enhanced for “Conduct” for Which Persons Have Been Tried and Acquitted: United States v. Watts*, 117 S. Ct. 633 (1997), 28 TEX. TECH. L. REV. 936 (1997); Matthew MacKinnon Shors, Note, *United States v. Watts: Unanswered Questions, Acquittal Enhancements, and the Future of Due Process and the American Criminal Jury*, 50 STAN. L. REV. 1349 (1998); Jeff Nicodemus, Note, *Watts v. United States: The Misguided Approval of a Sentencing Court's Authority to Consider Acquitted Conduct During Sentencing*, 25 AM. J. CRIM. L. 437 (1998); Michele M. Jochner, *Acquitted of the Crime, But Still Doing Time? What Watts Does to Constitutional Protections*, 13 CRIM. JUST. 18 (Spring 1998); Sandra Wolkov, *Reasonable Doubt in Doubt: Sentencing and the Supreme Court in United States v. Watts*, 52 U. MIAMI L. REV. 661 (1998); Erica K. Beutler, *A Look at the Use of Acquitted Conduct in Sentencing*, 88 J. CRIM. L. & CRIMINOLOGY 809 (1998); Elizabeth E. Joh, *“If It Suffices to Accuse”*: *United States v. Watts and the Reassessment of Acquittals*, 74 N.Y.U. L. REV. 887 (1999); Marguerite A. Driessen, *Challenging the Irrelevant Acquittal*, 11 GEO. MASON L. REV. 331 (2002); Recent Case, *Criminal Law—Double Jeopardy—First Circuit Upholds Reprosecution of Defendant Acquitted in “Sham” Trial—Gonzalez v. Justices of the Municipal Court of Boston*, 382 F.3d 1 (1st Cir. 2004), *Vacated Mem.*, 125 S. Ct. 1640 (2005), 118 HARV. L. REV. 2913 (2005); James J. Bilsborrow, Note, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 WM. & MARY L. REV. 289 (2007); Farnaz Farkish, Note, *Docking the Tail that Wags the Dog: Why Congress Should Abolish the Use of Acquitted Conduct at Sentencing and How Courts Should Treat Acquitted Conduct After United States v. Booker*, 20 REGENT U. L. REV. 101 (2007–08).

<sup>11</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000); *Blakely v. Washington*, 542 U.S. 296, 301 (2004).

<sup>12</sup> *United States v. Booker*, 543 U.S. 220, 223 (2005); *Rita*, 127 S. Ct. at 2458; *Gall*, 128 S. Ct. at 597.

is not supplanted by judicial fact-finding in sentencing which would seem to contravene the *Apprendi/Blakely/Booker* Sixth Amendment rationale.<sup>13</sup>

This article suggests that *Jones v. United States*,<sup>14</sup> a pre-*Apprendi* case in which the Court already suggested such a principled dividing line, has gone largely unrecognized in framing the “acquitted conduct” question in Sixth Amendment terms.<sup>15</sup> The *Jones* analysis would permit a sentencing court to consider facts that were *not* central to the previous jury acquittal, while protecting the integrity of the jury verdict by imposing a *res judicata/collateral estoppel*-like limitation on the sentencing court’s reliance on facts which were *integral* to the jury verdict. Under the remedial procedures established in *Booker*, *Rita* and *Gall*, judicial reliance on “acquitted conduct,” as described in *Jones*, should be considered *unreasonable* and an abuse of sentencing court discretion by the appellate courts.

Part II briefly sketches the current state of post-*Booker* doctrine in light of its most recent iteration in *Gall* and *Rita*. Part III examines the current state of “acquitted conduct” as a factor in sentencing in the lower federal courts, with particular attention to the Sixth Amendment concerns implicit in the judicial use of “acquitted conduct” pointed out in the minority opinions. Part IV analyzes *United States v. Watts*, the Supreme Court precedent most commonly relied upon by the lower courts in upholding judicial use of “acquitted conduct” in sentencing. It also analyzes *Jones v. United States*, which this article asserts is the more appropriate Supreme Court precedent to guide the lower courts in resolving the Sixth Amendment/judicial discretion “acquitted conduct” sentencing dilemma. Part V suggests a conceptual approach to the “acquitted conduct” dilemma that reformulates the existing precedent into two parallel lines of cases: the *Jones/Apprendi/Blakely* “scope of Sixth Amendment jury fact-finding” cases, and the *Booker/Rita/Gall* line of “remedial procedure” cases. It does so in a manner that resolves many of the apparent contradictions in lower court “acquitted conduct” cases by permitting the sentencing court to consider facts *other* than those related to elements of the offense(s) of which a jury has acquitted the defendant.

## II. BOOKER, RITA AND GALL: THE REMEDIAL CASES

A jury verdict on all of the factual elements of an offense beyond a reasonable doubt is, of course, a foundational principle applicable in trials

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<sup>13</sup> *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring).

<sup>14</sup> 526 U.S. 227 (1999).

<sup>15</sup> *Id.* at 232.

before either a judge or jury.<sup>16</sup> Under sentencing procedures that preceded the creation of legislatively-mandated “guidelines” over the past twenty-odd years, a jury conviction would permit the sentencing court, using its own discretion, to impose an individuated sentence within the broad range created by the legislature<sup>17</sup> (such as three to ten years, zero to twenty years, etc., often subject to earlier release “on parole” depending upon a decision by a parole board, which acted independently of the sentencing function).<sup>18</sup> This is the pre-existing paradigm upon which the Sentencing Guidelines systems were imposed by the Congress and state legislatures.<sup>19</sup>

Because of perceived wide disparities *between* judges that resulted from this wide-ranging judicial discretion in the prior system, first the Minnesota Legislature,<sup>20</sup> then Congress<sup>21</sup> and a number of other states, enacted “guidelines” that in various ways limited judicial discretion and/or imposed a fixed set of legislatively-mandated factual criteria that would result in sentences that could be numerically calculated.<sup>22</sup> As the Court recognized in *Booker*, by establishing a fixed sentence *within* the range permitted by the legislature and based on facts delineated by the legislature, but without permitting “reasonable” judicial discretion, the Guidelines impinged upon the historically well-established ability of the court to impose an individuated sentence.<sup>23</sup> To the extent that legislatively-mandated guidelines permitted a court to impose sentences *beyond* the maximum imposed by the legislature based on facts not decided by a jury, *Blakely* established that the Sixth Amendment right to a jury trial was being violated.<sup>24</sup>

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<sup>16</sup> *In re Winship*, 397 U.S. 358, 363 (1970).

<sup>17</sup> See discussion in *Gall v. United States*, 128 S. Ct. 586, 597 (2007).

<sup>18</sup> The virtual elimination of the parole system has resulted in convicted defendants serving nearly all of their sentences imposed by courts with small reductions for “good time,” but without an independent determination by a parole board that the convict has been rehabilitated or should be released before the completion of the sentence for other reasons. This “truth in sentencing”/“determinate sentencing” has resulted in a huge increase in prison populations and a drastic reduction of rehabilitation as a corrections model. This model was the subject of a campaign initiated by private corrections companies and other entities that had an interest in increasing corrections facilities. However, these issues are beyond the scope of this article. For further information on this subject, see *THE CEILING OF AMERICA: AN INSIDE LOOK AT THE U.S. PRISON INDUSTRY* (Daniel Burton-Rose et al eds., 1998) and Marc Mauer, *RACE TO INCARCERATE* (1999).

<sup>19</sup> *THE CEILING OF AMERICA: AN INSIDE LOOK AT THE U.S. PRISON INDUSTRY* (Daniel Burton-Rose et al eds., 1998); Marc Mauer, *RACE TO INCARCERATE* (1999).

<sup>20</sup> MINN. STAT. ANN. § 244.101 Subdiv.1 (2007) (amended 1993).

<sup>21</sup> 18 U.S.C. § 3553(a) (2006).

<sup>22</sup> *Id.*

<sup>23</sup> See *United States v. Booker*, 543 U.S. 220, 221 (2005).

<sup>24</sup> See *Blakely v. Washington*, 542 U.S. 296, 301 (2004).

Other than the fact of a prior conviction, any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.<sup>25</sup>

However, the proper role of judicial discretion and jury fact-finding in imposing of sentences *within* the “Guidelines range” remained an open question.<sup>26</sup>

#### A. UNITED STATES V. BOOKER

In *United States v. Booker*, the Sixth Amendment issues at the heart of *Blakely* caused the Court to directly address the constitutionality of the entire mandatory Federal Guidelines scheme, within which judicial discretion was limited to the imposition of a sentence within a pre-determined “Guidelines range.”<sup>27</sup> The Guidelines range was derived from a U.S. Sentencing Commission “grid,” which considers the “criminal history” score on one axis and “offense severity” on another to arrive at a sentencing “score.”<sup>28</sup> In *Booker*, the Court held that “mandatory” guidelines, which relied upon legislatively-mandated factual categories to limit judicial fact-finding, rather than permitting judicial discretion to reach an individuated case-specific sentence, did not pass constitutional muster.<sup>29</sup>

The Court resolved this apparent contradiction by declaring the Sentencing Guidelines to be “advisory,” rather than mandatory.<sup>30</sup> This remedial aspect of *Booker* drew objection from members of the Court as the less desirable “cure,” compared to requiring jury-found facts to be more directly integrated into the Guidelines scheme.<sup>31</sup> But, the interplay between the “advice” of the Guidelines and the proper exercise of the expanded, *reasonable* judicial discretion required by *Booker* also remained an open question.<sup>32</sup>

Those aspects of the Congressionally-created sentencing scheme which (a) made the Sentencing Guidelines sentencing range mandatory; (b) dictated the factors the sentencing court could consider; and (c) directed the appellate courts to apply a *de novo* standard of review to sentences which

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<sup>25</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

<sup>26</sup> *See Gall v. United States*, 128 S. Ct. 586, 602 (2007).

<sup>27</sup> *See generally* *United States v. Booker*, 543 U.S. 220 (2005).

<sup>28</sup> *See id.* at 297 & n.15 (Stevens, J., dissenting in part).

<sup>29</sup> *Id.* at 233.

<sup>30</sup> *Id.* at 262–64.

<sup>31</sup> *Id.* at 284–85 (Stevens, J., dissenting in part).

<sup>32</sup> *See Rita v. United States*, 127 S. Ct. 2456, 2469–70 (2007).

departed from the Guidelines range, were struck down.<sup>33</sup> Although *Booker* rejected specific legislative limitations upon judicial discretion in sentencing,<sup>34</sup> it did *not* reject judicial *consideration* of the sentencing factors established by Congress and seemed to recognize “presumption of reasonableness” for sentences within the Guidelines range.<sup>35</sup> As might be expected, the re-casting of the long-standing mandatory Guidelines scheme as “advisory” presented enormous challenges for the lower courts,<sup>36</sup> which the Supreme Court began to clarify during the 2006-07 term in *Rita v. United States*<sup>37</sup> and further clarified in *Gall v. United States* in December 2007.<sup>38</sup>

<sup>33</sup> *Booker*, 543 U.S. at 259.

<sup>34</sup> *Id.* at 260.

<sup>35</sup> The underlying Sixth Amendment question, which gave rise to *Booker* in the first place, i.e. the proper role of Sixth Amendment jury fact-finding, has not been addressed in the cases that have attempted to apply *Booker* to a federal sentencing system in disarray.

