SUPREME COURT
OF THE
STATE OF CONNECTICUT

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S.C. 20734

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STATE OF CONNECTICUT
v.
RICHARD LANGSTON

_____

BRIEF OF DEFENDANT/APPELLANT
WITH SEPARATE APPENDIX

_____

TO BE ARGUED BY:

JOHN R. WEIKART

OR

EMILY GRANER SEXTON

FILED: DECEMBER 10, 2021

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STATEMENT OF ISSUES

1. Did the trial court improperly deny the defendant's motion to correct his illegal sentence by failing to find that his constitutional rights to due process and trial by jury were violated when the sentencing court relied on conduct of which the jury had acquitted him?
2. Should the Court exercise its inherent supervisory authority to create a rule prohibiting a sentencing court from considering acquitted conduct and to reverse the trial court's denial of the defendant's motion to correct illegal sentence?

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INTRODUCTION

Our federal and state constitutions establish certain foundational rights and protections that are fundamental to the fairness of all criminal trials. Among these are the right to have one's guilt or innocence adjudicated by a jury of one's peers, and the right to be presumed innocent of any charge unless and until convicted of that charge by such a jury.

In the present case, the jury acquitted the defendant, Richard Langston, of a charge that he assaulted the victim in the first degree by shooting him. Despite his acquittal and the continuing presumption of innocence that accompanied it, the court, in sentencing the defendant on convictions of robbery in the first degree and two firearms charges, nevertheless made its own finding that the defendant had in fact shot the victim. After making additional extensive findings during the sentencing regarding what it determined were the long-term effects of the shooting, the court sentenced the defendant on the robbery and firearms charges to a total effective sentence of twenty-five years of imprisonment, consecutive to a ten-year sentence in another case. The defendant later brought a Motion to Correct Illegal Sentence, claiming his sentencing violated his constitutional rights, which the court denied, and he now appeals from that judgment.

In two landmark decisions released since 2019, the Supreme Court of Michigan and the Supreme Court of New Jersey have both determined that these precise circumstances—a judge's reliance at sentencing on the very conduct on which a jury has acquitted the defendant—violates a defendant's constitutional rights to due process and trial by jury. The time has come for Connecticut to likewise recognize the fundamental constitutional infirmity and injustice inherent in this practice. Accordingly, the defendant respectfully asks this Court to reverse the judgment and remand his case to the trial court for a fair sentencing proceeding free from the intrusion of this type of improper judicial factfinding.

FACTS AND NATURE OF PROCEEDINGS

The defendant, Richard Langston, "was arrested on March 25, 1998, in connection

with an armed robbery and shooting that occurred on March 4, 1998, during a drug transaction in a parking lot on Garden Street in Hartford. The [defendant] was charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (5), commission of a class A, B or C felony with a firearm in violation of General Statutes § 53-202k, criminal possession of a firearm in violation of General Statutes § 53a-217 and robbery in the first degree in violation of General Statutes § 53a-134(a) (2). The jury found the petitioner not guilty of assault in the first degree, but guilty of the other charges. The petitioner's conviction was upheld summarily on direct appeal. See *State v. Langston*, 67 Conn. App. 903, 786 A.2d 547 (2001), cert. denied, 259 Conn. 916, 792 A.2d 852 (2002)." *Langston v. Commissioner of Correction*, 104 Conn. App. 210, 211, 931 A.2d 967, cert. denied, 284 Conn. 941, 937 A.2d 697 (2007); see also Bill of Particulars dated May 14, 1999, A011.

At the defendant's sentencing, the prosecutor asked the trial court, *Spada, J.*, to find by a preponderance of the evidence that the defendant had shot the victim, Richard Middleton, in the back of his knees, the very assault the jury had acquitted him of, and to make that a factor in the sentencing. Specifically, the prosecutor argued:

> I think that the offenses in this case, which are of a very serious nature, certainly demand a serious sentence. And while he was found not guilty of the assault charges [sic], there is that U.S. Supreme Court case: [*United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997)], which allows the Court to take into consideration conduct for which a defendant was acquitted if the Court finds that that conduct was proven by a preponderance of the evidence. I would certainly submit to the Court that the assault on Mr. Middleton was proven by a preponderance of the evidence and would ask the Court to take that into account in setting its sentence in this matter. . . . As the Court heard, he'll be carrying around pieces of lead in the back of his knees for the rest of his life.

T. 6/30/99 at 4; A055. Defense counsel argued that the court should respect the jury's verdict of acquittal on the assault charge:

> I want to make it clear to the Court, first of all, that [the defendant] was acquitted on the shooting. A jury felt that Mr. Langston, although [he] had committed the robbery and was in possession of a firearm, might not have been the shooter. There was a second shooter there. So there is some doubt that remains. I would ask this Court to take that into consideration, what the jury's decision was, and in spite of [the prosecutor's] citing of a Supreme Court case, whether by preponderance of the evidence or reasonable doubt, the fact remains that he does not stand convicted of the assault for which he was charged.

T. 6/30/99 at 5-6; A056-057.

In announcing the defendant's sentence, the court first reviewed what it found were the factual underpinnings of the case. Despite the jury's acquittal on the assault charge, the court found that the defendant had shot Middleton. The court went on to comment at length on the lingering effects that Middleton's shooting had, and would continue to have, on both Middleton himself and on taxpayers:

> The circumstances resulting in this tragic mishap arose from a drug sale gone bad. The victim testified that in negotiating to buy an eight ball of cocaine from the defendant, after displaying his money or approximately $100.00, the defendant opened his exterior clothing to expose a handgun tucked into his belt. That seeing the gun, the victim, Mr. Middleton, turned about, started to walk away and was shot in the back of both legs by the defendant. Middleton, to this day, carries one of the bullets in his leg. He is effectively crippled and denied from enjoying the full quality of his life. All because this defendant elected to fire a handgun for the sake of stealing $100.00 from an unsuspecting victim. Further, Mr. Middleton has been denied the opportunity to pursue a meaningful vocational career. He is essentially unable to secure employment and must now, for the remainder of his life, be dependent on the public dole for his support and sustenance. Mr. Middleton is currently on social security disability payments and these will likely continue for the rest of his life. These payments, of course, are shouldered by the taxpayers of this country and these payments will likely total in the hundreds-of-thousands of dollars.
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> We learned at trial that Middleton underwent four days of hospitalization and major surgeries on both of his legs. He now requires, as a relatively young man, the use of a cane to walk. In effect, his life has been stolen from him.

T. 6/30/99 at 8-10; A059-016. The sentencing court's comments regarding its reasons for the sentence imposed take up approximately three and one-half transcript pages. See T. 6/30/99 at 8, line 13, to 11, line 21. Twenty-seven lines, or the equivalent of one full page, are about the shooting and its effects. See id. at 8, line 23, to 9, line 18, and at 9, line 26, to 10, line 3.

The court sentenced the defendant to a period of fifteen years of imprisonment on the first-degree robbery conviction, five years of imprisonment on the conviction of a class A, B, or C felony with a firearm, to run consecutively to the sentence on the robbery conviction, and a period of five years of imprisonment on the criminal possession of a firearm charge, to run consecutively with the other two sentences, for a total effective sentence of twenty-five

years.[1] T. 6/30/99 at 11-12; A062-063. The court took judicial notice of a sentence of ten years imposed by another judge the previous day in a separate case and ordered that the sentence in this case was to run consecutively to that sentence, for a total combined effective sentence of thirty-five years in the two cases.[2] T. 6/30/99 at 12; A063.

The defendant filed a Revised Motion to Correct Illegal Sentence on February 16, 2021, asserting that the sentencing court, by taking into consideration the assault charge on which he had been acquitted, violated his right to due process under the sixth and fourteenth amendments to the United States constitution and article first, section eight of the Constitution of Connecticut. A013. The trial court,[3] *Graham, J.*, heard the motion on March 30, 2021, and delivered an oral decision denying the motion, concluding that the sentencing court's consideration of the acquitted conduct was not improper and that, accordingly, "the defendant has failed to demonstrate a constitutional violation or other basis to grant the motion to correct under Practice Book Section 43-22." T. 3/30/21 at 11; A035. The court subsequently filed a signed transcript of its oral decision. A031. This appeal followed.

ARGUMENT

I. The Court Improperly Denied The Defendant's Motion To Correct An Illegal Sentence Where The Sentencing Court Had Relied On Acquitted Conduct In Violation Of His Constitutional Rights.

A. Standard of review and relevant rules of practice

Plenary. "[W]hether [a party] was deprived of his due process rights is a question of

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[1]The maximum authorized total effective sentence was thirty years. See General Statutes (Rev. to 1997) § 53-202k (commission of class A, B, or C felony with firearm punishable by five years of imprisonment); General Statutes (Rev. to 1997) § 53a-217 (criminal possession of firearm is class D felony); General Statutes (Rev. to 1997) § 53a-134 (b) (robbery in first degree is class B felony); General Statutes (Rev. to 1997) § 53a-35a (5) (conviction of class B felony under § 53a-134 (a) (2) punishable by five to twenty years of imprisonment) & (7) (conviction of class D felony under § 53a-217 punishable by two to five years of imprisonment).

[2]The defendant has now served more than twenty-two of those thirty-five years.

[3]For clarity, the court that imposed the sentence in 1999 is referred to in this brief as the sentencing court, while the court that denied the defendant's motion to correct his illegal sentence in 2021, the judgment from which he now appeals, is referred to as the trial court.

law, to which we grant plenary review . . . .” *State v. Collymore*, 334 Conn. 431, 477, 223 A.3d 1, cert. denied, 141 S. Ct. 433, 208 L. Ed. 2d 129 (2020). Additionally, a claim that a sentencing violated due process and the right to trial by jury is subject to plenary review. *State v. Bell*, 283 Conn. 748, 786, 931 A.2d 198 (2007) (plenary review of claim pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 [2000]).