<sup>36</sup> See generally *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007) (holding that an explicit retroactive amendment modifying the Guidelines coupled with *Booker* gave cause to vacate defendant’s sentence and remand for resentencing); *United States v. Reinhart*, 442 F.3d 857 (5th Cir. 2006) (holding an appeal of a pre-*Booker* sentence that opened up the resentencing to a higher sentence as valid); *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2006) (directing the district court to vacate a sentence and resentence defendant pursuant to *Booker* requirements); *United States v. Sutherlin*, 424 F.3d 726 (8th Cir. 2005) (affirming a lower court’s sentence using mandatory Guidelines when mandatory application of the Guidelines was harmless); *United States v. Davis*, 407 F.3d 1269 (11th Cir. 2005) (holding that the Guidelines did not grant a sentencing court “virtually unfettered discretion” to impose a sentence outside the Guidelines range).

<sup>37</sup> In the 2006–07 term, the Court also decided *Cunningham v. California*, 549 U.S. 270 (2007), which was an example of an application of *Blakely* and *Booker* to a California sentencing scheme that the majority considered to be of the same nature as that struck down in those cases.

The California Supreme Court in *Cunningham* based its opinion on an earlier California case in which it held that the California sentencing scheme survived *Blakely* because the broad discretion of judges to identify aggravating facts did not present the Sixth Amendment issues discussed in *Apprendi*, *Blakely* and *Booker*. *Id.* at 289–90. The majority opinion by Justice Ginsburg was accompanied by a dissent by Justice Kennedy in which Justice Breyer joined, and a second dissenting opinion by Justice Alito in which Justices Kennedy and Breyer joined.

The California Determinate Sentence Law (DSL) provided for findings by the trial court to expose the defendant to an elevated “upper term” sentence following a jury conviction. *Id.* at 288. These factual findings were not inherent in the jury verdict and required only proof by preponderance and, therefore, fell afoul of the *Apprendi/Blakely/Booker* Sixth Amendment requirement of jury fact-finding to impose a sentence beyond that to which a defendant would be exposed upon conviction only. The California DSL was struck down as violative of those cases. *Id.* at 288–89.

Justice Kennedy dissented from the entire line of *Apprendi* cases as incorrect, joined Justice Alito’s dissent and asserted that:

[T]he Constitution ought not to be interpreted to strike down all aspects of sentencing systems that grant judicial discretion with some legislative direction and control . . . if the Court confined the *Apprendi* rule to sentencing enhancements based on the nature of the offense . . . for example, the fact that a weapon was used; violence was employed; a stated amount of drugs or other contraband was involved . . . [j]uries could consider these matters without serious disruption because these facts are often part of the statutory definition of the aggravated crime . . . . On the other hand, judicial determination is appropriate with regard to factors exhibited by the defendant. These are facts that should be taken into consideration in sentencing but have little if any significance for whether the defendant committed the crime.

*Id.* at 296–97 (Kennedy, J., dissenting) (emphasis added).

## B. GALL V. UNITED STATES

In *Gall*, the defendant entered into a plea agreement which stipulated to the defendant's limited participation in a scheme to distribute ". . . at least 2,500 grams of [ecstasy], or the equivalent of at least 87.5 kilograms of marijuana" on a university campus.<sup>39</sup> The parties stipulated that the defendant had withdrawn from the conspiracy prior to the effective date of enhanced Guidelines penalties for the offenses at issue but that the co-conspirators had not.<sup>40</sup> The presentence report confirmed that he had no previous record, was not an organizer or the conspiracy leader, and had not continued his previous heavy use of drugs.<sup>41</sup> The Guidelines recommendation was thirty to thirty-seven months of imprisonment,<sup>42</sup> but probation was authorized by statute.<sup>43</sup>

At sentencing, the district court received a "flood" of letters from current acquaintances and business associates of the defendant attesting to his good character and several witnesses testified on his behalf.<sup>44</sup> The prosecution did not contest any of the evidence concerning Gall's law-abiding life during the five years following his withdrawal from the conspiracy, but did request the same thirty-six month prison sentence as his co-conspirators.<sup>45</sup> The sentencing court imposed a sentence of thirty-six months of probation, supported by a detailed sentencing memorandum explaining the decision in light of the § 3553(a) factors.<sup>46</sup> In addition to the memorandum, the court reminded Gall that probation was an act of leniency arising from his post-offense, pre-indictment good conduct and that imprisonment would be "counter effective" in this case.<sup>47</sup> However, relying on its earlier opinion in *United States v. Claiborne*,<sup>48</sup> the Eighth Circuit reversed and remanded for resentencing because of the sentencing court's departure from incarceration to probation.

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Justice Alito's dissent saw no distinction between the advisory sentencing scheme approved of in *Booker* and the California Determinate Sentencing Law. *Id.* at 297.

<sup>38</sup> *Gall v. United States*, 128 S. Ct. 586, 597 (2007) (this article focuses primarily on *Gall* as the most recent clarification of the doctrine and which so directly builds upon *Rita* that discussion of both cases is unnecessary for purposes of the issues discussed in here).

<sup>39</sup> *Id.* at 592.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 593.

<sup>43</sup> *Id.* at 602.

<sup>44</sup> *Id.* at 593.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 593, 597.

<sup>47</sup> *Id.* at 593.

<sup>48</sup> 439 F.3d 479 (8th Cir.), *cert. granted*, 127 S. Ct. 551 (2006), *vacated*, 127 U.S. 2245 (2007).

A 7-2 majority of the Court (with Justices Thomas and Alito dissenting) rejected the Eighth Circuit's requirement that a significant "outside the Guidelines" downward deviation (in this case probation rather than incarceration) required the sentencing court to support its decision with findings that amounted to "extraordinary circumstances."<sup>49</sup> The Court summarily rejected this standard as "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."<sup>50</sup>

According to the majority opinion, either a "mathematical formulation" or "proportional review" of sentences outside of the Guidelines' range creates, in essence, a standard of review that is not consistent with the "presumption of reasonableness" or the "abuse of discretion" standard of appellate review which is required "*whether inside or outside the Guidelines range.*"<sup>51</sup> Sentences *within* the Guidelines range *may* be viewed by the appellate court as carrying a "presumption of reasonableness," but such a presumption is *not* required.<sup>52</sup> Perhaps more importantly, the Court specifically noted that sentences *outside* the Guidelines range *cannot* be viewed with a "presumption of unreasonableness."<sup>53</sup> According to the *Gall* majority opinion, the appellate court:

may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.<sup>54</sup>

The importance of maintaining judicial discretion in sentencing was emphasized by the majority, owing to practical considerations related to the sentencing court's greater familiarity with the record and factors such as credibility of witnesses, as well as familiarity with the actual application of the Guidelines.<sup>55</sup> In addition to these practical considerations, the policy of individuated sentencing was equally important.

It has been the uniform and consistent in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.<sup>56</sup>

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<sup>49</sup> *Gall*, 128 S. Ct. at 595, 602.

<sup>50</sup> *Id.* at 595.

<sup>51</sup> *Id.* at 595-97 (emphasis added).

<sup>52</sup> *Id.* at 597.

<sup>53</sup> *Id.* (emphasis added).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 598 (citing *Koon v. United States*, 518 U.S. 81, 113 (1996)).

As applied to the facts in *Gall*, the Court found that the sentencing court had correctly calculated the applicable Guidelines range and complied with the procedural requirements outlined in *Rita*, but the appellate court held that the sentencing court had erred in failing to give sufficient weight to the seriousness of the offense, one of the factors set out in § 3553(a)(2)(A), and in failing to properly consider § 3553(a)(6): “the need to avoid unwarranted sentence disparities among defendants who have been found guilty of similar conduct.”<sup>57</sup>

However, the Supreme Court noted that, because the sentencing court had committed no procedural error, and *had* considered all of the factors set out in § 3553(a), the only issue was whether the appellate court had applied the proper standard of review in overturning the sentencing court’s exercise of discretion, and the Court found that it had not.<sup>58</sup> According to the Court, the standard actually applied by the Eighth Circuit “more closely resembled *de novo* review of the facts . . .”<sup>59</sup> and the appellate court had failed to accord the proper deference to the sentencing court’s weighing of relevant factors.<sup>60</sup>

Justices Scalia and Souter issued short concurring opinions highlighting the continuing contradiction between *Booker* and *Blakely*, insofar as the majority opinions in both cases permit sentences to be based upon facts determined by the judge, not the jury.<sup>61</sup> Justice Scalia felt compelled by *stare decisis* to give effect to the holding in *Rita* and noted that the deferential standard adopted by the Court was preferable to the “proportionality” standard applied by the Eighth Circuit.<sup>62</sup> But he specifically noted that the contradictions between judge and jury fact-finding, as described in the *Apprendi/Blakely* lines of cases, remain to be resolved:

The door . . . remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.”<sup>63</sup>

Justice Souter *also* recognized that the Sixth Amendment/individuated sentencing contradiction remains unresolved after *Gall*, but suggested that the remedy should be taken up by Congress to establish a sentencing pro-

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<sup>57</sup> *Id.* at 598–99.

<sup>58</sup> *Id.* at 600.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 602.

<sup>61</sup> *Id.* (Scalia, J., concurring).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

cedure requiring “jury findings of all facts necessary to set the upper range of sentencing discretion.”<sup>64</sup>

The dissent by Justice Thomas rejected the concept that departure *below* the Guidelines was permissible at all.<sup>65</sup> Justice Alito’s lengthier dissent pointed out that *Booker*’s remedial measures arose from a Sixth Amendment jury-trial challenge to the Guidelines arising from *Blakely*’s recognition of the right to be sentenced based on facts found by a jury, not a judge, “at least under a mandatory guidelines system.”<sup>66</sup> The *Booker* remedy (making the Guidelines advisory) is not a solution to the underlying problem which, according to Justice Alito, is confirmed by the failure of the *Gall* opinion to address any of the underlying issues with respect to jury fact-finding and leads to the conclusion, “that the *Blakely-Booker* line of cases has gone astray.”<sup>67</sup>

Justice Alito noted that the Court drew a distinction between judicial fact-finding under a guidelines system, which would be a violation of the Sixth Amendment right to a jury trial, and judicial fact-finding under a discretionary system, which would not.<sup>68</sup> However, he argues that this distinction:

cannot be defended as a matter of principle. It *would* be a coherent principle to hold that *any* fact that increases a defendant’s sentence beyond the *minimum* required by the jury’s verdict must be found by a jury. Such a holding, however, would clash with accepted sentencing practice at the time of the adoption of the Sixth Amendment.<sup>69</sup>

Historically, both state and federal statutes permitting sentencing over a range of years based on judicial discretion and fact-finding following a conviction by jury verdict were the rule, not the exception.<sup>70</sup> Furthermore, Justice Alito notes that the only difference between this sort of judicial fact-finding and that under a guidelines system “is explicit and the effect of each critical finding is quantified.”<sup>71</sup> In both instances, the additional sentence is based upon judicially determined facts, not jury determined facts, making the Sixth Amendment principle the same in either system.<sup>72</sup>

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<sup>64</sup> *Id.* at 603 (citing *Rita*, 127 S. Ct. at 2463, 2464) (Souter, J., concurring).

<sup>65</sup> *Id.* (Thomas, J., dissenting).

<sup>66</sup> *Id.* at 605 (Alito, J., dissenting).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 606 (emphasis added).

<sup>70</sup> See *Jones v. United States*, 526 U.S. 227, 247–48 (1999).

<sup>71</sup> *Gall*, 128 S. Ct. at 606 (Alito, J., dissenting).

<sup>72</sup> See *id.*

However, Justice Alito recognized that the Court's acceptance of the distinction also permits individual judges to exercise discretion and establish their own sentencing policies, which is also in fundamental contradiction with the policy objectives of the Sentencing Reform Act to remove, or at least limit, this power of individual judges.<sup>73</sup> The *Booker* "remedy" restores to judges a measure of the discretionary, policy-making authority removed by Congress in establishing mandatory guidelines, but Justice Alito also accepts that *stare decisis* requires adherence to the *Blakely-Booker* line of cases.<sup>74</sup> He suggests a solution to the Sixth-Amendment/judicial discretion contradiction inherent in these cases that focused on limiting their reach by upholding the Eighth Circuit opinion in *Gall*.<sup>75</sup>

Thus, as drawn from both the majority and concurring opinions in *Rita* and reiterated in *Gall*, the proper sentencing procedure would include:

- (1)an accurate calculation of the applicable Guidelines range;<sup>76</sup>
- (2)a hearing in which both parties may argue for the sentence they deem appropriate in light of the seven Congressionally-mandated factors set out in § 3553(a);<sup>77</sup>
- (3)consideration by the sentencing court of the extent of the deviation from the Guidelines, if an "outside the Guidelines" sentence is warranted;<sup>78</sup>
- (4)sufficient fact-finding by the sentencing court to justify the extent of the deviation and to permit meaningful appellate review.<sup>79</sup>

Furthermore, the Court made clear in *Gall* that a deferential "abuse of discretion" standard is applicable to *all* sentences imposed by the trial court pursuant to the *Rita* format, even when the trial court sentences *outside* the Guidelines.<sup>80</sup> This means that an "outside the Guidelines sentence" does not carry a presumption of *unreasonableness*, nor does an "inside the Guidelines sentence" carry a presumption of *reasonableness*. In both cases, the sentencing court must exercise its discretion reasonably, but the abuse of discretion on appellate review will certainly consider the degree of de-

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<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 607.

<sup>76</sup> *Rita v. United States*, 127 S. Ct. 2456, 2463; *Gall*, 128 S. Ct. at 596.

<sup>77</sup> *Gall*, 128 S. Ct. at 596.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.* at 597.

<sup>80</sup> See *id.*

parture and the reasons given by the sentencing court in light of statutorily articulated Congressional sentencing policy.<sup>81</sup>

After *Gall v. United States*, it is apparent that many of the issues arising from *Booker* with respect to the proper role of legislatively established maximum sentences, legislatively established Guidelines and judicial discretion in sentencing have largely been resolved, particularly insofar as *Blakely* made clear that sentences greater than the statutory maximum may not be decided by the sentencing court. It is also clear that most members of the Court recognize that the proper relationship between the Sixth

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<sup>81</sup> In *Kimbrough v. United States*, 128 S. Ct. 558 (2007), decided the same day as *Gall*, a majority of the Court applied the *Rita/Gall* methodology to the vast sentencing disparities between the possession of powder cocaine, as opposed to “crack” cocaine. *Id.* at 575. Under the Guidelines, there is a 100-1 ratio for the possession of “crack” versus powder. *Id.* at 571. Kimbrough pled guilty to conspiracy to distribute, possession of both forms of cocaine with intent to distribute, as well as possession of a firearm, which exposed him to a statutory minimum prison term of fifteen years [180 months] and a maximum of life. *Id.* at 564.

The Guidelines’ recommended range was 228–270 months [19 to 22.5 years]. *Id.* at 565. The sentencing court found that a sentence in this range was greater than necessary to accomplish the purposes of 18 U.S.C. § 3553(a). *Id.* The court noted that had Kimbrough only possessed powder cocaine, his sentence would be only 97 to 106 months [8 to 9 years] and sentenced the defendant to the statutory minimum for crack cocaine of 180 months [15 years]. *Id.* The Fourth Circuit found that a sentence outside the Guidelines range is per se unreasonable when it is based on the crack cocaine/powder cocaine disparity. *Id.* A majority of the Court, applying *Gall*, reversed. *Id.* at 576.

Justice Ginsburg delivered an opinion for the Court with which Justice Scalia concurred separately and from which Justices Thomas and Alito dissented. *Id.* at 564, 577–78. The majority examined the history of the powder/“crack” disparity and found that the distinction was not based upon any empirical data and that the Sentencing Commission had asked Congress to review the matter on several occasions. *Id.* at 567. The majority found that the sentencing court had not abused its discretion based on the facts in the case and properly de-weighted the Guidelines recommendation in light of § 3553(a). *Id.* The 4.5 year-sentence reduction (below the Guidelines recommendation) was not an abuse of discretion. *Id.* at 576.

Justice Scalia concurred in the judgment but wrote separately to reinforce the specifics of the judicial discretion at issue and the unarticulated Sixth Amendment jury trial issues which remain to be addressed after *Gall*. *Id.* at 577. According to Justice Scalia, the previous post-*Booker* cases can be understood as permitting the sentencing court a wide range of discretion in considering the § 3553(a) factors and to reject the Guidelines recommendation. *Id.* However, if the Guidelines must be followed, *Booker* would be violated even when the sentence is reasonable under § 3553(a) and within the statutory minimum and maximum, and, therefore, the defendant would have been entitled to a lesser sentence but for facts decided by the judge rather than the jury. *Id.*

Justices Thomas and Alito filed separate dissenting opinions in which Justice Thomas continues to assert that the *Booker* remedy fails to properly come to grips with the Sixth Amendment jury fact-finding problem, and he would have resolved *Booker* by simply requiring that any sentence beyond those necessary for the conviction to be submitted to the jury, while leaving the mandatory nature of the Guidelines intact. *Id.* However, there is nothing in his opinion that in any way indicates opposition to the thrust of either *Blakely* or *Booker*, with respect to the primacy of jury-factfinding. *See id.* at 577–78. In a one paragraph dissent, Justice Alito reiterated his dissent in *Gall* and would have not engaged in determining whether the statutory disparity, itself, was reasonable. *Id.* at 578–79.

Amendment right to jury-found facts and judicial discretion in sentencing remains unresolved.

### III. “ACQUITTED CONDUCT” AND JUDICIAL SENTENCING DISCRETION

Neither *Rita* nor *Gall* have resolved the thorniest remaining post-*Booker* problem: reconciling the proper fact-finding role of the jury under the Sixth Amendment with the unavoidable necessity of judicial discretion in crafting individuated sentences following a jury verdict,<sup>82</sup> which the “acquitted conduct” problem puts into bold relief:

(1) If *Apprendi* and *Blakely* are read to hold that a sentencing court may never “reasonably” rely upon facts found by the sentencing court under *Booker*, when imposing a sentence *within* the statutory range as well as beyond it, how can case-specific judicial discretion in sentencing be effectuated, without requiring a jury verdict upon virtually *any* fact relied upon by the sentencing court?

(2) Conversely, if *Rita* and *Gall* are read to *permit* a sentencing court to “reasonably” rely upon facts *rejected* by a jury verdict of acquittal in imposing a sentence, *within* the statutory maximum, how can such a sentence be reconciled with the Sixth Amendment principles of *Apprendi*, *Blakely* and *Booker* which emphasize the importance of jury fact-finding in sentencing, which is *Booker*’s foundation?

Although the Supreme Court has not addressed “acquitted conduct” in the post-*Booker* era, every Circuit that has addressed it has found no constitutional impediment in a sentencing court considering “acquitted conduct” imposing a sentence, as long as that sentence was within the “statutory maximum” limitation imposed by *Blakely*.<sup>83</sup> Thus, jury fact-finding from *all* sentences within the Guidelines range has been completely removed. However, every circuit has also relied upon *United States v. Watts*,<sup>84</sup> a pre-*Apprendi* case, which upheld the use of “acquitted conduct” in the context of a due process and double-jeopardy challenge, but which did not address the Sixth Amendment issues that gave rise to *Apprendi*, *Blakely*, *Booker*, *Rita* or *Gall*.<sup>85</sup>

A few district court opinions and circuit court opinions have argued that in light of the heightened respect for Sixth Amendment-mandated jury

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<sup>82</sup> See *Gall*, 128 S. Ct. at 602–10 (Scalia, J. and Souter, J., concurring and Alito, J., dissenting).

<sup>83</sup> *Blakely v. Washington*, 542 U.S. 296, 301 (2004).

<sup>84</sup> See generally *United States v. Watts*, 519 U.S. 148 (1997).

<sup>85</sup> *Id.* at 156–57.

fact-finding in sentencing reflected in *Apprendi*, *Blakely* and *Booker*, “acquitted conduct” has no place in judicial sentencing considerations.<sup>86</sup> And, most recently, Justice Souter’s dissenting opinion in *Rita* points to *Jones* as the case that actually initiated the *Apprendi/Blakely/Booker* “sentencing revolution,” which this article suggests may provide the previously unrecognized foundation for resolving the apparent jury-found “acquitted conduct”/judicial discretion contradiction in Supreme Court Sixth Amendment jurisprudence.<sup>87</sup>

#### A. *BLAKELY V. WASHINGTON* AND “ACQUITTED CONDUCT”

The “acquitted conduct” dilemma (illustrated by the lower court cases discussed below) stems from the same Sixth Amendment concerns upon which the *Apprendi* and *Blakely* opinions are premised, and which eventually gave rise to *Booker*. However, the *Blakely* opinion makes clear that the Sixth Amendment right to jury-found facts was not necessarily limited to the imposition of sentences above the statutory maximum, as demonstrated by Justice Alito’s dissent in *Gall* that discusses *Blakely*’s implications.<sup>88</sup> The majority opinion in *Blakely*, written by Justice Scalia, was joined by Justices Stevens, Souter, Thomas and Ginsberg.<sup>89</sup>

According to Justice Scalia, writing for the majority, both *Apprendi* and *Blakely* were based upon much more fundamental considerations than properly allocating factual decision-making in sentencing and were constitutionally grounded in the abstract question of:

the need to give intelligible content to the right of a jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. . . . *Apprendi* carries out this design by ensuring that the judge’s authority to sentence derives wholly from the jury’s verdict. Without that restriction, the jury would not exercise the control that the Framers intended.<sup>90</sup>

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<sup>86</sup> *United States v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005); see also *United States v. Faust*, 456 F.3d 1342 (11th Cir. 2006); *Grier*, 475 F.3d 556 (3d Cir. 2007).

<sup>87</sup> See *Rita v. United States*, 127 S. Ct. 2456, 2485 (2007) (Souter, J., dissenting).

<sup>88</sup> *Gall v. United States*, 128 S. Ct. 586, 605 (2007) (discussing *Blakely*, 542 U.S. 309–10) (Alito, J., dissenting).

<sup>89</sup> Justice O’Connor filed a dissenting opinion, in which Justices Breyer, Rehnquist and Kennedy joined in whole or substantial part. Justice Kennedy also filed a dissenting opinion, in which Justice Breyer joined. Justice Breyer filed a separate dissent in which Justice O’Connor joined.

<sup>90</sup> *Blakely*, 542 U.S. at 305–06 (emphasis added).

In *Blakely*, Scalia, writing for the majority, notes that ignoring this aspect of *Apprendi* would lead either to: (a) the jury finding whatever facts the legislature labels as *elements of an offense* and those it labels as *sentencing*, “no matter how much they may increase the punishment,”<sup>91</sup> might be determined by the judiciary; or (b) legislatures establishing sentencing factors that would have to be *within constitutional limits*, such as when, perhaps the sentencing factor is a “tail which wags the dog of the substantive offense.”<sup>92</sup> Neither of these considerations, central to the *Blakely* opinion, is limited to the facts of *Blakely* alone.