“Our rules of practice permit ‘[t]he judicial authority [to] at any time correct an illegal sentence . . . .’ Practice Book § 43–22. . . . [F]ollowing a successful challenge to the legality of a sentence, the case may be remanded for resentencing.” *State v. Tabone*, 292 Conn. 417, 427, 973 A.2d 74 (2009). A sentence imposed in violation of a defendant’s due process rights is illegal within the meaning of Practice Book § 43-22. See id., 427-31 (motion to correct illegal sentence improperly denied where substitution of probation for special parole upon resentencing exceeded original sentence in violation of defendant’s due process rights).

B. Reviewability

The defendant preserved his claims that the court violated his constitutional rights to due process and trial by jury under the federal and state constitutions by raising them in his February 16, 2021 Revised Motion to Correct Illegal Sentence. See A026. To the extent this Court determines that any aspect of the defendant’s claims on appeal has not been properly preserved, he seeks review pursuant to *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

“A defendant may prevail on an unpreserved claim under *Golding* when (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail.” (Citations omitted; internal quotation marks omitted.) *State v. Armadore*, 338

Conn. 407, 436–37, 258 A.3d 601 (2021). Here, the record is adequate to review the trial court's determination that the sentencing court did not deny the defendant's constitutional rights when it relied on acquitted conduct; the sentencing court's reliance on acquitted conduct is apparent from the June 30, 1999 sentencing transcript, and the subsequent legal determination that the sentencing did not violate the defendant's constitutional rights is fully set forth in the signed transcript of the March 30, 2021 hearing. Additionally, whether the sentencing court violated the defendant's constitutional rights to due process and trial by jury is undoubtedly of constitutional magnitude alleging violation of fundamental rights. Accordingly, the defendant's claims, even if not fully and properly preserved, are reviewable.

C. The sentencing court's consideration of acquitted conduct violated the defendant's federal constitutional rights to due process and trial by jury.

The defendant's claim that the sentencing court violated his federal constitutional rights involves the intersection of several constitutional principles. First and foremost among these is the fourteenth amendment right to due process. "In order to prevail on a fourteenth amendment due process claim the defendant must allege: (1) a liberty or property right protected by the fourteenth amendment; and (2) that the deprivation of that interest contravened due process." *State v. B.B.*, 300 Conn. 748, 752, 17 A.3d 30 (2011), citing *Mathews v. Eldridge*, 424 U.S. 319, 332-33, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). As the Supreme Court has noted, "the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty— . . . is [a] 'deprivation of liberty' triggering the protections of the Due Process Clause . . . ." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 200, 109 S. Ct. 998, 1006, 103 L. Ed. 2d 249 (1989).

Additionally, "[t]he sixth amendment to the United States constitution provides in relevant part: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .' The sixth amendment right to a jury trial is made applicable to the states through the fourteenth amendment due process clause. *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) . . . ." *State v. Watson*,

251 Conn. 220, 225 n.7, 740 A.2d 832 (1999). Related to this sixth amendment right to a jury trial and the fourteenth amendment are two bedrock constitutional principles protecting criminal defendants: the state's burden of proof beyond a reasonable doubt and the accompanying presumption of innocence. "'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law.' *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 403, 39 L. Ed. 481 (1895). This presumption 'is a basic component of a fair trial,' *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976), and derives from the Due Process Clauses under the Fifth and Fourteenth Amendments of the Constitution, *Taylor v. Kentucky*, 436 U.S. 478, 485–86 n. 13, 98 S. Ct. 1930, 1935 n. 13, 56 L. Ed. 2d 468 (1978). Likewise, requiring the Government to carry the heavy burden of proving a defendant guilty beyond a reasonable doubt is sacrosanct law and derives from the Due Process Clause. *In re Winship*, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 1071–73, 25 L. Ed. 2d 368 (1970) (conviction requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged). . . . *Winship* made clear that the reasonable doubt standard is the means by which the presumption of innocence is implemented. [Id.], 1072." (Footnote omitted.) *United States v. Doyle*, 130 F.3d 523, 534–35 (2d Cir. 1997).

As will be demonstrated later in this brief, these important constitutional principles come under direct attack when a sentencing judge bases a sentence in part on acquitted conduct. First, however, it is important to address the authorities relied on by the trial court in denying the defendant's motion to correct to examine why they do not constitute binding precedent and, thus, do not preclude further inquiry into the defendant's constitutional claims.

1. No binding authority governs whether the sixth and fourteenth amendments prohibit consideration of acquitted conduct in sentencing.

The trial court, in concluding that the sentencing court did not commit a constitutional violation when it considered acquitted conduct in arriving at the defendant's sentence, relied as its sole authority on two older cases: *State v. Huey*, 199 Conn. 121, 505 A.2d 1242 (1986), and *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997). While a

cursory look at these cases easily could give a casual observer the impression that the defendant's claim is foreclosed by state and federal precedent, a closer examination reveals that neither case is controlling, because neither examined the issue presented here: whether a sentencing court's reliance on acquitted conduct is inconsistent with the constitutional rights to due process and trial by jury.

State v. Huey set forth the principles governing what facts a sentencing court may consider when exercising its sentencing discretion. As set forth in *Huey*, the sentencing court may consider a wide range of facts beyond what would be admissible at trial:

> [I]f a sentence is within statutory limits it is not generally subject to modification by a reviewing court. . . . A sentencing judge has very broad discretion in imposing any sentence within the statutory limits and in exercising that discretion he may and should consider matters that would not be admissible at trial. . . . To arrive at a just sentence, a sentencing judge may consider information that would be inadmissible for the purpose of determining guilt . . . evidence of crimes for which the defendant was indicted but neither tried nor convicted . . . evidence bearing on charges for which the defendant was acquitted . . . and evidence of counts of an indictment which has been dismissed by the government. . . .
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> The trial court's discretion, however, is not completely unfettered. As a matter of due process, information may be considered as a basis for a sentence only if it has some minimal indicium of reliability. . . . As long as the sentencing judge has a reasonable, persuasive basis for relying on the information which he uses to fashion his ultimate sentence, an appellate court should not interfere with his discretion.

(Citations omitted; internal quotation marks omitted.) *State v. Huey*, supra, 199 Conn. 126-27.

At first blush, *Huey* may appear to foreclose the argument that a sentencing court may not consider acquitted conduct; it mentions acquitted conduct as part of its recitation of the various types of information a sentencing court may consider. Id., 126. But that language was not relevant to the issue before the court in *Huey*, which did not involve in any way a sentencing judge's consideration of acquitted conduct. In *Huey*, the defendant was charged with burglary in the first degree and sexual assault in the first degree. Id., 123. After plea negotiations, the defendant pleaded guilty to a substitute information charging him with sexual assault in the *third* degree, an offense that did not involve penetration as an element. Id. The prosecutor represented to the court at sentencing that the victim would have testified

at trial that penetration occurred, after which the defendant denied penetration. Id., 124. In sentencing the defendant, the court cited his unwillingness to admit to penetration, finding that it reflected poorly on his potential for rehabilitation. Id., 125.

Accordingly, the issue in *Huey* was whether a sentencing court, following a defendant's guilty plea on a reduced charge, could factor in the defendant's denial of facts related to an element of a more serious originally-charged offense, which was not an element of the pleaded-to charge. *Huey* therefore did not involve acquitted conduct, nor did it relate to jury verdicts in any way. On the contrary, because the defendant in *Huey* pleaded guilty, he waived his right to a jury trial. See *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969) (defendant who enters guilty plea simultaneously waives several constitutional rights, including right to trial by jury); *State v. Domian*, 235 Conn. 679, 686, 668 A.2d 1333 (1996) (same). This means not only that *Huey* was not factually on point, but also that the sixth amendment right to a jury trial was not, and could not have been, at issue. Accordingly, the question of whether a sentencing court may consider acquitted conduct during sentencing without infringing on the defendant's rights to due process and trial by jury, was not before the *Huey* court. Consequently, *Huey*'s passing dictum that a sentencing court may rely on evidence bearing on charges for which the defendant was acquitted has no binding effect.[4] Nor are there any other appellate cases in Connecticut squarely examining whether a sentencing court's consideration of acquitted conduct violates the sixth and fourteenth amendments of the United States constitution.[5]

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[4]"[D]ictum is an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination . . . . Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case . . . are obiter dicta, and lack the force of an adjudication." (Internal quotation marks omitted.) *Rosenthal Law Firm, LLC v. Cohen*, 190 Conn. App. 284, 291, 210 A.3d 579, 583 (2019). A statement that "constitutes dictum . . . cannot be considered binding." *Tele Tech of Connecticut Corp. v. Dept. of Public Utility Control*, 270 Conn. 778, 811, 855 A.2d 174 (2004).

[5]*State v. Pena*, 301 Conn. 669, 22 A.3d 611 (2011), discussed at length infra, addresses the issue only under our state constitution. See id., 682-84.

The other case cited by the trial court, *United States v. Watts*, supra, 519 U.S. 148, also is not controlling. In *Watts*, the Supreme Court of the United States ruled "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id., 157. Nevertheless, a closer examination of *Watts*, as well as later Supreme Court authority, reveals that its holding is considerably more limited than appears on first glance. Specifically, the Court decided *Watts* on double jeopardy grounds and did not consider whether a sentencing court's reliance on acquitted conduct violates a defendant's rights to due process and trial by jury under the fourteenth and sixth amendments. This becomes apparent when several factors are taken into account.

First, a close examination of *Watts* itself reveals that the right against double jeopardy was the sole constitutional consideration encompassed by its holding. *Watts* was a consolidated appeal from two different cases. In the first case, the jury convicted the defendant of possessing cocaine with intent to distribute, but acquitted him of using a firearm in relation to that offense. Id., 149-50. Nevertheless, the sentencing court found by a preponderance of the evidence that the defendant had possessed guns in connection with the drug offense. Id., 150. In the other case, the defendant was charged with two counts related to separate drug transactions. Id. The jury convicted her on the first count, but acquitted her on the second. Id. The sentencing judge nevertheless found by a preponderance of the evidence that the defendant had been involved in the incident underlying the acquitted count and took that into account in calculating her sentence. Id., 150-51. In both cases, the Court of Appeals reversed the defendants' convictions, concluding that the District Court had improperly considered the acquitted conduct. Id.