In *Blakely*, Scalia, writing for the majority, also took note of the triad of competing imperatives mentioned above: the scope of legislative power; the scope of judicial discretion in sentencing; and, the power *reserved* to the jury by the Sixth Amendment.<sup>93</sup> According to Scalia’s opinion, “the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.”<sup>94</sup> Scalia then addressed the dissenting opinions in turn by relying primarily upon the primacy of Sixth Amendment jury fact-finding as a bulwark against judicial and governmental oppression, a fundamental supervening value with respect to which their more instrumentalist objections are unavailing.<sup>95</sup> When applied to the “acquitted conduct” scenario, the importance of the role of the jury verdict in limiting oppressive exercise of judicial discretion could hardly be clearer.<sup>96</sup>

Following the Court’s Sixth Amendment opinion in *Blakely* and *Booker*, the lower federal judiciary has expressed widely differing views regarding their impact on the primacy of jury verdicts when “acquitted conduct” is used to impose a sentence that is within the statutory maximum. Since *Blakely*, on its facts, prohibits consideration of judicially-found facts to increase a sentence *beyond* the statutory maximum, there is little question that a sentencing court may not reasonably rely on facts rejected by the jury in imposing a sentence *beyond* the statutory maximum.<sup>97</sup> The unsettled question remains, however, as to whether facts that were considered and

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<sup>91</sup> *Id.* at 306.

<sup>92</sup> *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986). A disproportionate sentencing outcome based on “acquitted conduct” was discouraged by Judge Posner in *United States v. Horne*, 474 F.3d 1004, 1007 (7th Cir. 2007).

<sup>93</sup> *Blakely*, 542 U.S. at 308.

<sup>94</sup> *Id.*

<sup>95</sup> *See id.* at 308–13.

<sup>96</sup> *See United States v. Faust*, 456 F.3d 1342, 1348 (11th Cir. 2006); *see also infra* note 107.

<sup>97</sup> *Blakely*, 542 U.S. at 301–02.

rejected by a jury acquittal can be used in imposing a sentence within the statutory maximum.

#### B. "ACQUITTED CONDUCT" IN THE LOWER COURTS

The Sixth Amendment implications of *Blakely* as it relates to "acquitted conduct" were first discussed in *United States v. Pimental*,<sup>98</sup> which called into question judicial use of "acquitted conduct" in sentencing across the board.<sup>99</sup> Other lower courts have also expressed serious reservations about the Sixth Amendment implications of reliance on "acquitted conduct" in sentencing.<sup>100</sup> However, an unpublished trial court opinion which excluded "acquitted conduct" on Sixth Amendment grounds was overruled by the Fourth Circuit in *United States v. Ashworth*.<sup>101</sup>

In at least three circuits that have addressed "acquitted conduct" issues, strongly worded dissents or concurring opinions have taken issue with the proposition that "acquitted conduct" may properly be used by the sentencing court under *any* circumstances. The rationale expressed by the opinions that rejected "acquitted conduct" as a factor in sentencing start with language drawn from *Apprendi* and *Blakely* that focuses on the role of the jury as an institutional restraint on the exercise of governmental power,<sup>102</sup> and have read the Sixth Amendment principles these cases reflect as prohibiting judicial use of "acquitted conduct" for *any* valid purpose in sentencing.<sup>103</sup> An example of the reasoning that has caused some courts to reject "acquitted conduct" as a proper factor to be considered by a sentencing court arises from the thrust of *Blakely* itself, which asserts the primacy of jury fact-finding in sentencing. In broad terms, "The Sixth Amendment right to a jury trial is endangered *whenever* a judge imposes a sentence that is not based solely on facts 'reflected in the jury verdict or admitted by the

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<sup>98</sup> 367 F. Supp. 2d 143 (D. Mass. 2005).

<sup>99</sup> *Id.* at 152–53; see also Judge Nancy J. Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 421 (1999) (discussing Sixth Amendment issues implicit in the use of "acquitted conduct").

<sup>100</sup> See also *United States v. Ibanaga*, 454 F. Supp. 2d 532, 536–38 (E.D. Va. 2006); *United States v. Coleman*, 370 F. Supp. 2d 661, 668–73 (S.D. Ohio 2005); *United States v. Gray*, 362 F. Supp. 2d 714, 721–22 (S.D. W. Va. 2005); *United States v. Carvajal*, No. 04 222AKH, 2005 WL 476125 (S.D. N.Y. Feb. 22, 2005).

<sup>101</sup> 139 Fed. App'x 525, 527 (4th Cir. 2005) (unpublished).

<sup>102</sup> See *Apprendi v. New Jersey*, 530 U.S. 446, 565 (2000) (Breyer, J., dissenting); see also *Blakely*, 542 U.S. at 301–02.

<sup>103</sup> See *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring); *United States v. Mercado*, 474 F.3d, 654, 658 (9th Cir. (Cal. 2007) (Fletcher, J., dissenting); *United States v. Grier*, 475 F.3d, 556 (3d Cir. 2007) (Ambro, J., concurring in the judgment; Soviter, J. and McKee, J., dissenting).

defendant.”<sup>104</sup> And, an example of the application of *Blakely*, prohibiting the use of “acquitted conduct,” is Judge Barkett’s opinion in *United States v. Faust*. Framed as a concurring opinion required by the Circuit precedent, Judge Barkett made clear that, “I strongly believe that this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.”<sup>105</sup> Unlike the majority in *Faust*, Judge Barkett believed that the Supreme Court meant exactly what it had said in *Blakely* and that the Sixth Amendment jury fact-finding requirement in sentencing applied to sentencing more broadly and was not necessarily limited to the facts of the *Blakely* case itself.

Although *Blakely* struck down a sentence *above* the statutory maximum (as Judge Barkett noted in her concurring opinion in *Faust*) there was nothing in *Blakely* to suggest that the principle it announced regarding jury-found facts in sentencing was necessarily limited to the facts in that case. But, perhaps even more importantly according to Judge Barkett, a sentencing practice which permits a defendant who has been acquitted by a jury to be incarcerated by a sentencing court based on the same facts rejected by the jury goes far beyond an abstract concern for the Sixth Amendment.<sup>106</sup> This principle violates “fundamental conceptions of justice, which . . . define the community’s sense of fair play and decency,”<sup>107</sup> trivializing legal guilt and innocence.

However, like other opinions upholding the use of “acquitted conduct” in the lower courts, the majority in *Faust* based its analysis almost exclusively on *United States v. Watts*,<sup>108</sup> a double-jeopardy case which, as pointed out by Judge Barkett in *Faust*, appears to be completely misplaced as a doctrinal foundation for Sixth Amendment analysis, post-*Blakely* and

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<sup>104</sup> *Faust*, 456 F.3d at 1349 (Barkett, J., concurring) (quoting *Blakely*, 542 U.S. at 301) (emphasis added).

<sup>105</sup> *Id.* (Judge Barkett concurring only because she felt constrained by the circuit precedent which expressly authorized the sentencing court to consider “acquitted conduct”).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1353 (citing *Dowling v. United States*, 493 U.S. 342, 353 (1990)).

<sup>108</sup> 519 U.S. 148 (1997); see also *United States v. Hurn*, 496 F.3d 784 (7th Cir. 2007); *United States v. Huff*, 514 F.3d 818 (8th Cir. 2008); *United States v. Emerson*, 223 Fed. App’x 496 (7th Cir. 2007); *Al-Arian v. United States*, 127 S. Ct. 2063 (2007); *United States v. Gobbi*, 471 F.3d 302 (1st Cir. 2006); *United States v. High Elk*, 442 F.3d 622 (8th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006); *United States v. Price*, 418 F.3d 771 (7th Cir. 2005); *United States v. Magallanez*, 408 F.3d 672 (10th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297 (11th Cir. 2005); *United States v. Ashworth*, 139 Fed. App’x 525 (4th Cir. 2005) (unpublished).

*Booker*.<sup>109</sup> Opinions in several of the circuits have relied on *Watts* in upholding the use of “acquitted conduct”<sup>110</sup> despite an explicit recognition by Justice Stevens in *Booker*, that the double jeopardy analysis in *Watts* was not necessarily determinative of the Sixth Amendment issues upon which the *Booker* opinion was premised.<sup>111</sup> And, while some lower courts have read this language to suggest that *Watts* has survived *Booker*,<sup>112</sup> there is nothing in *Booker* to suggest that the Sixth Amendment analysis upon which it relies is related in any way to the *Watts* double-jeopardy/due process analysis. Other than the aforementioned dissents and concurrences, which rejected the use of “acquitted conduct,” only one circuit has apparently recognized that the use of “acquitted conduct” to raise the statutory minimum sentence facing a defendant is prohibited.<sup>113</sup>

However, even among cases based on *Watts*, the lower courts have not been uniform in its application and have recognized the problem inherent in the conflict between the Sixth Amendment and judicial discretion in sentencing. For example, in *United States v. Horne*,<sup>114</sup> Judge Posner, even when relying on *Watts*, was careful to distinguish the facts in *Horne* from “a case in which a jury convicts a defendant of one very minor crime and acquits him of the serious crimes with which he was charged, and the judge then bases the sentence almost entirely on those crimes.”<sup>115</sup> Judge Posner’s opinion apparently recognizes that in some circumstances, “acquitted conduct” cannot be used by the sentencing court. But, his opinion does not undertake to explain a coherent principle upon which to build and does not take note of any distinction which might exist between the double-jeopardy/due process analysis in *Watts* and the Sixth Amendment analysis required post-*Apprendi/Blakely/Booker*.

After *Booker* and the clarifications of *Rita* and *Gall*, even a “within the Guidelines” sentence must be “reasonable” and, at a minimum, must

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<sup>109</sup> *Faust*, 456 F.3d at 1349 (Barkett, J., concurring) (rejecting the majority’s reliance upon *Watts*, citing the reference in *Booker* which notes that *Watts* was not a Sixth Amendment case and was “explicitly disavowed by the Supreme Court as a matter of Sixth Amendment law.”)

<sup>110</sup> *Watts*, 519 U.S. at 153.

<sup>111</sup> *United States v. Booker*, 543 U.S. 220, 240 (2005).

<sup>112</sup> See *United States v. Hurn*, 496 F.3d 784, 788 (7th Cir. 2007); *United States v. Mercado*, 474 F.3d 654, 657 (9th Cir. 2007); *United States v. Johnson*, 444 F.3d 1026, 1030 (9th Cir. 2006); *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States v. Farias*, 469 F.3d 393, 399–400 (5th Cir. 2006); *United States v. Price*, 418 F.3d 771, 787–88 (7th Cir. 2005).

<sup>113</sup> See *United States v. Vaughn*, 430 F.3d 518, 526–27(2d Cir. 2005) (upholding the use of acquitted conduct, other than conduct constituting elements of an offense that would raise the statutory minimum sentence).

<sup>114</sup> 474 F.3d 1004 (7th Cir. 2007).

<sup>115</sup> *Id.* at 1007.

reference § 3553(a) factors and be supported by sufficient factual findings to withstand deferential review. Thus, after *Gall*, the question to be resolved is whether “acquitted conduct” can ever be “reasonably” relied upon by a sentencing court, whether that sentence is within statutory and/or Guidelines range or not.<sup>116</sup>

#### IV. RECLAIMING SIXTH AMENDMENT “ACQUITTED CONDUCT” DOCTRINE

As discussed above, virtually all of the circuit court cases analyzing “acquitted conduct” following *Blakely* and *Booker* have looked to *United States v. Watts* to support the conclusion that “acquitted conduct” may be relied upon by a sentencing court. The following analysis of *Watts* demonstrates that this reliance is completely misplaced because neither the factual and procedural posture of *Watts*, nor the constitutional principles at issue in the case, can properly be positioned in the *Apprendi/Blakely/Booker* Sixth Amendment sphere.<sup>117</sup> The *Watts* opinion preceded the *Booker* federal “sentencing revolution” by nearly a decade.<sup>118</sup>

##### A. *WATTS V. UNITED STATES*: A PRECARIOUS DOCTRINAL FOUNDATION

Four years before deciding *Apprendi*, the Court accepted *certiorari* in two cases arising in the Ninth Circuit, *United States v. Watts*<sup>119</sup> and *United States v. Putra*,<sup>120</sup> which held that sentencing courts could not consider “acquitted conduct” in determining the appropriate sentence under the Sentencing Guidelines scheme.<sup>121</sup> According to the *per curiam* opinion of the

<sup>116</sup> See Petition for Writ of Certiorari at 5–6, *Al-Arian v. United States*, 127 S. Ct. 2063 (2007) (No. 06-1219), 2007 WL 700941 (presiding judge took into consideration *Blakely* and *Booker* when sentencing Al-Arian, ignoring the recommended sentence from the U.S. Attorney and sentencing Al-Arian just one month short of crossing the maximum sentencing threshold).

<sup>117</sup> James J. Bilsborrow, Note, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 WM. & MARY L. REV. 289 (2007); Farnaz Farkish, Note, *Docking the Tail that Wags the Dog: Why Congress Should Abolish the Use of Acquitted Conduct at Sentencing and How Courts Should Treat Acquitted Conduct After United States v. Booker*, 20 REGENT U. L. REV. 101 (2007–08); Bertrall L. Ross II, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 725 (2006).

<sup>118</sup> At the time it was decided, the *Watts* opinion was the subject of significant criticism: See sources cited *supra* note 10.

<sup>119</sup> 67 F.3d 790 (9th Cir. 1995), *rev’d*, 519 U.S. 148 (1997).

<sup>120</sup> 78 F.3d 1386 (9th Cir. 1996), *rev’d*, *United States v. Watts*, 519 U.S. 148 (1997).

<sup>121</sup> *Id.* at 1389. In *Putra*, the defendant was indicted on one count of aiding and abetting possession to distribute cocaine on two different dates, among other offenses. *Id.* at 1387. The jury acquitted the defendant of the first count but acquitted on the second. *Id.* However, the sentencing court found by a preponderance of the evidence that the defendant had been involved in the second transaction and increased the basis offense level by aggregating both amounts. *Id.* Another panel of the Ninth Circuit

Court, these rulings by two separate panels of the Ninth Circuit were contrary to every other Circuit that had considered the question and violated 18 U.S.C. § 3661, the Sentencing Guidelines and *Witte v. United States*.<sup>122</sup>

In *Watts*, weapons and ammunition were found in the bedroom closet of a home where a controlled substance had been found in the kitchen.<sup>123</sup> The jury convicted Watts of possession of cocaine with intent to distribute, but acquitted him of using firearms in relation to the drug offense.<sup>124</sup> The district court found by preponderance that Watts had possessed the guns in connection with the drug offense and the court added two points to the “offense level” under the Guidelines.<sup>125</sup> The court of appeals held that the district court had improperly “reconsider[ed] facts that the jury necessarily rejected by its acquittal.”<sup>126</sup>

The Court apparently viewed the issue as so well-settled that briefing and argument were unnecessary.<sup>127</sup> However, despite the presumed simplicity of the issue, indicated by the lack of a briefing schedule, the *per curiam* opinion is accompanied by a separate concurrence by Justice Scalia<sup>128</sup> and Justice Breyer,<sup>129</sup> which reveal a serious lack of agreement with the *Watts* majority opinion. In addition, both Justice Stevens<sup>130</sup> and Justice Kennedy<sup>131</sup> dissented because, in their view, the problem presented—use of facts associated with a jury acquittal to increase a sentence—could not be dispensed with so easily.

The un-briefed, un-argued *per curiam* opinion began by noting that pre-Sentencing Guidelines statute, 18 U.S.C. § 3661, describes a broad, almost limitless range of information that a sentencing court may consider and cites *Williams v. New York*,<sup>132</sup> a nearly fifty-year-old death penalty case that upheld the imposition of a death sentence based on thirty burglar-

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remanded for re-sentencing, reasoning that the acquittal by the jury was an “explicit rejection” of the defendant’s involvement in the second transaction and that “allowing an increase in [the defendant’s] sentence would be effectively punishing her for an offense for which she has been acquitted.” *Id.* at 1389. The panel held that this was an additional limitation on what the District Court could consider, “beyond any limitation imposed by the Guidelines.” *Id.*

<sup>122</sup> *Watts*, 519 U.S. at 154 (citing *Witte v. United States*, 515 U.S. 389 (1995)).

<sup>123</sup> *Watts*, 67 F.3d at 793.

<sup>124</sup> *Id.* at 796.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Watts*, 519 U.S. at 164.

<sup>128</sup> *Id.* at 158.

<sup>129</sup> *Id.* at 158–59.

<sup>130</sup> *Id.* at 164.

<sup>131</sup> *Id.* at 170–71.

<sup>132</sup> 337 U.S. 241 (1949).

ies of which the defendant had never been convicted.<sup>133</sup> It is unlikely that the *Williams* death sentence would be upheld after *Apprendi* and *Ring v. Arizona*, much less *Blakely* or *Booker*. But, according to the *Watts* opinion, the issue before the Court was no more than a restatement of the long tradition of permitting a sentencing court to consider any evidence in sentencing.<sup>134</sup>

The *Watts* opinion drew an analogy between the “relevant conduct” portion of the Guidelines and the “actions and circumstances that courts typically took into account when sentencing prior to the Guidelines’ enactment.”<sup>135</sup> The opinion points out the similarity between the language in 18 U.S.C. § 3661 and Guideline § 1B1.4, which *are* similar, but *not identical*, noting that: “In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, *unless otherwise prohibited by law.*”<sup>136</sup> This language seems to explicitly recognize that limitations other than those set forth in the Guidelines actually *were* within the contemplation of Congress, but this was not noted in the *per curiam Watts* opinion.<sup>137</sup>

The *Watts* opinion rests primarily upon the Court’s reading of Congress’ intent in enacting the Guidelines, but also relies on the double-jeopardy implications to which the Ninth Circuit referred, stating that “when a sentencing court considers facts underlying a charge on which the jury returned a verdict of not guilty, the defendant ‘suffer[s] punishment for a criminal charge for which he or she was acquitted.’”<sup>138</sup> In rejecting this analysis, the *Watts* opinion cites *Witte v. United States*<sup>139</sup> for a quite different proposition: that consideration of *uncharged* offenses in sentencing for one offense did not prevent a *subsequent* prosecution for the previously un-

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<sup>133</sup> *Id.* at 151. *But see* *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>134</sup> *Watts*, 519 U.S. at 152 (citing *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.)).

<sup>135</sup> *Id.* (citing *Witte v. United States*, 515 U.S. 389, 402 (1985) (quoting *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989))).

<sup>136</sup> *Id.* (emphasis added).

<sup>137</sup> But, the opinion does acknowledge that Guideline § 1B1.3 specifically notes that “[r]elying on the entire range of conduct” whether the subject of a conviction or not, thus rebutting the dissent of Justice Stevens, in which he contended that Congress did not intend that “acquitted conduct” be used to enlarge a sentence. *Id.* at 152–53. Even Justice Stevens conceded that “evidence adduced” during a trial resulting in acquittal could be used to decide a sentence within a Guidelines range. *Id.* at 162.

<sup>138</sup> *Id.* at 154.

<sup>139</sup> 515 U.S. 389 (1985).

charged crimes under the Double Jeopardy Clause.<sup>140</sup> The Ninth Circuit had made a completely different point, which was more akin to the *Apprendi/Blakely/Booker* analysis.

The *Watts* opinion also determined that the court of appeals “misunderstood the preclusive effect of an acquittal, when it asserted that a jury ‘reject[s]’ some facts when it returns a general verdict of not guilty.”<sup>141</sup> The difference in the standard of proof governing trial and sentencing resolves the matter because an acquittal “does not prove a defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt,”<sup>142</sup> and “the jury cannot be said to have ‘necessarily rejected’ any facts when it returns a general verdict of not guilty.”<sup>143</sup> The court noted that a verdict of acquittal does not prevent re-litigation under a lower standard of proof in a civil proceeding.<sup>144</sup> And, while this is certainly a correct statement with respect to double-jeopardy, the *per curiam* opinion in *Watts* does not discuss any Sixth Amendment issues at all.<sup>145</sup>

However, even *Watts* recognizes that there existed unresolved differences among the circuits as to whether, “in extreme circumstances,” *relevant conduct* under the Guidelines which would “dramatically increase the sentence must be based on clear and convincing evidence.”<sup>146</sup> Since *Watts* was not such a case, the *per curiam* opinion concluded that, “a jury’s verdict of acquittal does not prevent the sentencing court from considering conduct *underlying* the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.”<sup>147</sup> Justice Breyer concurred with the judgment of the *per curiam* opinion, but suggested that the Sentencing Commission or Congress could clarify the meaning of “relevant conduct” to “instruct the sentencing judge not to base a sentencing enhancement upon acquitted conduct . . . [g]iven the role that juries and acquittals play in our system.”<sup>148</sup>

In his concurrence, Justice Scalia disagreed with Justice Breyer’s assertion that the Sentencing Commission *could* “revers[e] today’s outcome by mandating disregard of the information we . . . hold it proper to con-

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<sup>140</sup> *Watts*, 519 U.S. at 155.

<sup>141</sup> *Id.* (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984)).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 156.

<sup>145</sup> *But see* Rudstein and Recent Case, *supra* note 10.

<sup>146</sup> *Watts*, 519 U.S. at 156.

<sup>147</sup> *Id.* at 157 (emphasis added).

<sup>148</sup> *Id.* at 159 (Breyer, J., concurring). However, between *Watts* in 1996 and *Booker* in 2005, Congress did not take up the invitation to revisit the issue.

sider.”<sup>149</sup> According to Justice Scalia, the language of 18 U.S.C. § 3661 and 18 U.S.C. § 3553(b) prohibited *both* the Commission and the courts from preventing the use of “acquitted conduct” in sentencing, although Congress (or presumably the Sixth Amendment) would have the power to make such a change in sentencing standards.<sup>150</sup>

The lengthy dissent of Justice Stevens referred to the *earlier* “sentencing guidelines revolution” in which:

[I]ndividualized sentencing that formerly justified vesting judges with virtually unreviewable sentencing discretion have been replaced by the impersonal interest in uniformity and retribution. [T]he modest name ‘Guidelines’ . . . have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed.<sup>151</sup>

Justice Stevens pointed out that 18 U.S.C. § 3661 upon which the *per curiam* opinion is grounded was actually a product of the *previous* “individualized sentencing” era, in which judges were free to consider a wide range of factors and to accord each the weight he or she considered appropriate within legislatively established limits, whether the result of an acquittal or not.<sup>152</sup>

However, under the Sentencing Guidelines regime, 18 U.S.C. § 3661 took on a completely different character when incorporated into the Guidelines’ limited judicial discretion system.<sup>153</sup> Justice Stevens also dispensed with the *Watts* opinion’s reliance on *Williams*,<sup>154</sup> *Witte*<sup>155</sup> and *McMillan*<sup>156</sup> as dispositive of the issue.<sup>157</sup>

Although Justice Stevens did not discuss “acquitted conduct” as a Sixth Amendment jury trial issue directly, he concluded that the statute should be construed to entail “the traditional requirement that criminal charges must be sustained by proof beyond a reasonable doubt.”<sup>158</sup> And, Justice Kennedy’s very brief dissent got to the heart of the issue, stating:

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<sup>149</sup> *Id.* at 158 (Scalia, J., concurring).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 159–60 (Stevens, J., dissenting) (quoting *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)).