The *Watts* Court examined whether the District Court's consideration of acquitted conduct violated the double jeopardy clause, focusing in particular on its previous holding in *Witte v. United States*, 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 351 (1995):

The Court of Appeals [in *Watts*] asserted 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. . . . As we explained in *Witte*, however, sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction. [Id.,] 402-403. In *Witte*, we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. We concluded that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." Id., 401. Rather, the defendant is "punished only for the fact that the present offense was carried out in a manner that warrants increased punishment . . . ." Id., 403; see also [*Nichols v. United States*, 511 U.S. 738, 747, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994)].

United States v. Watts, supra, 519 U.S. 154-55.

In other words, rather than conducting a full examination of the constitutionality of a sentencing court's reliance on acquitted conduct, the *Watts* Court examined *only* whether such reliance runs afoul of the prohibition against double jeopardy and concluded that it did not. And that conclusion was based simply on the general proposition that, notwithstanding a sentencing court's consideration of other conduct, the defendant is "punished," for purposes of the double jeopardy clause, only for the conduct upon which he was convicted. *Watts* makes clear that this rule, specific to the double jeopardy context, holds even where the additional conduct considered by the sentencing court is acquitted conduct. This says nothing, however, about the significance of an acquittal outside of the narrow double jeopardy context and, in particular, whether a defendant's due process and jury trial rights are violated when a sentencing judge, notwithstanding a defendant's acquittal on a charge, finds that he committed the conduct underlying that charge for purposes of sentencing. As our Supreme Court has recognized, the fact that a matter "may be constitutional when attacked on one ground does not necessarily mean that it can withstand such an attack on another ground." *Seals v. Hickey*, 186 Conn. 337, 349, 441 A.2d 604 (1982).

Second, *Watts* was a summary reversal, that is, a relatively small category of Supreme Court opinions in which the court simultaneously grants certiorari and summarily reverses the judgment below, issuing a short, usually per curiam, opinion without the benefit of either

briefing or oral argument. See E. Hartnett, "Summary Reversals in the Roberts Court," 38 Cardozo L. R. 591, 591-92 (2016). This practice has long been criticized, by members of the Court and outside commentators alike, as producing hastily decided opinions without the benefit of the normal measures—full briefing and oral argument—designed to ensure well-considered and sound precedent.[6] See *Montana v. Hall*, 481 U.S. 400, 409-10, 107 S. Ct. 1825, 95 L. Ed. 2d 354 (1987) (Marshall, J., dissenting) ("I can think of no compelling reason, and to date none has been suggested, why we should nurture a practice that can only foster resentment, uncertainty, and error. Rather, I believe that when the Court contemplates a summary disposition it should, at the very least, invite the parties to file supplemental briefs on the merits, *at their option*." [Emphasis in original.]); E. Brown, "Foreword: Process of Law," 72 Harv. L. Rev. 77, 94 (1958) ("[I]f the Court exercises its discretionary jurisdiction to deal with issues of national significance, almost by definition those issues warrant, if they do not require, more than summary consideration. If the Court chooses to exercise a more individualized function with respect to selected cases, it is not thereby relieved of following procedures which provide both fairness to litigants and conditions conducive to informed and considered decision.") In any event, looking at *Watts* in particular, the lack of in-depth briefing and oral argument provides ample reason to conclude that the Court did not seriously consider the impact of constitutional rights other than the stated issue of double jeopardy.

Third, the Supreme Court itself has confirmed these very points—that the holding in

[6]Indeed, the same concerns have been directed toward the Court's entire shadow docket, of which summary reversals are one category. See W. Baude, "Foreword: The Supreme Court's Shadow Docket," 9 NYU J. of Law & Liberty 1 (2015). The most recent high-profile criticism came from within the Court itself when Justice Kagan gave warning in a dissent, joined by Justice Breyer and Justice Sotomayor, from the Court's denial of the application for injunctive relief in *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021), the recent challenge to Texas' law limiting the availability of abortions. See id., 2500 (Kagan, J., dissenting) ("Today's ruling illustrates just how far the Court's 'shadow-docket' decisions may depart from the usual principles of appellate process. That ruling, as everyone must agree, is of great consequence. Yet the majority has acted without any guidance from the Court of Appeals—which is right now considering the same issues. It has reviewed only the most cursory party submissions, and then only hastily.")

Watts is a very limited one confined to the realm of double jeopardy law and that it was made in a summary reversal opinion without briefing or oral argument. In *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the Court evaluated both *Witte* and *Watts* to determine whether, as precedent, they prevented a conclusion that the Federal Sentencing Guidelines were unconstitutional to the extent that they required a judge to impose a sentence above the normal range for the offense of conviction based on the judge's finding, by a preponderance of the evidence, of an additional fact. The Court observed: "In *Watts*, relying on *Witte*, we held that *the Double Jeopardy Clause permitted a court to consider acquitted conduct* in sentencing a defendant under the Guidelines. In neither *Witte* nor *Watts* was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." Id., 240. The Court went on in a footnote to even more strongly indicate its view of the limited scope of *Watts*, and even to imply that *Watts*, as a summary reversal, may not have been as carefully considered as it otherwise would have been: "*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. . . . See [*United States v. Watts*, supra, 519 U.S. 171] (KENNEDY, J., dissenting)." *United States v. Booker*, supra, 240 n.4.[7] It is therefore apparent that the United States Supreme Court itself does not consider *Watts* to have considered or ruled on the issue presented here.

Fourth, in light of the language from *Booker*, a number of courts have questioned either the continuing viability of *Watts* generally, its applicability outside of the double jeopardy context, or both. See *State v. Melvin*, 248 N.J. 321, 346, 258 A.3d 1075 (2021) ("[a]s clarified in *Booker*, *Watts* was cabined specifically to the question of whether the practice of using acquitted conduct at sentencing was inconsistent with double jeopardy");

[7]The Supreme Court of the United States has cited *Watts* on only one occasion after *Booker*, and then merely for certain broad propositions regarding the Federal Sentencing Guidelines. See *Pepper v. United States*, 562 U.S. 476, 488, 491, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011).

People v. Beck, 504 Mich. 605, 624-625, 939 N.W.2d 213 (2019) ("Five justices gave [*Watts*] side-eye treatment in *Booker* and explicitly limited it to the double-jeopardy context. . . . As we must, we take the Court at its word. We therefore find *Watts* unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process."), cert. denied, 140 S. Ct. 1243, 206 L. Ed. 2d 240 (2020); *United States v. Colemen*, 370 F. Supp. 2d 661, 669 (S.D. Ohio 2005) ("[t]he viability of *Watts* . . . was questioned by Justice Stevens' constitutional majority opinion in *Booker*"); *United States v. Pimental*, 367 F. Supp. 2d 143, 150 (D. Mass. 2005) ("*United States v. Booker* substantially undermines the continued vitality of *United States v. Watts* both by its logic and by its words" [footnote omitted]).

Regardless of whether *Watts* remains good law with regard to double jeopardy, it is apparent that the Supreme Court did not decide there whether use of acquitted conduct in sentencing violates the sixth and fourteenth amendments. Its holding was limited to the double jeopardy context, as the Court later made clear in *Booker*. Accordingly, like *Huey*, it does not answer the constitutional issue raised by the defendant in the present case. In the absence of binding authority, the Court is left to review this issue as one of first impression.

2. The impact of *Apprendi v. New Jersey* and its progeny on the right to a jury trial.

The impact of *Apprendi v. New Jersey*, 530 U.S. 466, 481, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and the line of cases that have followed in its wake, on the law governing the right to a jury trial and the respective roles of jury and judge in sentencing cannot be overstated. As the Michigan Supreme Court has observed, *Apprendi* and the cases that followed marked a "sea change" in "the United States Supreme Court's jurisprudence analyzing a defendant's due process and Sixth Amendment rights." *People v. Beck*, supra, 504 Mich. 616. These cases collectively have established the supremacy of the jury in our constitutional scheme with regard to factfinding and has placed constitutional limitations on the ability of judges to usurp the jury's factfinding role.

"[I]n *Apprendi* . . . the United States Supreme Court concluded that the federal due process clause and sixth amendment to the United States constitution require that, [o]ther

than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Internal quotation marks omitted.) *State v. Evans*, 329 Conn. 770, 780-81, 189 A.3d 1184 (2018), cert. denied, 139 S. Ct. 1304, 203 L. Ed, 2d 425 (2019). The last two decades have brought a series of additional opinions from the Supreme Court that have expanded on the principle that any facts that alter the range of penalties available to the sentencing court must be found by the jury. For example, the Court extended *Apprendi* to conclude that a jury must also find any fact that triggers a mandatory minimum sentence in *Alleyne v. United States*, 570 U.S. 99, 108, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Other cases have further extended the general reasoning of *Apprendi* and *Alleyne* to a wide range of factual situations to determine that the rights to due process and trial by jury are violated when the range of punishments available to a sentencing court is determined by a judge's factfinding, rather than the jury's. See *United States v. Haymond*, 139 S. Ct. 2369, 204 L. Ed. 897 (2019) (new prison term with higher mandatory minimum following revocation of supervised release); *Southern Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012) (imposition of criminal fine); *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (enhanced sentence under mandatory federal sentencing guidelines); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (sentence enhancement under mandatory state sentencing guidelines); *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (imposition of death penalty). Collectively, these cases have steadily rolled back a judge's role as factfinder in sentencing.