<sup>152</sup> *Id.* at 160–61.

<sup>153</sup> *Id.* at 162.

<sup>154</sup> *Id.* at 165.

<sup>155</sup> *Id.* at 166, 167.

<sup>156</sup> *Id.* at 167, 168.

<sup>157</sup> *Id.* at 168.

<sup>158</sup> *Id.* at 169.

We have not decided a case on this precise issue, for it involves not just prior criminal history but conduct underlying a charge *for which the defendant was acquitted*. . . . The distinction ought to be confronted by a reasoned course of argument, not by shrugging it off. . . . At least it should be said that to *increase a sentence* based on conduct underlying a charge *for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal*. . . .<sup>159</sup>

Perhaps more importantly (considering the precedential value of *Watts* in evaluating the “acquitted conduct” issue from a post-*Booker*, Sixth Amendment viewpoint) Justice Kennedy opined that the issue was too important to be decided without briefing and oral argument.<sup>160</sup>

Because the *Watts* opinion was based on an incomplete record, Justices Stevens and Kennedy noted that the reach of the *per curiam* opinion (beyond the limited statutory/double-jeopardy issues upon which the case was decided) was not clear.<sup>161</sup> The procedural posture of *United States v. Watts* and its reliance on the Double Jeopardy Clause, rather than the Sixth Amendment principles, makes *Watts* a precarious foundation upon which to negate the fundamental Sixth Amendment principle of jury supremacy in fact-finding in post-*Apprendi* cases.<sup>162</sup>

#### B. *JONES V. UNITED STATES* AND THE ORIGINS OF THE “SENTENCING REVOLUTION”

However, the pre-*Apprendi* case that *does* discuss limitations on a sentencing court’s discretion following an acquittal in Sixth Amendment terms is *Jones v. United States*,<sup>163</sup> a case that has been ignored by all of the circuit opinions that have upheld the sentencing court’s use of “acquitted conduct,”<sup>164</sup> with the exception of a dissent in *United States v. Grier*.<sup>165</sup> However, in a dissenting opinion in *Rita v. United States*, Justice Souter suggested that *Jones*, rather than *Watts*, was the more faithful pre-*Apprendi* precedent upon which to ground *Blakely-Booker* Sixth Amendment analysis, and that *Jones*, rather than *Apprendi*, was the genesis of the Court’s re-

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<sup>159</sup> *Id.* at 170 (emphasis added).

<sup>160</sup> *Id.* at 171.

<sup>161</sup> *Id.* at 164 (Stevens, J., dissenting), 170 (Kennedy, J., dissenting).

<sup>162</sup> *See id.* at 154.

<sup>163</sup> *See generally* *Jones v. United States*, 526 U.S. 227 (1999).

<sup>164</sup> *United States v. Faust*, 456 F.3d 1342, 1351 (11th Cir. 2006) (Barkett, J., concurring)(citing *Jones*, 526 U.S. at 227 without specifically identifying its import in the development of the *Apprendi/Blakely/Booker* line of cases).

<sup>165</sup> 475 F.3d 556 (3d Cir. 2007). This case, strictly speaking, is not an “acquitted conduct” case but does discuss *Jones v. United States* in dicta.

vivification of the Sixth Amendment right to jury-found facts in sentencing.<sup>166</sup>

In *Jones*, the defendant was convicted of carjacking by a jury and sentenced pursuant to a sentencing scheme that provided for increased penalties upon judicially found facts, which increased the maximum carjacking penalty from fifteen years to twenty-five years, based on the sentencing court's finding of "serious bodily injury."<sup>167</sup> The Government argued in *Jones* that "serious bodily injury" need not be proven beyond a reasonable doubt to a jury because it was "only a condition for imposing an enhanced sentence . . . not an element of a more serious crime."<sup>168</sup>

In an opinion written by Justice Souter, joined in part by Justices Stevens, Scalia, Thomas and Ginsburg, the Court held that "acquitted conduct" may *not* be used in sentencing, at least with respect to elements of the offense, under Sixth Amendment jury trial principles.<sup>169</sup> *Jones*, like *Apprendi/Blakely/Booker*, is rooted in the fundamental importance of jury fact-finding: "The question might be less serious . . . if the history bearing on the Framers' understanding of the Sixth Amendment principle demonstrated an accepted tolerance for exclusively judicial factfinding to peg penalty limits. *But such is not the history.*"<sup>170</sup>

However, in *Jones*, the Court was only called upon to interpret the federal statute in question and did not expressly rule on the Sixth Amendment implications of the Government's argument.<sup>171</sup> Nevertheless, the Court *did* consider the issue important enough to apply the doctrine of constitutional avoidance, thus *implying* that a ruling *upholding* the statute, as interpreted by the Government, *would* violate the Sixth Amendment or another constitutional principle.<sup>172</sup> To construe the statutory "condition" as an *element* of a more serious offense would require jury fact-finding, according to *Jones*.<sup>173</sup>

It is significant that the author of the *Jones* opinion, Justice Souter, pointed out its importance as a precursor to the later Sixth Amendment cases that began with *Apprendi* in his dissent in *Rita v. United States* by

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<sup>166</sup> *Rita v. United States*, 127 S. Ct. 2456, 2485 (2007) (Souter, J., dissenting)..

<sup>167</sup> *Jones*, 526 U.S. at 227.

<sup>168</sup> *Rita*, 127 S. Ct. at 2485 (citing *Jones*, 526 U.S. at 233.) In *Rita*, Justice Souter considered this "an unsettling argument" because the nature of statutorily-created sentencing schemes can make liability for an enhanced penalty a more serious issue than determination of guilt or innocence. *Id.*

<sup>169</sup> *Jones*, 526 U.S. at 251–52.

<sup>170</sup> *Id.* at 244 (emphasis added).

<sup>171</sup> *Id.* at 252 n.11.

<sup>172</sup> *Id.* at 239.

<sup>173</sup> *Id.* at 232.

stating: “For if judicial factfinding necessary for an enhanced sentencing range were held to be adequate in the face of a defendant’s objection, a defendant’s right to have a jury standing between himself and the power of government to curtail his liberty would take on a previously unsuspected modesty.”<sup>174</sup> According to Justice Souter’s *Rita* dissent, *Jones* should actually be seen as having identified the problem that was “presented inescapably” in *Apprendi* and resolved in favor of the Sixth Amendment by,

placing disputed factfinding off judicial limits when, but only when, its effect would be to raise the range of possible sentences . . . [The court] recognized that the jury right would be trivialized beyond recognition if that traditional practice [i.e., judicial factfinding relevant to sentencing within the range, established by the legislature and set by the jury’s verdict] could be extended to the point that a judge alone . . . could find a fact necessary to raise the upper limit of a sentencing range.<sup>175</sup>

Justice Souter’s dissent in *Rita* reviews the post-*Jones* Sixth Amendment doctrine through *Apprendi/Blakely/Booker* and concludes that *Rita* carried with it the danger of replicating the Sixth Amendment problem that the Court had “flagged” in *Jones*, because it established a procedure for reconciling the Guidelines factors with judicial fact-finding without addressing the judicial discretion/Sixth Amendment right to a jury trial problem head-on.<sup>176</sup> According to Justice Souter, the only remedy possible would be to hold that a within the Guidelines sentence carried “no presumption of reasonableness,” to avoid replicating the unconstitutional system of appeal-proof sentences within-the-Guidelines ranges, determined by facts found by judges alone.<sup>177</sup> This, of course, anticipates the eventual ruling of the majority in *Gall v. United States* several months later.<sup>178</sup>

However, eliminating the “presumption of reasonableness” alone would not completely resolve the issue of reconciling Congress’ intent to bring greater uniformity in sentencing and the Court’s concern for increased judicial discretion to impose individuated sentences, with the Sixth

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<sup>174</sup> *Rita v. United States*, 127 S. Ct. 2456, 2485 (2007) (Souter, J., dissenting).

<sup>175</sup> *Id.* at 2486.

<sup>176</sup> Although no member of the Court had noted the apparent relationship between the holding of the Court in *Jones v. United States*, this issue was presented to the Court for the first time in a Petition for a Writ of Certiorari in *United States v. Al-Arian* during the 2006–07 term. 127 S. Ct. 2063 (2007) (No. 06-1219), 2007 WL 700941. Author was appellate counsel for Dr. Sami Al-Arian who had been acquitted of “terrorism” related charges in what TIME Magazine called the biggest loss for the Bush administration to date. See Tim Padgett & Wendy Malloy, *When Terror Charges Just Won’t Stick, A jury vindicates a fiery pro-Palestinian professor. Did the feds just waste their time?*, TIME, Dec. 19, 2005, at 46.

<sup>177</sup> *Rita*, 127 S. Ct. at 2488.

<sup>178</sup> *Id.* at 2486–87. See discussion of *Gall*, *supra* Part II.B.

Amendment right to a jury trial which constitutionally limits that discretion.<sup>179</sup> Rather, Justice Souter suggests that any sentencing scheme must include “provision for jury, not judicial, determination of *any* fact necessary for a sentence within an upper Guidelines subrange.”<sup>180</sup> While it is not immediately clear what Justice Souter considered this “upper subrange” to be, it is quite clear that he recognized that an increased sentence, even within the statutory maximum based on conduct not found by a jury, would run afoul of the Sixth Amendment.<sup>181</sup>

In addition to Justice Souter’s suggestion that *Jones* provides a more substantial precedent than does *Watts*, Justice Stevens noted in *Booker* that *Watts* involved “a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause.”<sup>182</sup> Also, the *Watts* opinion “did not even have the benefit of full briefing or oral argument.”<sup>183</sup> As a result, it was “unsurprising that [the Court] failed to consider fully the issues [i.e. the Sixth Amendment issues previously at issue in *Blakely*] presented to [them] in these cases.”<sup>184</sup> However, this does not mean that the Sixth Amendment analysis of *Booker* and *Jones v. United States*, which would apparently prevent the use of “acquitted conduct,” is completely overcome by reference to the double-jeopardy/due process analysis of *Watts*, as lower courts seem to have concluded.<sup>185</sup>

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<sup>179</sup> *Id.* at 2488.

<sup>180</sup> *Id.* (emphasis added).

<sup>181</sup> *Id.*

<sup>182</sup> *United States v. Booker*, 543 U.S. 220, 240 (2005).

<sup>183</sup> *Id.* at 240 n.4.