The *Apprendi* line cases have not yet directly addressed the issue before this Court, where acquitted conduct was used by the sentencing court as a basis to determine a sentence *within* the sentencing range authorized by the jury verdict rather than to alter the range of authorized sentences. Nevertheless, the principles underlying the *Apprendi* line of cases are entirely inconsistent with *any* use of acquitted conduct in sentencing. These principles are most clearly and cogently stated in the majority opinion in *Blakely v.*

Washington, authored by Justice Antonin Scalia. As explained there, the right to a jury trial is an embodiment of the founders' conviction that the people, as represented by the jury, should retain control over the judiciary. Consequently, in our constitutional system, a judge's authority to sentence derives entirely from, and is limited by, the jury's verdict:

> Th[e] right [to trial by jury] 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. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed.1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones v. United States*, 526 U.S. 227, 244-248, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). *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.

(Emphasis added.) *Blakely v. Washington*, 542 U.S. 296, 305-306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). These principles were recently reiterated in Justice Neil Gorsuch's plurality opinion in *United States v. Haymond*:

> Together with the right to vote, those who wrote our Constitution considered the right to trial by jury "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977). Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions. J. Adams, Diary Entry (Feb. 12, 1771), in 2 Diary and Autobiography of John Adams 3 (L. Butterfield ed. 1961); see also 2 J. Story, Commentaries on the Constitution § 1779, pp. 540–541 (4th ed. 1873).
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> Toward that end, the Framers adopted the Sixth Amendment's promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In the Fifth Amendment, they added that no one may be deprived of liberty without "due process of law." Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has "extend[ed] down centuries." *Apprendi v. New Jersey*, [supra, 530 U.S. 477].
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> *Consistent with these understandings, juries in our constitutional order exercise*

> *supervisory authority over the judicial function by limiting the judge's power to punish. A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct.* In the early Republic, if an indictment or "accusation ... lack[ed] any particular fact which the laws ma[d]e essential to the punishment," it was treated as "no accusation" at all. 1 Bishop § 87, at 55; see also 2 M. Hale, Pleas of the Crown *170 (1736); Archbold *106. And the "truth of every accusation" that was brought against a person had to "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." 4 Blackstone 343.

(Emphasis added.) *United States v. Haymond*, supra, 139 S. Ct. 2369.

These important principles—that the judge's authority to sentence is entirely derived from the jury's verdict and that the jury's verdict limits the judge's power to punish—illuminate why a sentencing judge's reliance on acquitted conduct violates the constitutional guarantees of due process and the right to a jury trial. If the judge's authority to sentence exists only as a result of the jury's verdict and that verdict places a limit on the judge's power to punish, then a sentence only has validity to the extent that it remains within the limits set by the jury. Consequently, the jury's *acquittal* of the defendant on other charges must preclude those charges from playing any role in the sentencing. In other words, the framers of the constitution conferred exclusively upon juries, not judges, the power to determine the defendant's guilt or innocence on the various charges and, by extension, which charges may be the basis for a sentence. Id.

Viewed in this way, it becomes apparent why acquitted conduct must be treated differently than the rest of the broad range of facts properly considered by a sentencing court as discussed in *Huey*. See *State v. Huey*, supra, 199 Conn. 126-27. When the jury has cleared the defendant of criminal responsibility for certain charges and a judge disregards the jury's verdict and determines the length of the defendant's sentence partly on the basis of the very conduct underlying those acquitted charges, the intrusion upon the jury's control is obvious and undeniable. Accordingly, while the sentencing court normally may consider the entire universe of facts in sentencing a defendant, when it relies on *acquitted* conduct, it specifically disregards the conclusion of the jury. But the jury is the body upon which the framers of the constitution conferred the exclusive power to determine whether the defendant

should suffer any criminal consequences for that very conduct. Under those circumstances the court intrudes upon the control the constitution has conferred upon the jury, substituting its own judgment that the defendant should suffer criminal consequences for the very conduct from which the jury already relieved him of responsibility. Such a result blatantly violates the constitutional scheme intended by the framers, as described in *Blakely* and *Haymond*.

3. This Court should adopt the reasoning of recent decisions of the Supreme Courts of Michigan and New Jersey and other authorities declaring reliance on acquitted conduct in sentencing unconstitutional.

All the foregoing concerns are at the heart of the landmark decisions of the Supreme Courts of Michigan and New Jersey declaring unconstitutional the precise practice at issue here—that is, a sentencing court's reliance on acquitted conduct. An examination of these decisions reveals that they present cogent and compelling analyses, which should be adopted by this Court.

In its 2019 decision in *People v. Beck*, supra, 504 Mich. 605, the Supreme Court of Michigan found a violation of the right of due process under the United States Constitution and remanded for resentencing where the sentencing judge relied on acquitted conduct in sentencing. Id., 629-30. The defendant in *Beck* was convicted as a fourth-offense habitual offender of being a felon in possession of a firearm and a second offense of carrying a firearm during the commission of a felony, but was acquitted of open murder, carrying a firearm with unlawful intent, and other charges. Id., 610. Although being a felon-in-possession is generally punishable in Michigan by up to five years of imprisonment, the jury's conviction of the defendant as a fourth-offense habitual offender exposed him to a maximum sentence of life imprisonment. See id., 660-61 (*Clement, J.*, dissenting); see also MCL (Michigan Compiled Laws) § 769.12 (1) (b) (person who has been convicted of 3 or more felonies may be sentenced up to life imprisonment if the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life); MCL § 750.224f (5) (felon who possesses firearm guilty of felony punishable by imprisonment for not more than 5 years). While observing that the jury found that the defendant did not commit

a homicide beyond a reasonable doubt, the sentencing judge nonetheless found by a preponderance of the evidence that the defendant did shoot the victim, causing his death. *People v. Beck*, supra, 504 Mich. 611-12. The sentencing judge then imposed a sentence of 240 to 400 months. Id., 610. The defendant appealed, challenging his sentence on the ground that the sentencing court had increased his sentence based on conduct of which he had been acquitted. Id., 612.

On appeal, the Supreme Court of Michigan reviewed the United States Supreme Court precedents, observing that "[a]round 1999, the United States Supreme Court's jurisprudence analyzing a defendant's due-process and Sixth Amendment rights underwent a sea change" with the release of the decision in *Apprendi*. Id., 616. The Michigan court also concluded that *Watts* was "unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process," due to its limitation to the double jeopardy context. Accordingly, the *Beck* court went on to "address this question on a clean slate." Id.

The Michigan court reasoned that the presumption of innocence is violated when a sentencing judge makes findings contradicting the jury's verdict of acquittal:

> When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard. But when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent. . . .
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> Unlike . . . uncharged conduct . . . conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process.

(Citation omitted.) *People v. Beck*, supra, 504 Mich. 626-27; see also E. Beutler, "A Look at the Use of Acquitted Conduct at Sentencing," 88 J. Crim. L. & Criminology 809, 809 (1998) (there are "fundamental differences between uncharged and acquitted conduct which trigger these constitutional concerns" and "[t]he use of acquitted conduct in sentencing raises due process and double jeopardy concerns that deserved far more careful analysis than they received" in *Watts*). Ultimately, the *Beck* Court determined that "due process bars sentencing

courts from finding beyond a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted" and remanded for resentencing.[8] *People v. Beck*, supra, 504 Mich. 629-30.

Following the Michigan court's decision in *Beck*, the New Jersey Supreme Court also recently held that the use of acquitted conduct in sentencing constitutes a violation of due process in *State v. Melvin*, 248 N.J. 321, 258 A.3d 1075 (2021). *Melvin* was an appeal from two different cases with different defendants. In the first, the jury found the defendant guilty of second-degree unlawful possession of a handgun and not guilty of more serious charges including first-degree murder and first-degree attempted murder. Id., 326. Despite the defendant's acquittal on the murder and attempted murder charges, the sentencing court determined that the defendant shot the three victims, citing *Watts* as authority for making such a finding. Id. In the second case, presided over by the same judge, the jury found the defendant guilty of kidnapping, conspiracy to commit kidnapping, and felony murder, but acquitted her of seven other counts including first-degree murder and conspiracy to commit murder. Id. The sentencing judge, again relying on *Watts*, found that, despite the jury's verdict, the defendant "was the mastermind who orchestrated the victim's murder." Id.

On appeal, the Supreme Court of New Jersey agreed with the Michigan Supreme Court that *Watts* was limited to the double jeopardy context and therefore is not controlling on the issue of due process. Id., 346. The New Jersey court then turned to engaging in its own analysis of the rights to due process and trial by jury.[9] Observing the importance of the right to a criminal trial by jury, the court went on to conclude that it would be fundamentally

[8]The United States Supreme Court declined to disturb the Michigan Supreme Court's holding in *People v. Beck* that consideration of acquitted conduct violates federal due process when it denied Michigan's petition for a writ of certiorari last year. See *Michigan v. Beck*, 140 S. Ct. 1243, 206 L. Ed. 2d 240 (2020).

[9]The New Jersey Supreme Court in *Melvin* ultimately decided the issue based on due process under New Jersey's state constitution rather than the United States constitution. Nevertheless, the court's extensive reliance on federal precedent as well as the Michigan Supreme Court's federal due process analysis in *Beck* makes the opinion highly persuasive on the federal constitutional due process issue.

unfair to permit a sentencing judge to make findings contrary to a jury verdict of acquittal:

> In order to protect that right [to trial by jury], we cannot allow the finality of a jury's not-guilty verdict to be put into question. To permit the re-litigation of facts in a criminal case under the lower preponderance of the evidence standard would render the jury's role in the criminal justice process null and would be fundamentally unfair. In order to protect the integrity of our Constitution's right to a criminal trial by jury, we simply cannot allow a jury's verdict to be ignored through judicial fact-finding at sentencing. Such a practice defies the principles of due process and fundamental fairness.
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> Justice Scalia noted as much in *Blakely v. Washington*, [supra, 542 U.S. 296]. In *Blakely*, the United States Supreme Court refined *Apprendi* by clarifying what constituted the statutory maximum for sentencing purposes. Id. at 301-02, 124 S. Ct. 2531. Although *Blakely* is thus tangential to our analysis, a hypothetical posed by Justice Scalia resonates strongly with the matters before this Court. In questioning critics of *Apprendi*, the Court challenged the idea that if a fact is labeled by the Legislature as a sentencing factor, it may be found by the judge no matter how much the punishment is increased as a result of the finding; in the Court's view, such a proposition would mean
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> > that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. [Id. at 306, 124 S. Ct. 2531.]
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> Justice Scalia's hypothetical predicted the untenable situation in which Melvin finds himself. Melvin was convicted of second-degree unlawful possession of a weapon and acquitted of two counts of first-degree murder, second-degree possession of a weapon for an unlawful purpose, and second-degree aggravated assault. In other words, the jury determined that Melvin had a gun but acquitted him of all charges that involved using the gun—or even having the purpose to use it unlawfully. Nevertheless, the trial court, in applying aggravating factor six, found by a preponderance of the evidence that Melvin used the firearm "to shoot upon three other human beings." The absurd result that the *Blakely* hypothetical predicted came to be in Melvin's case.
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> And in acquitting Melvin of any offenses that involved using the weapon—or even of having had the purpose to use the firearm unlawfully . . . the jury's verdict should have ensured that Melvin retained the presumption of innocence for any offenses of which he was acquitted. That the jury's verdict here served as "a mere preliminary to a judicial inquisition into the facts of the crime that the State actually [sought] to punish," is an absurd and unfair result indeed. See *Blakely*, 542 U.S. at 306, 124 S. Ct. 2531.

State v. Melvin, supra, 248 N.J. 349-50.

Crucially, both *Beck* and *Melvin*, like the present case, involved a sentencing judge relying on acquitted conduct as a factor for imposing a sentence within the range of sentences authorized by the jury's verdict. See *People v. Beck*, supra, 504 Mich. 660-61 (*Clement, J.*, dissenting); *State v. Melvin*, supra, 248 N.J. 343. Accordingly, they are factually

on point with the present case in not being governed directly by *Apprendi* and its progeny, but nevertheless being informed by the principles underlying those cases. The cogent analysis in both *Beck* and *Melvin* provides a compelling basis for this Court to likewise adopt the view that a sentencing court violates a defendant's rights to due process and to trial by jury when it relies on facts contrary to his acquittal on other charges.

Also instructive is recent United States Supreme Court case law on the related issue of the effect of an acquittal following a defendant's retrial upon successful appeal from a conviction. In *Nelson v. Colorado*, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017), the Court held that, under those circumstances, the state is obligated to refund to the acquittee the fees, court costs, and restitution that were exacted from the now-acquitted defendant upon his earlier conviction. Id., 1252. The Court observed:

> [O]nce th[e] convictions were erased, the presumption of their innocence was restored. See, e.g., *Johnson v. Mississippi*, 486 U.S. 578, 585, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) (After a "conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge."). "[A]xiomatic and elementary," the presumption of innocence "lies at the foundation of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895). Colorado may not retain funds taken from [the defendants] solely because of their now-invalidated convictions . . . for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.

(Emphasis in original; footnotes omitted.) *Nelson v. Colorado*, supra, 137 S. Ct. 1255-56. Or, as the lower appellate court affirmed in *Melvin* framed it: "If this 'presumption of innocence' still constitutes a bedrock constitutional principle, then it must mean that once acquitted, the accused must be viewed as innocent—not just not guilty—of the acquitted charge." *State v. Paden-Battle*, 464 N.J. Super. 125, 147, 234 A.3d 332 (App. Div. 2020), aff'd sub nom. *State v. Melvin*, 248 N.J. 321, 258 A.3d 1075 (2021).

The *Nelson* Court's reasoning that a state "may not presume [an acquittee] guilty *enough* for monetary extractions"; (emphasis in original) id., 1256; has great resonance here. If the state cannot, consistent with due process, presume a person, acquitted following reversal of his conviction, guilty enough for the state to keep his money, it is difficult to see

how the state could presume an acquittee to be guilty enough to extend his prison sentence on other charges. Yet that is exactly what happened here. The jury acquitted the defendant, and the sentencing court thereafter determined that, in its judgment, he was guilty enough of the charged assault that it could rely heavily on that charged assault in sentencing him. *Nelson* therefore provides additional compelling evidence that the United States Supreme Court would resolve the due process question presented here in the defendant's favor.[10]

As noted in *Beck*; see *People v. Beck*, supra, 504 Mich. 627-29; there has been a significant chorus of dissent from the view that the constitution is not offended by a sentencing court's considering acquitted conduct in arriving at a sentence. Among these is now-Supreme Court Justice Brett Kavanaugh, who, while on the Court of Appeals for the District of Columbia Circuit, repeatedly expressed his concerns about sentencing based on

[10]The federal circuits have rejected claims that consideration of acquitted conduct at sentencing is improper. These decisions have generally either seen *Watts* as controlling or have reasoned that the *Apprendi* line of cases have not specifically held that consideration of acquitted conduct is improper when the sentence imposed is within the range authorized by the jury's verdict. See, e.g., *United States v. Bell*, 795 F.3d 88, 103-104 (D.C. Cir. 2015) (defendants' sentences fell within the statutory range, thus taking case outside *Apprendi* cases), cert. denied, 137 S. Ct. 37, 196 L. Ed. 2d 48 (2016); *United States v. Mercado*, 474 F.3d 654, 656-58 (9th Cir. 2007) (*Watts* controlling despite *Booker*), cert. denied, 552 U.S. 1297, 128 S. Ct. 1736, 170 L. Ed. 2d 542 (2008); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006) (summarily concluding District Court can rely on evidence regarding acquitted conduct even post-*Booker*). Some of these opinions have also relied on *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), a case that the *Beck* court has convincingly reasoned has been overruled. See *People v. Beck*, supra, 504 Mich. 619-24. For cases in this category, see, e.g., *United States v. Horne*, 474 F.3d 1004, 1006-1007 (7th Cir.), cert. denied, 127 S. Ct. 2957, 168 L. Ed. 2d 279 (2007). In short, these decisions have not engaged in the probing analysis of the rights of due process and trial by jury undertaken in *Beck* and *Melvin*.

It is notable that, perhaps as a result of increasing doubt cast on the matter by the accretion of additional cases in the *Apprendi* line as well as the release of *Nelson*, most of the more recent federal Court of Appeals decisions rejecting such due process/jury trial right claims have been designated as unpublished. See, e.g., *United States v. Rhodes*, 789 Fed. Appx. 366 (4th Cir. 2019), cert. denied, 140 S. Ct. 2678, 206 L. Ed. 2d 828 (2020); *United States v. Burg*, 764 Fed. Appx. 836 (10th Cir. 2019); *United States v. Chapman-Sexton*, 758 Fed. Appx. 437, 443 (6th Cir. 2018), cert. denied, 139 S. Ct. 2731, 204 L. Ed. 2d 1122 (2019); *United States v. Swartz*, 758 Fed. Appx. 108, 111-12 (2d Cir. 2018). These later cases have also rejected the relevance of *Nelson* to the sentencing issue.

acquitted conduct, most recently observing that "[a]llowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?" *United States v. Bell*, 808 F.3d 926, 928 (D. C. Circ. 2015) (Kavanaugh, J., concurring); see also *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir.) (Kavanaugh, J., concurring) ("The oddity of [federal sentencing practices] is perhaps best highlighted by the fact that courts are still using *acquitted* conduct to increase sentences beyond what the defendant otherwise could have received—notwithstanding that five Justices in the *Booker* constitutional opinion stated that the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved *to a jury beyond a reasonable doubt*." [Emphasis in original.]), cert. denied, 552 U.S. 888, 128 S. Ct. 240, 169 L. Ed. 2d 147 (2007).

Perhaps the most compelling observation comes from Judge Patricia A. Millett in the same District of Columbia Circuit case in which Judge Kavanaugh made his most recent observations. Responding to the suggestion that reliance on acquitted conduct is constitutionally sound because a sentencing judge finds facts by a lower standard of proof than the jury's beyond a reasonable doubt standard, Judge Millett observed:

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

(Emphasis added.) *United States v. Bell*, supra, 808 F.3d 930 (Millett, J., concurring).[11]

Connecticut's courts have not hesitated to place themselves in the vanguard of constitutional law to protect defendants' rights before the United States Supreme Court has definitely spoken on an issue, even when doing so puts them in the small minority of jurisdictions. In *State v. Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), our Supreme Court held that "first time in-court identifications . . . implicate due process protections and must be prescreened by the trial court." Id., 426. It did so because, even though other courts had concluded otherwise, it was "an issue for which the arc of logic trumps the weight of authority." Id., 431. Here, likewise, the compelling logic of the Michigan Supreme Court in *Beck* and the New Jersey Supreme Court in *Melvin* should prevail, and this Court should conclude that permitting a sentencing judge to find that a defendant committed the very acts of which the jury acquitted him is contrary to the rights to due process and trial by jury.

Here, the jury found the defendant not guilty of the assault charge that was brought against him. The sentencing court nevertheless found that the defendant shot the victim. Additionally, the court relied heavily on its finding that the defendant shot the victim, the long-term effects the shooting had on the victim, and even its impact on the taxpayers, in explaining the heavy sentence it imposed on the defendant. In short, the sentencing court determined the length of the defendant's sentence in significant part based on the very conduct of which the jury found him not guilty. Stated differently and in the plainest English, this is a case in which some of the defendant's time behind bars will have been the result of

[11]Other concurring and dissenting opinions of Court of Appeals judges writing in opposition to reliance on acquitted conduct in sentencing as cited in *Beck* include: *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir.) (Barkett, J., concurring specially), cert. denied, 549 U.S. 1046, 127 S. Ct. 615, 166 L. Ed. 2d 456 (2006); *United States v. Canania*, 532 F.3d 764, 778 (8th Cir.) (Bright, J., concurring), cert. denied, 555 U.S. 1037, 129 S. Ct. 609, 172 L. Ed. 2d 466 (2008); *United States v. Mercado*, 474 F.3d 654, 662 (9th Cir. 2007) (Fletcher, J., dissenting), cert. denied, 552 U.S. 1297, 128 S. Ct. 1736, 170 L. Ed. 2d 542 (2008); *United States v. White*, 551 F.3d 381, 392 (6th Cir. 2008) (Merritt, J., dissenting), cert. denied, 556, U.S. 1215, 129 S. Ct. 2071, 173 L. Ed. 2d 1147 (2009); *United States v. Brown*, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millett, J., concurring); id., 415 (Kavanaugh, J., dissenting in part).

an assault the jury found he did not commit. Because the sentencing court relied so extensively on the shooting and its aftereffects in arriving at the defendant's sentence in direct contradiction of the jury's acquittal of the defendant on the assault charge, the defendant was, and will continue to be, deprived of liberty in violation of his federal rights to due process and trial by jury. Accordingly, the trial court improperly denied the motion to correct the defendant's illegal sentence.