<sup>184</sup> *Id.*

<sup>185</sup> See generally *United States v. Grier*, 475 F.3d 556 (3d Cir. 2007). *Grier* involved an altercation over an unpaid bill and possession of a bicycle which resulted in a shooting but, apparently, no injuries. *Id.* at 559. The defendant was arrested on state charges of aggravated assault, receiving stolen property and unlawful possession of a firearm, all of which were dismissed. *Id.* *Grier* was subsequently indicted in federal court for unlawful possession of a firearm by a felon and possession of a stolen firearm. *Id.* He pled guilty to the first count and the second was dismissed pursuant to the plea agreement. *Id.*

The pre-sentence report reflected a four level-enhancement for using a firearm in connection with the dismissed state felony charges, raising the recommended Guidelines sentence from 84 to 105 months to 120 to 150 months. *Id.* at 559–60. At sentencing, the other party testified as to the altercation and the sentencing court adopted the enhancement finding aggravated assault, rather than simple assault under state law, but reduced the sentence by two offense levels because of the involvement of the other party in the altercation. *Id.* at 560. *Grier* received a sentence of 100 months and appealed the Court’s use of a preponderance standard to find a state felony and its failure to articulate its considerations under 18 U.S.C. § 3553(a). *Id.* at 561.

The majority opinion considered whether the Due Process Clause requires facts relevant to sentencing enhancements, “particularly those that constitute a ‘separate offense’ under governing law beyond a reasonable doubt.” *Id.* at 561. The majority held that under *Booker*, once a jury has found a defendant guilty of an offense beyond a reasonable doubt of all elements of one offense, the defendant

While the reference to *Jones* by Justice Souter is the first such reference in an opinion of the Court, the importance of *Jones* in the *Apprendi/Blakely/Booker* line of cases was first extensively discussed by the concurrence and dissent in the Third Circuit opinion *United States v. Grier*, although the Sixth Amendment issue was not raised below and the case was remanded for resentencing for other reasons.<sup>186</sup> The concurrence and dissent in *Grier* noted the importance of *Jones*' focus on the *elements of the offense* that the jury had considered and rejected in an acquittal, as being of a different order of constitutional magnitude than facts that the jury had not considered.<sup>187</sup> Additionally, other than *United States v. Grier*, circuits that have upheld the use of "acquitted conduct" by relying on *Watts*<sup>188</sup> have failed to note that in *Jones*, the Court already held that a distinction must be made for facts that are a factual element of the *acquitted offense* to give effect to Sixth Amendment jury trial considerations.<sup>189</sup>

Although the majority in *Grier* dismissed *Jones* by characterizing the opinion as one of statutory construction alone, the dissent makes clear that:

That [non-constitutional] reading of *Jones* is belied by the rationale for the opinion . . . which discussed at length the "grave and doubtful constitutional questions" that would arise were it to interpret the statute to treat the finding of "serious bodily harm" as a sentencing factor . . . rather than as an element of the offense that "must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."<sup>190</sup>

Though *Grier* is not, strictly speaking, an "acquitted conduct" case, the dissenting and concurring opinions in *Grier* highlight both the impor-

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may be sentenced up to the statutory maximum without additional findings beyond a reasonable doubt, even when those facts constitute a separate offense under state law, unless those facts would increase the statutory maximum sentence for the offense. *Id.* at 565. However, the majority remanded the case in light of the failure of the trial court to provide a factual basis for determining whether the sentence was reasonable. *Id.* at 572.

<sup>186</sup> *Id.* at 572.

<sup>187</sup> *Id.* at 578 (Ambro, J., concurring), 594–95 (Sloviter, J., dissenting).

<sup>188</sup> See generally *United States v. Watts*, 519 U.S. 148 (1997).

<sup>189</sup> Despite Justice Steven's explicit recognition that Double Jeopardy analysis in *Watts* is not necessarily determinative of the Sixth Amendment issues in *Booker*, majority opinions in several of the circuits have relied on *Watts* in upholding the exercise of judicial discretion in sentencing based on "acquitted conduct" and none have referred to the relevant discussion in this Court's holding in *Jones*. See *United States v. Gobbi*, 471 F.3d 302 (1st Cir. 2006); *United States v. High Elk*, 442 F.3d 622 (8th Cir. 2006); *United States v. Dorcelly*, 454 F.3d 366 (D.C. Cir. 2006); *United States v. Price*, 418 F.3d 771 (7th Cir. 2005); *United States v. Magallanez*, 408 F.3d 672 (10th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297 (11th Cir. 2005); *United States v. Ashworth*, 139 Fed. App'x 525 (4th Cir. 2005) (unpublished); *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005) (upholding the use of acquitted conduct, other than that constituting elements of the offense).

<sup>190</sup> *Grier*, 475 F.3d at 594 (citing *Jones*, 526 U.S. at 232.) (citations omitted).

tance of *Jones* in the *Apprendi/Booker* line of Sixth Amendment cases. They provide compelling reasoning why that must be so, given the important role of jury fact-finding underpinning the entire system that echoes the discussion of the same issues in the district court and circuit court opinions in which “acquitted conduct” has been at issue.<sup>191</sup>

In sum, it seems plain that Justice Souter’s suggestion that his Sixth Amendment opinion in *Jones* actually began the Sixth Amendment sentencing revolution establishes its reasoning as a far more reliable foundation upon which to ground the “acquitted conduct” doctrine after *Booker* than does *Watts*.

#### V. JUDICIAL DISCRETION AND THE SIXTH AMENDMENT: DRAWING A PRINCIPLED LINE

As a starting place, it is necessary to recognize that, as Justice Souter has pointed out, *Jones* was actually the first modern case that addressed the Sixth Amendment implications of sentencing guidelines systems.<sup>192</sup> Secondly, it is important to see *Booker* as a case that both addresses the constitutional infirmity in the mandatory Guidelines scheme with which a unanimous Court agrees<sup>193</sup> and that portion which imposes a particular remedy for the infirmity with which all members of the Court did *not* agree.<sup>194</sup> However, that disagreement, which continues to be reflected in *Rita* and *Gall*, does not undermine in any way the centrality of the Sixth Amendment concerns that gave rise to the doctrine. Now that *Rita* and *Gall* have re-established a workable procedural methodology consistent with *Booker*, these cases constitute a “remedial trilogy,” which is of a conceptually different order than the cases that first set out the Sixth Amend-

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<sup>191</sup> See *id.* at 578 (Ambro, J., concurring), 594, 595 (Sloviter, J., dissenting). It is worthy to note that the *Grier v. United States* opinion of the Third Circuit pointing out the importance of *Jones* in the Sixth Amendment cases post-*Apprendi* was decided at about the same time that the Court accepted certiorari in *Rita*.

The suggestion that *Jones v. United States*, rather than *Watts*, was a more faithful source of precedent in evaluating post-*Booker* sentencing issues was first proposed to the Court in the Petition for Writ of Certiorari, *Al-Arian v. United States*, 127 S. Ct. 2063 (2007) (No. 06-1219), an “acquitted conduct” case which was being considered by the Court just after certiorari had been granted in *Rita*. Although the *Al-Arian* Petition was not specifically cited by Justice Souter in his *Rita* dissent (which acknowledged for the first time that his earlier Sixth Amendment opinion in *Jones* was actually the first in the what became the *Jones, Apprendi, Blakely, Booker, Rita, Gall* Sixth Amendment sentencing cases) the *Al-Arian* Petition first suggested the connection to the Court.

<sup>192</sup> *Rita v. United States*, 127 S. Ct. 2456, 2485 (2007) (Souter, J., dissenting). (discussing *Jones*, 526 U.S. at 233).

<sup>193</sup> *United States v. Booker*, 543 U.S. 220, 272 (2005).

<sup>194</sup> *Id.* at 246–47.

ment questions inherent in a sentencing guidelines scheme, as articulated in *Jones*, *Apprendi*, *Blakely* and the Sixth Amendment analysis in *Booker*.

The fundamental thesis of this article (*i.e.* that the renewed vigor of the Sixth Amendment right to jury-determined facts in sentencing which is at the heart of *Apprendi* and *Blakely* is at odds with the “remedial” aspects of *Booker*, insofar as judicially-found facts are still permissible in a “discretionary” sentencing scheme) is apparently well-recognized by several members of the Court.<sup>195</sup> As pointed out in Justice Alito’s dissent in *Gall*, on the surface, the distinction between mandatory and discretionary sentencing schemes is a distinction without an apparent difference from a Sixth Amendment standpoint.<sup>196</sup>

It is certainly true, as recognized by both Justice Scalia and Alito that notwithstanding some conceptual impediments, the Court is committed to the *Booker* remedy<sup>197</sup> and, as noted by Justices Scalia and Souter, a principled resolution of the conflicting policy imperatives spelled out earlier in the article (*i.e.*, (a) the importance of the Sixth Amendment right to jury trial; (b) respect for Congressionally mandated policy of greater uniformity in sentencing; and, (c) retention of the historic role of individuated sentencing (based on judicial discretion exercised within a statutorily limited range)) is yet to be completely resolved, particularly when a sentence within the statutory maximum is imposed.<sup>198</sup>

#### A. ELEMENTS OF THE OFFENSE AS A JUDICIAL “NO-GO ZONE”

However, the “acquitted conduct” cases discussed above, when *Jones* is included in the doctrine, suggest a principled resolution of the apparent dilemma that remains to be addressed following *Rita* and *Gall*. Rather than continuing the apparently misplaced reliance on *United States v. Watts* for guidance with respect to the post-*Booker* treatment of “acquitted conduct,” re-integrating *Jones v. United States* into the *Apprendi* case line (to which Justice Souter maintains his *Jones* opinion gave birth) provides a much firmer foundation to distinguishing between those facts which must be found by the jury and which may be found by the sentencing court in imposing individuated sentence consistent with the sentencing objectives established by Congress, as described in *Rita* and *Gall*. Were the lower courts to begin applying the *Jones* rationale to “acquitted conduct” in sen-

<sup>195</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

<sup>196</sup> *Gall v. United States*, 128 S. Ct. 586, 605 (2007).

<sup>197</sup> *Id.* at 606.

<sup>198</sup> *Rita*, 127 S. Ct. at 2475, 2476 (Scalia, J., concurring).

tencing in a manner similar to civil *res judicata*<sup>199</sup> and *collateral estoppel*,<sup>200</sup> a workable solution to the apparently irresolvable dilemma may be at hand.

Under the *Jones* rationale,<sup>201</sup> following an acquittal, the facts inherent in the proof of the elements of the offense should be foreclosed from subsequent consideration in sentencing. However, facts *not* directly related to the proof of elements of the offense *would* become “fair game” under the same standards applicable under the *Booker, Rita* and *Gall* remedial procedures. This construct, recognized in *Jones*, has the potential to eliminate the apparent contradictions between *Blakely* and *Booker* on the one hand and the Congressional objectives of the Sentencing Act on the other.

In this posture, the important Sixth Amendment right to jury decision-making would give way in the interest of retaining judicial discretion *within* the range established by the legislature. But a jury verdict of “not guilty” would establish a “no go” zone of facts which the prosecution has chosen to put before the jury to prove-up the elements of the charged offense. Facts put to the jury by the prosecution and in jury instructions that the jury has rejected either by acquittal or possibly by even by failure of the jury to reach a verdict,<sup>202</sup> should be considered “unreasonable” and an abuse of discretion under the *Booker, Rita* and *Gall* remedial formula.