D. The sentencing court's consideration of acquitted conduct violated the defendant's state constitutional rights to due process and trial by jury.

Even should this Court not be persuaded that the sentencing court's reliance on acquitted conduct at his sentencing violated his federal constitutional rights, the Court should determine that the sentencing court's action did violate his rights to due process and trial by jury as protected by article first, §§ 8 and 19 of Connecticut's state constitution. The Court should do so because the sole appellate case on this issue was premised on an entirely mistaken reading of precedent and because the factors set forth in *State v. Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992), militate in favor of recognizing a constitutional violation.

1. *State v. Pena* was based on an entirely mistaken understanding of *State v. Huey* and should be overruled.

Our Supreme Court last considered whether a sentencing court's consideration of acquitted conduct violates a defendant's rights to due process and trial by jury under our state constitution in *State v. Pena*, supra, 301 Conn. 669. In *Pena*, the defendant was found guilty of carrying a pistol without a permit and criminal possession of a firearm, but not guilty of murder and manslaughter in the first degree with a firearm. Id., 671-72. At sentencing, the court began by observing "that [the defendant] is not here today to be sentenced for a murder because he was found not guilty by the jury for that. So, the court is not going to sentence him for murder." (Internal quotation marks omitted.) Id., 679. The court then addressed its belief that the defendant shot the victim: "In the court's mind, [the defendant] fired that gun at [the victim]. And although the jury didn't agree with that, the court believes that he did. The evidence was that he had the gun and he shot at [the victim]." (Internal quotation marks

omitted.) Id., 680. The court concluded that the defendant deserved a severe sentence on the basis of that and other factors. Id.

On appeal to our Supreme Court, the defendant claimed that the sentencing court's reliance on evidence relating to the charges of murder and manslaughter deprived him of his state constitutional rights to due process and trial by jury. Id., 682. In resolving that claim, the Court viewed its opinion in *State v. Huey* as controlling, and, accordingly, framed the question as whether it should overrule *Huey*. See id., 677 ("defendant further urges this court to exercise its supervisory authority . . . to overrule *State v. Huey* . . . and to prohibit trial courts from considering, at sentencing, conduct of which the defendant has been acquitted"); id. ("we decline the invitation to overrule *Huey* and its progeny, and agree with the state that the present case is controlled by that case"); id., 683 ("we conclude that *Huey* controls the present case and we see no reason to disturb its holding"); id., 684 ("we decline the defendant's invitation to overrule *Huey*"). Based on this framing of the issue, the Court indicated that it opted not to overrule *Huey*, and, accordingly, concluded that the sentencing court's reliance on the acquitted conduct was not improper. Id., 683-84.

The decision in *Pena*, therefore, was premised entirely on the principle of stare decisis and the Court's belief that *Huey* had already held that a sentencing court's reliance on acquitted conduct is permissible. The flaw in the Court reasoning, however, is apparent; as discussed in part I C 1 of this brief, *Huey* made no such holding, because that issue was not even before the *Huey* Court. As stated previously, the issue in *Huey* was whether a sentencing court, following a defendant's guilty plea on sexual assault in the third degree, could factor against the defendant his denial that penetration had occurred, a fact relevant only to the originally-charged offense of sexual assault in the first degree. See *State v. Huey*, supra, 199 Conn. 124-25. *Huey*, therefore, involved neither acquitted conduct nor the right to trial by jury. The sole connection of *Huey* to the question of whether a sentencing court may consider acquitted conduct was the *Huey* Court's passing dictum that a sentencing judge may consider "evidence bearing on charges for which the defendant was acquitted . .

. .” Id., 126, citing *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972).

The *Pena* court’s reliance on mere dicta in *Huey* as the case’s holding, constituting the weight of precedent under the principle of stare decisis, was contrary to well-established and fundamental legal principles. Indeed, as every first-year law student learns, “[u]nder the accepted rule, the doctrine of stare decisis contemplates only such points as are actually involved and determined in a case, and not what is said by the court on points not necessarily involved therein.” *Riley v. Board of Police Commissioners*, 145 Conn. 1, 5, 137 A.2d 759 (1958). Accordingly, *Pena* was decided based on a false premise that binding authority on the issue already existed in the form of *Huey*, causing the *Pena* Court to erroneously frame the issue as whether *Huey* should be overruled.

By misapplying the principle of stare decisis, the *Pena* court operated with a presumption against finding a constitutional violation, because stare decisis “counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it.” (Internal quotation marks omitted.) Additionally, because the Court viewed the issue as having already been decided, it entirely bypassed the important and well-established test for considering challenges under our state constitution—the factors established under *State v. Geisler*, 222 Conn. 672, 684-86, 610 A.2d 1225 (1992).[12] “The *Geisler* factors serve a dual purpose: they encourage the raising of state constitutional issues in a manner to which the opposing party . . . can respond; and *they encourage a principled development of our state constitutional jurisprudence*. . . . [A] proper *Geisler* analysis does not require us simply to tally and follow the decisions favoring one party's state constitutional claim; a *deeper review* of those decisions’ underpinnings is required because we follow only persuasive decisions.” (Emphasis added.) *Fay v. Merrill*, 338 Conn. 1, 26, 256 A.3d 622

[12]As discussed in the next section of this brief, the *Geisler* factors are: “(1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of [the] constitutional [framers]; and (6) contemporary understandings of applicable economic and sociological norms [otherwise described as public policies].” (Internal quotation marks omitted.) *State v. Purcell*, 331 Conn. 318, 341-42, 203 A.3d 542 (2019).

(2021). Here, no *Geisler* analysis has ever taken place to permit the deep, principled review of whether our state constitution prohibits a sentencing judge from relying on acquitted conduct, because the *Pena* Court instead erroneously decided the issue on the basis of stare decisis.

Under these unique circumstances, stare decisis should not be a bar to the Court reconsidering the issue. As our Supreme court has explained:

> This court has repeatedly acknowledged the significance of stare decisis to our system of jurisprudence because it gives stability and continuity to our case law. . . . The doctrine of stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . Despite this adherence to past precedent, this court also has concluded that, [t]he value of adhering to precedent is not an end in and of itself, however, if the precedent reflects substantive injustice. Consistency must also serve a justice related end. . . . When a previous decision clearly creates injustice, the court should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision. . . . The court must weigh [the] benefits of [stare decisis] against its burdens in deciding whether to overturn a precedent it thinks is unjust. . . . It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations.

State v. Miranda, 274 Conn. 727, 733-34, 878 A.2d 1118 (2005). Because *Pena* was itself erroneously decided on stare decisis grounds, and the question of whether consideration of acquitted conduct violates due process and the right to a jury trial has never been subjected to the appropriate *Geisler* analysis, it is appropriate to revisit *Pena* and for stare decisis to yield to a consideration of the issue under the proper legal standard.

2. The *Geisler* factors support recognizing a state constitutional violation.

"[I]n determining the contours of the protections provided by our state constitution, we employ a multifactor approach that we first adopted in [*State v. Geisler*, supra, 222 Conn. 685]. The factors that we consider are (1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of [the] constitutional [framers]; and (6) contemporary understandings of applicable economic and sociological norms [otherwise described as public policies]." (Internal quotation marks omitted.) *State v.*

Purcell, 331 Conn. 318, 341-42, 203 A.3d 542 (2019). "[W]e recognize that [the factors] may be inextricably interwoven. . . . [N]ot every *Geisler* factor is relevant in all cases." (Internal quotation marks omitted.) *State v. Jenkins*, 298 Conn. 209, 262, 3 A.3d 806 (2010).

i. The operative constitutional text

Article first, § 8, as amended, provides in relevant part: "In all Criminal prosecutions, the accused shall have a right . . . in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be . . . deprived of life, liberty or property without due process of law . . . ." Our Supreme Court "has recognized that the text of the due process . . . [clause] in article first, § 8, of our state constitution . . . is not materially different from the corresponding [clause] of the federal constitution." *State v. Purcell*, supra, 331 Conn. 344-45. Nevertheless, the Court has also recognized that the due process concerns related to other rights enumerated in the constitution require under some circumstances greater protection than the federal constitution affords.[13] Id., 345. Additionally, the Court has decided matters of due process solely under the state constitution independent of any consideration of the federal right. See *Fasulo v. Arafeh*, 173 Conn. 473, 378 A.2d 553 (1977).[14] Accordingly, the lack of textual distinction between the federal and Connecticut constitutions' due process clauses is no barrier to the Court recognizing state due process protections greater than, and independent of, federal protections.

Article first, § 19, as amended, provides in relevant part: "The right of trial by jury shall remain inviolate . . . ." "Inviolate" is defined as: "Not violated or profaned; intact"; American Heritage Dictionary of the English Language (4th Ed. 2000); "Intact; not violated; free from

[13]In *State v. Purcell*, supra, 331 Conn. 318, our Supreme Court "h[e]ld that, to adequately safeguard the right against compelled self-incrimination under article first, § 8, of the Connecticut constitution, police officers are required to clarify an ambiguous request for counsel before they can continue the interrogation." (Footnote omitted.) Id., 312.

[14]In *Fasulo v. Arafeh*, supra, 173 Conn. 473, our Supreme Court determined that our state constitution granted civilly committed persons a due process right to receive "periodic judicial review of their commitments in the form of state-initialed recommitment hearings replete with the safeguards of the initial commitment hearings at which the state bears the burden of proving the necessity for their continued confinement." Id., 483.

substantial impairment." Black's Law Dictionary (Abridged 6th Ed. 1991). The Supreme Court of Washington, which has the same language in its state constitution, has discussed the meaning of the term: "The term 'inviolate' connotes deserving of the highest protection and indicates that the right must remain the essential component of our legal system that it has always been. . . . The right must not diminish over time and must be protected from all assaults to its essential guaranties." (Citations omitted; internal quotation marks omitted.) *Davis v. Cox*, 183 Wash. 2d 269, 288-89, 351 P.3d 862 (2015) (en banc), abrogated on other grounds by *Maytown Sand & Gravel, LLC v. Thurston County*, 191 Wash. 2d 392, 423 P.3d 223 (2018). The use of the strong term "inviolate" to describe the right of jury by trial thus suggests that our constitution protects against any attempts to substantially impair a party's right to have issues of fact decided by the jury. A sentencing judge's expressed disagreement with a jury verdict of acquittal and reliance on the facts underlying the acquitted charge constitutes a substantial impairment of the right to have the jury resolve factual issues and, accordingly, the practice is contrary to the language of our constitution itself.

ii. Historical insights into the intent of the constitutional framers

Our Supreme Court, over a century ago in *State v. Gannon*, 75 Conn. 206, 226-234, 52 A. 727 (1902), provided a valuable overview of the historical development of trial by jury in Connecticut from early colonial times until the years around the ratification of our state constitution in 1818, shedding light on what would have been the framers' understanding of the right to trial by jury. The *Gannon* Court observed that, when the English first settled Connecticut in the early 17th century, trial by jury was still developing in England, although juries were put into use in some parts of Connecticut. Id., 227. By the time of the charter of 1662, however, trial by jury "was beginning to be regarded and acknowledged as a political right, and was doubtless looked upon by the colonists as one of those 'liberties' referred to in the charter." Id., 228. Particularly relevant to the matter at issue here, the *Gannon* Court recites that, among the early reforms in the colonial history of jury trials in Connecticut was "the repeal in 1694 of the order authorizing the court to impanel another jury whenever

dissatisfied with their finding of fact." Id., 229. Thus, early in Connecticut's colonial history, measures were taken to eradicate the practice of the court second-guessing and undermining jury findings.

Furthermore, the century or so leading up to the 1818 constitution saw a process of working out the respective roles of judge and jury, with the court ultimately being given authority over the law, and all matters of factfinding being placed within the control of the jury. During the eighteenth century, a practice had developed, apparently at least partly as a result of judges' lack of formal legal training during that period, of permitting counsel to argue both facts and law to the jury, and letting the jury be the arbiter of both. Id., 230. By 1807, that practice was curbed when the judges of the Superior Court, newly authorized to enact rules of practice, adopted a rule requiring the court to instruct the jury in the law, but keeping the task of finding the facts firmly within the ambit of the jury. Id., 231. It was within this context that, "when our declaration of rights was framed in [the] 1818 [constitution], the 'right of trial by jury,' with its well-known essential features as then established by our common law, was one of those 'liberties and rights' recognized and established and declared to be forever after 'inviolate.'" Id., 232.

Additional insight into our constitutional forbears' understanding of the constitutional right to trial by jury can be gleaned from statutes they enacted soon after the adoption of the constitution. Again, *Gannon* provides valuable insight:

> In 1820, a committee, consisting of Zephaniah Swift, Lemuel Whitman, and Thomas Day, were appointed to revise the statutes. Judge Swift tells us that this appointment was made for the special purpose of bringing legislation into greater harmony with the constitution just adopted. In the performance of that duty, they revised the law of 1812 enforcing the duty of the judge to direct the jury in matters of law. That act properly covered both civil and criminal cases, and its purpose was simply to enforce a common-law duty. In revising the act, the nature of that duty is more fully defined, and is stated both under the head of civil actions and criminal proceedings. The full definition applicable to all cases is given under the head of civil actions. It shall be the 'duty of the court to decide all questions of law arising in the trial of a cause, and in committing the cause to the jury to direct them to find accordingly, and to *submit all questions of fact to a jury with such observations as they may think proper on the evidence for their information, without any direction how they shall find the facts*.' Rev. 1821, p. 49.

(Emphasis added.) Id., 233. Accordingly, through the constitution of 1818 and the statutes enacted to support it, the framers of our state constitution demonstrated their conviction that the roles of judge and jury were to be clearly delineated and strictly separated, with judges to be arbiters of the law, and juries to be the *sole* arbiters of fact without any interference from the judge. These principles are therefore among those the framers understood to be "inviolate" in the 1818 constitution.

iii. Related Connecticut precedents

The most pertinent Connecticut case is that of *Seals v. Hickey*, supra, 186 Conn. 337, which is instructive in construing what types of actions on the part of the court violate the right to a jury trial. There, our Supreme Court held that our state constitutional right to trial by jury was violated by a statute that prohibited the reading of a settlement agreement to the jury in a civil trial and empowered the trial court to deduct from the jury's verdict any amount of money the plaintiff had received by way of settlement. See id., 341 n.6. Our Supreme Court noted that "the constitutional right of trial by jury includes the right to have issues of fact as to which there is room for a reasonable difference of opinion among fair-minded men passed upon by the jury and not by the court." (Internal quotation marks omitted.) Id., 352, citing *Mansfield v. New Haven*, 174 Conn. 373, 375, 387 A.2d 699 (1978). Thus, while the legislature could "subject the exercise of the right to a jury trial to conditions and regulations of procedure for the better promotion of justice and the public welfare so long as the substance of the right is not adversely affected of the exercise of the right is not prevented"; (internal quotation marks omitted) id., 352-53; the statute in question was impermissible because it "allow[ed] the court to interfere with and invade the fact-finding function of the jury by permitting it to substitute its judgment for that of the jury." Id., 352.

It is particularly relevant to the present question that the *Seals* Court spoke to the right to have issues of fact passed upon by the jury *and not by the court*. Id., 352. In other words, where there is a factual controversy, our guarantee of trial by jury provides that the jury is the *only* entity that is to decide that fact. Also significant is the court's emphasis that the trial court

may not "substitute its judgment for that of the jury"; id., 352; for that is exactly what occurred in the present case. The defendant's responsibility for the matters charged in the assault count was passed upon not by the jury alone, but by both the jury and the court in succession, contrary to what *Seals* holds our constitution requires. Moreover, when the sentencing court decided it disagreed with the jury on the assault charge, it substituted its judgment for that of the jury, something also expressly forbidden under *Seals*.

iv. Persuasive federal precedents

As indicated in Part I A of this brief, the defendant's position is that federal constitutional law prohibits a sentencing court from relying on acquitted conduct. Even if this Court determines that the current state of federal law does not support that conclusion, as the analysis set forth previously in part I A this brief makes clear, the current federal legal landscape does set forth compelling principles that make the jury's findings supreme when it comes to sentencing. As previously discussed, the Supreme Court's decision in *United States v. Booker*, supra, 543 U.S. 220, placed into doubt the continued viability of *United States v. Watts*, supra, 519 U.S. 148, and made clear that the *Watts* court's inquiry into the constitutionality of the practice was limited to the double jeopardy clause. Accordingly, there is no controlling precedent from the United States Supreme Court. As further set forth in part 1 A of this brief, *Apprendi* and its progeny, over the last two decades, have reasserted, as a matter of the rights of due process and trial by jury, the jury's preeminent position with regard to fact finding. Indeed, as Justice Scalia's majority opinion in *Blakely v. Washington*, supra, 542 U.S. 305-306, observed, "the judge's authority to sentence derives wholly from the jury's verdict." Additionally, the opinion in *Nelson v. Colorado* has disapproved as a matter of due process the practice of a state court ignoring an acquittal and its accompanying presumption of innocence by finding that the acquittee is *guilty enough* that he may suffer a deprivation of a constitutionally protected interest—in the case of *Nelson*, a deprivation of property. *Nelson v. Colorado*, supra, 137 S. Ct. 1249, 1256.

In short, federal constitutional jurisprudence has been on the move for the last two

decades, advancing simultaneously on the *Apprendi* front in the direction of limiting sentencing judges' ability to take issues of fact out of the constitutionally-protected control of the jury, and on the *Nelson* front in the direction of requiring that the presumption of innocence be given its full effect. This Court's state constitutional analysis should recognize the convergence of these fronts and join the ranks of the courts that prohibit reliance on acquitted conduct at sentencing.

v. Persuasive precedents of other states

In examining the precedents of other states, the Court should give strong consideration to the compelling analyses of the Supreme Court of New Jersey in its 2021 opinion in *State v. Melvin*, supra, 248 N.J. 321, and the Supreme Court of Michigan in its 2019 opinion in *People v. Beck*, supra, 504 Mich. 605, for all the reasons previously discussed at length in section I C 3 of this brief. This Court should adopt the reasoning of those opinions and join the building movement toward recognizing that acquitted conduct is different from all other categories of facts a sentencing court considers—different because it directly invades the province of the jury and thus violates the defendant's right to a jury trial and because it violates the presumption of innocence. Additionally, the Court should consider past opinions of other states that have found error in a sentencing court's consideration of acquitted conduct, while not always articulating the constitutional bases for those determinations with the precision of the New Jersey and Michigan courts. See *State v. Koch*, 107 Haw. 215, 224-25, 112 P.3d 69 (2005) (sentencing court committed error in considering acquitted conduct); *State v. Cote*, 129 N.H. 358, 372-76, 530 A.2d 775 (1987) (where defendant was acquitted of five of eight charges and convicted of three others, which occurred at one date and time, sentencing court abused its discretion by finding defendant's acts were not isolated incidents); cf. *State v. Marley*, 321 N.C. 415, 423-25, 364 S.E.2d 133 (1988) (due process and fundamental fairness precluded trial court from aggravating defendant's sentence for lesser-included offense with element of greater offense of which defendant had been acquitted).

vi. Relevant public policies

Scholarly commentators have pointed to several public policy concerns, beyond the constitutional principles already discussed, that are implicated when judges consider acquitted conduct in sentencing. One commentator has observed that, in addition to undercutting the finality of verdicts and circumventing the jury's constitutional role in determining the defendant's guilt or innocence, allowing sentencing judges to consider acquitted conduct "frustrates the role of citizen participation in the criminal justice system, robbing that system of the democratic legitimacy conferred by the jury's role, and diminishing the civic value of juror participation in the criminal justice process." B. Johnson, "The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It," 49 Suffolk U. L. Rev. 1, 26 (2016). It "conveys a message to the jury that the fruit of their service is unimportant. Instead of instilling notions of democratic accountability in the criminal justice system, the message conveyed to jurors is that their fact-finding was trivial." Id. Because all citizens are potential jurors, sending this message should not be taken lightly.