#### B. RES JUDICATA/COLLATERAL ESTOPPEL AND “ACQUITTED CONDUCT”

The suggestion that *res judicata/collateral estoppel*-“like” principles should be applied to jury verdicts as a limitation upon judicial discretion in sentencing recognizes that the principles can be applied only as an *analogy* to the doctrines themselves. That the proof beyond a reasonable doubt standard applicable to criminal jury verdicts means that judicial fact-finding by a preponderance standard at sentencing cannot be subject to any concept formally in the absence of the underlying Sixth Amendment concerns.<sup>203</sup> It is well-established that a criminal acquittal has no effect on subsequent civil litigation given the differences in the standards of proof.<sup>204</sup>

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<sup>199</sup> See *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

<sup>200</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

<sup>201</sup> See generally *Jones v. United States*, 526 U.S. 227 (1999).

<sup>202</sup> A “hung jury” that cannot reach a verdict, no less than an acquittal, exists within the system as a check on judicial power and short of a conviction, any jury decision should have the same impact vis-à-vis judicial sentencing power, if the Sixth Amendment principle is to predominate. See *Petition for Writ Certiorari* at 3, *Al-Arian v. United States*, 127 S. Ct. 2063 (2007) (No. 06-1219), 2007 WL 700941 (Al-Arian entered guilty plea to prevent retrial on “hung-jury” counts.).

<sup>203</sup> *United States v. Watts*, 519 U.S. 148, 155–57 & n.2 (1997).

<sup>204</sup> *Id.* at 156.

On the other hand, when the integrity of Sixth Amendment jury trial right is at issue, another set of considerations emerge suggesting *some* form of these principles *must* apply when all members of the Court concede that the *Booker, Rita and Gall* remedy has been accepted. There seems to be precious few alternatives, if the primary Sixth Amendment analysis of *Jones, Apprendi, Blakely* and *Booker* is to retain vitality and coherence.<sup>205</sup>

Turning to the Court's Sixth Amendment concerns regarding judge-found facts in sentencing, *res judicata* principles would prevent the *judicial use* of criminal charges that were, or *could* have been, put to the jury by the prosecution.<sup>206</sup> This would mean that lesser included offenses or uncharged offenses would not be available to a judge in sentencing. Likening the criminal jury verdict to a final civil judgment would prevent re-litigation of claims that that were, or *could have been*, litigated is the standard most protective of jury fact-finding and most consistent with Sixth Amendment values.<sup>207</sup> A lesser alternative would encourage partial-charging by the prosecution to retain maximum judicial enhancement possibilities in sentencing.

Similarly, in civil litigation, *collateral estoppel* typically applies to facts that were *actually* litigated in proceedings in which the party against whom it is being asserted had an adequate opportunity to contest the factual issue.<sup>208</sup> In this context, the prosecution has every opportunity and incentive to litigate the issues upon which the acquittal was premised and upon which it seeks a conviction. However, application of *collateral estoppel* limitations to "actually litigated facts" alone, in this context, carries the danger of *overly-limiting* the impact of the jury verdict by encouraging charging decisions that take advantage of finely drawn distinctions between facts actually decided by the jury, or decided by implication, and those that were not.

Nevertheless, no matter *which* standard is applied by the Court, the distinction between the impact of a verdict of acquittal and a hung jury can also be framed in a way that lessens or strengthens Sixth Amendment jury fact-finding. It is not uncommon for a jury to acquit a defendant on one or more counts, while finding the defendant guilty on some counts and failing

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<sup>205</sup> As discussed previously, the importance of the Sixth Amendment right to jury-found facts is central to the entire line of cases that led to the "sentencing revolution." See discussion *supra* Part IV.B.

<sup>206</sup> See *Rita v. United States*, 127 S. Ct. 2456, 2475–76 (2007) (Scalia, J., concurring) (discussing the scope of *res judicata*).

<sup>207</sup> Accord Anne Bowen Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. CIN. L. REV. 1 (1989); see *Rita*, 127 S. Ct. at 2474–76.

<sup>208</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

to reach a verdict on yet other counts.<sup>209</sup> In this event, the Sixth Amendment's bulwark against judicial fiat, which is the heart of the right to jury fact-finding, would be substantially eroded should the sentencing court be permitted to pick and choose facts related to charges upon which the prosecution was unable to sustain its burden of proof. From this perspective, "hung-verdict conduct," no less than "acquitted conduct," should be considered outside the scope of proper judicial fact-finding. This is particularly the case since the prosecution has *complete* discretion to frame its case to suit its own objectives and charging *un-provable* counts to *expand* the discretion of the sentencing court would be a strong incentive, indeed.

### C. JONES AS A "JUDICIAL LACUNA"

The reliance of the lower courts on *Watts* to reject "acquitted conduct" challenges, particularly following *Booker*, is something of a mystery in light of the references in nearly all post-*Apprendi* cases to the underlying, unresolved Sixth Amendment questions regarding "sentencing enhancement upon acquitted conduct . . . [g]iven the role that juries and acquittals play in our system . . ." <sup>210</sup> and, as evidenced by Justice Breyer's and Scalia's recognition that under 18 U.S.C. § 3661 and 18 U.S.C. § 3553(b), neither the Commission nor the courts could prevent "acquitted conduct" to be used in sentencing, but that Congress (and, by necessary implication) the Sixth Amendment *would* have the power to do so.<sup>211</sup> Further, within *Booker* itself, *Watts* is noted as insufficient precedent, both because of its procedural posture and its failure to address Sixth Amendment issues.<sup>212</sup>

The mystery may have something to do with a quite understandable judicial interest in avoiding any reduction in the newly revived discretionary role of the judiciary in sentencing. However, following the recent clarifications of the *Blakely-Booker* recasting of the Federal Sentencing Guidelines,<sup>213</sup> as elaborated in *Rita v. United States* and *Gall v. United States*, the role that "acquitted conduct" might properly play in sentencing has also been significantly clarified, at least by necessary implication.<sup>214</sup> The dissenting opinion of Justice Souter in *Rita*, which recognizes that *Jones v. United States* is the foundation upon which *Apprendi* and later Sixth

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<sup>209</sup> See Petition for Certiorari at 3–4, *Al-Arian v. United States*, 127 S. Ct. 2063 (2007) (No. 06-1219), 2007 WL 700941 (of the seventeen counts at issue, Al-Arian was acquitted on eight, with the jury "hung" 10-2 for acquittal on the remaining counts); see also *Rita*, 127 S. Ct. at 2481.

<sup>210</sup> *United States v. Watts*, 519 U.S. 148, 159 (1997) (Breyer, J., concurring).

<sup>211</sup> *Rita*, 127 S. Ct. at 2488 (Souter, J., dissenting).

<sup>212</sup> *United States v. Booker*, 543 U.S. 220, 240 (2005) (discussing *Watts*, 519 U.S. at 155).

<sup>213</sup> See *supra* Part II.A & III.A.

<sup>214</sup> See *supra* Part V.A. (discussing the role that "acquitted conduct" plays in sentencing).

Amendment cases were based, significantly undercuts the reliance of the lower courts on *Watts*, as dispositive of the question.<sup>215</sup> And, although *Rita* did not address the question of “acquitted conduct” directly, Justice Souter’s assertion that his own opinion in *Jones* is integral to the line of cases leading to *Booker* significantly recasts *Jones*’ role in interpreting “acquitted conduct” cases, post-*Booker*.<sup>216</sup>

Whether or not the failure of the lower courts to take cognizance of *Jones* as integral to the post-*Apprendi* line of cases is the result of oversight, or an understandable, inherent interest in maintaining maximum judicial sentencing prerogatives following *Booker*, the result is the same. The failure by *all* of the Circuits to take *Jones* into account actually *reinforces* the importance of the jury in sentencing as a *bulwark against judicial fiat*, upon which the Court has premised *all* of its recent Sixth Amendment opinions, concurrences and dissents in *Jones*, *Apprendi*, *Blakely* and *Booker*.<sup>217</sup>

## VI. CONCLUSION

Now that *Gall* has both clarified the procedural aspects of *Rita* and the standard of review, the question still remains as to whether: (a) a judge may ever “reasonably” rely on “acquitted conduct” to increase a sentence within-the-Guidelines, and (b) if so, under what circumstances. However, since *Jones* apparently *already* prohibits the use of “acquitted conduct” in sentencing, at least when the facts in question go to conduct that is an *element* of the acquitted offense, there seems little doctrinal or practical justification for continued reliance on *Watts* in relation to the Sixth Amendment “acquitted conduct” issues that arise post-*Apprendi/Blakely/Booker*.<sup>218</sup>

Following *Gall v. United States*, the re-construction of a coherent sentencing scheme under the post-*Booker* Federal Sentencing Guidelines, has largely been accomplished, at least with respect to re-establishing the relationship between Congress’s power to define crimes and to broadly establish proper penalties and the judiciary’s role in applying Congressional sentencing policy in an individuated fashion.<sup>219</sup> However, the relationship

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<sup>215</sup> *Rita*, 127 S. Ct. at 2485.

<sup>216</sup> *Id.* at 2486–87.

<sup>217</sup> See also *Blakely v. Washington*, 542 U.S. 296, 306–07 (2004) (stating that “[t]he jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish”) (emphasis in the original).

<sup>218</sup> See also *United States v. Lynch*, 437 F.3d 902, 916 (9th Cir. 2005) (applying a “clear and convincing evidence” test to an unproven sentencing factor that disproportionately impacted the sentence, rather than the preponderance standard applied in *Watts*).

<sup>219</sup> *Gall v. United States*, 128 S. Ct. 586, 597–98 (2007).

between the exercise of necessary judicial discretion and the role of jury fact-finding as a necessary *restraint* on judicial discretion under the Sixth Amendment is less firmly established.<sup>220</sup>

While some members of the Court have argued that jury fact-finding post-*Booker* should be expanded to encompass all facts upon which the sentencing court may rely,<sup>221</sup> the acceptance by the Court of the *Booker* advisory Guidelines “remedy” requires that the Court find a principled dividing line between jury and sentencing court-determined facts, within the *Booker*, *Rita* and *Gall* remedial procedures.

The question of the use of “acquitted conduct” that was considered by a jury and rejected by a verdict of acquittal most clearly presents the conflict between these competing constitutional imperatives. Although lower courts have almost uniformly applied *Watts v. United States*, a pre-*Booker* case that seems to permit consideration of acquitted conduct by the sentencing court, this article demonstrates that another pre-*Booker* case, *Jones v. United States* is the most appropriate precedent upon which to ground the Sixth Amendment analysis of “acquitted conduct” post-*Booker*.

Although the Court has not specifically addressed “acquitted conduct” in the post-*Booker* era, a close reading of *Jones*, *Booker* and *Rita* demonstrates that under *Jones*, the use of “acquitted conduct” to support judicial discretion in sentencing creates a direct conflict with the Sixth Amendment jury trial right. As a result the Court should rule that use of “acquitted conduct,” at least with respect to those facts related to the elements of the acquitted offense, is unreasonable for *all* purposes, whether within the statutory maximum sentence or not.

In *Gall*, the Court established that a failure of the sentencing court to consider all of the § 3553(a) factors would result in an “unreasonable” sentence, as would the failure of the sentencing court to make a record with respect to these factors sufficient for appellate review.<sup>222</sup> If this same principle were extended to *prohibit* the sentencing court from considering facts related to the elements of the offenses that a jury has considered but rejected, the integrity of the Sixth Amendment jury fact-finding would be respected *within* the Guidelines’ range, as well as without, as already established by *Blakely*.

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<sup>220</sup> *Id.* at 604 (Alito, J., dissenting).

<sup>221</sup> *Id.* at 596–97.

<sup>222</sup> *Id.* at 595.