Another policy concern is that sentencing judges' consideration of acquitted conduct gives the prosecution a second bite at the apple. Coupled with this is a related concern over the lower procedural safeguards in place at a sentencing hearing. "This does not violate Double Jeopardy principles because the defendant is being punished for the offense of conviction, not for offense of acquittal; however, it implicates as a policy matter the interests of the defendant in being free from prosecutors' repeated efforts to establish that the defendant was responsible for the sentence-enhancing behavior. This 'second bite' problem is particularly troubling because the defendant is offered fewer procedural protections at sentencing than at trial." (Footnote omitted.) Id. As another commentator has observed: "Not only is the government excused from the rigors of proof beyond a reasonable doubt, but the government is also excused from the rules of evidence customarily attendant at trial. Hearsay, double hearsay, and even triple hearsay is permissible as long as there is an 'indicia of reliability.' Finally . . . the right to confront witnesses, one of the basic rights at trial, is not

recognized at sentencing." (Footnotes omitted.) E. Ngov, "Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing," 76 Tenn. L. Rev. 235, 238-39 (2009).

Allowing judges to second-guess the jury's verdict also constitutes a kind of "judge nullification," which turns the concept of jury nullification on its head and undermines the jury's important role in our system as a check on state power. "The use of acquitted conduct at sentencing invites courts to nullify juries and risks undermining the vital roles that juries serve in the justice system. Juries are essential to the checks and balance system built into our democratic government. The Supreme Court has recognized that the jury was 'designed to guard against a spirit of oppression and tyranny on the part of rulers, and was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" Id., 275, quoting *United States v. Gaudin*, 515 U.S. 506, 510-11, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

All of the *Geisler* factors advise in favor of a conclusion that a sentencing court's consideration of acquitted conduct violates the defendant's state constitutional rights to due process and trial by jury. Accordingly, this Court should conclude that the trial court improperly denied the defendant's motion to correct his illegal sentence.

E. The state cannot demonstrate harmlessness beyond a reasonable doubt.

In the context of a constitutional violation, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt. . . . The state bears the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt." *State v. Montgomery*, 254 Conn. 694, 718, 759 A.2d 995, 1011 (2000).

The state cannot show that the sentencing court's impermissible reliance on acquitted conduct and the court's subsequent denial of his motion to correct his illegal sentence were harmless beyond a reasonable doubt. Specifically, the sentencing court did not make a mere passing reference to the defendant shooting the victim. On the contrary, the court extensively discussed the profound and lingering effects that it found the shooting had on the victim, and even mentioned the effect on taxpayers. In fact, of the roughly three and one-half transcript

pages taken up by the sentencing court's explanation for the sentence, a full page is devoted to the court's findings regarding the shooting and its aftereffects. It is therefore apparent that these were among the primary factors the court relied upon in arriving at the sentence. Under these circumstances, there is far more than a mere reasonable doubt as to whether the error was harmless; it is highly likely that the court imposed a longer sentence than it otherwise would have. The result is that for some period of time at the end of his sentence, the reason the defendant will still be in prison will be the judge's finding that he shot the victim, notwithstanding his acquittal of assault by the jury. In short, the sentencing court's constitutional error lengthened the defendant's sentence beyond a reasonable doubt. This Court should reverse the judgment denying the defendant's motion to correct his illegal sentence and should remand this case for a resentencing confined to permissible factors.

II. The Court should exercise its inherent supervisory authority to prohibit the consideration of acquitted conduct in sentencing decisions.

The principles regarding the supervisory authority of Connecticut's appellate courts are well established:

> It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole . . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice . . . . Our supervisory authority is not a form of free-floating justice, untethered to legal principle . . . . Rather, the rule invoking our use of supervisory power is one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole . . . . Indeed, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of [this court's] supervisory powers.

In re Daniel N., 323 Conn. 640, 645, 150 A.3d 657 (2016).

Cases in which our courts have invoked their supervisory authority to make rules fall into two categories:

> In the first category are cases wherein we have utilized our supervisory power to articulate a procedural rule as a matter of policy . . . without reversing [the underlying judgment] or portions thereof. . . . We invoke our supervisory authority in such a case . . . not because the use of that authority is necessary to ensure that justice is achieved in the particular

> case. Rather, we have determined that the [appellant] received a fair trial and therefore is not entitled to the extraordinary remedy of a new trial. Nevertheless, it may be appropriate, in such circumstances, to direct our trial courts to conduct themselves in a particular manner so as to promote fairness, both perceived and actual, in future cases. . . . In the second category are cases wherein we have utilized our supervisory powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal. . . . In other words, in the first category of cases we employ only the rule-making power of our supervisory authority; in the second category we employ our rule-making power and our power to reverse a judgment. . . .
>
> [T]he salient distinction between these two categories of cases is that in one category we afford a remedy and in the other we do not. . . . In the second category of cases, where we exercise both powers under our supervisory authority, the party must establish that the invocation of our supervisory authority is truly necessary because [o]ur supervisory powers are not a last bastion of hope for every untenable appeal. . . . In almost all cases, "[c]onstitutional, statutory and procedural limitations are generally adequate to protect the rights of the [appellant] and the integrity of the judicial system. . . . [O]nly in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts will we exercise our supervisory authority to reverse a judgment. . . . In such a circumstance, the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Although these standards are demanding, they are also flexible and are to be determined in the interests of justice.

Id., 645-48.

Here, if the Court determines that the sentencing court's consideration of acquitted conduct did not constitute a constitutional violation, the Court should nevertheless employ its inherent supervisory authority to impose a rule prohibiting this practice under the second category discussed in the foregoing passage.[15] That is because, for all of the reasons recited

[15]There are three minimal threshold requirements for the Court to exercise its supervisory power to review an *unpreserved* claim. *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut*, 311 Conn. 123, 155, 84 A.3d 840 (2014). "[T]he record must be adequate for review, such that there is . . . no need for additional trial court proceedings or factual findings, and all parties must have had an opportunity to be heard on the issue. . . . In addition, review of an unpreserved claim generally is inappropriate if it results in unfair prejudice to any party." Here, the claim at issue was preserved through the defendant's filing of the Motion to Correct Illegal Sentence, and therefore these threshold requirements do not apply. Even if they do apply, however, the requirements are met: (1) the record is adequate, as the sentencing transcript demonstrates the sentencing court's reliance on acquitted conduct; (2) all parties had an opportunity to be heard on the issue during the proceedings on the motion to correct, and will have an opportunity to be heard in this appeal; and (3) there

at length in part I of this brief, the integrity of the judicial system must be protected by ensuring that sentencing decisions are made in a manner that does not interfere with the verdict reached by the jury. Specifically, as discussed previously, a judge's determination that a defendant committed the very conduct of which he has been acquitted by a jury contravenes the presumption of innocence that is foundational in our system of criminal justice, contradicts the principle of proof beyond a reasonable doubt, undercuts the finality of verdicts, circumvents the jury's constitutional role, sends a message that jury service is unimportant, gives prosecutors a second bite at the apple without the heightened procedural safeguards attendant to a trial, and weakens juries' role as a check on state power. Moreover, several of these concerns, namely, disregard for the presumption of innocence, lack of proof beyond a reasonable doubt, failure to observe the finality of the verdict, and the lowered procedural safeguards present at sentencing, go to the fairness of the proceeding as to this particular defendant and therefore call for this Court to grant the defendant the remedy of reversal. See id., 647-48. These factors provide a compelling reason for this Court to exercise its supervisory authority to reverse the judgment and remand for a new sentencing proceeding.

CONCLUSION

For all of the foregoing reasons, this Court should conclude that the sentencing court's heavy reliance on acquitted conduct during the defendant's sentencing violated his rights to due process and trial by jury in violation of his rights under the federal and/or state constitutions. In the alternative, the Court should employ its supervisory authority to create a rule prohibiting the consideration of acquitted conduct at sentencing. In either event, this Court should reverse the trial court's denial of the defendant's motion to correct his illegal sentence and remand this case for a new sentencing.[16]

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is no unfair prejudice to the state, as it will have a full opportunity to present any and all appropriate information to the court during a new sentencing procedure if this court reverses the judgment.

[16]The defendant's request for five additional pages in this brief to address the state constitution was granted on December 3, 2021.

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CERTIFICATION

Pursuant to Practice Book § 67-2, I hereby certify the following:

1. This brief and appendix comply with all provisions of this rule;

2. This brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law;

3. This brief and appendix are true copies of the brief and appendix that were submitted electronically pursuant to subsection (g) of this section;

4. A true electronic copy of this brief and appendix were delivered via e-mail to the counsel of record listed below on December 10, 2021, and said electronic copies redacted any personal identifying information where necessary to comply with the provisions of this rule;

5. In accord with Practice Book § 62-7, a copy of this brief and appendix was sent to each counsel of record, those trial judges who rendered a decision that is the subject of this appeal, and my client, on December 10, 2021, as further detailed below.

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