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The Due Process Clause of the Fifth Amendment ensures that no person shall be "deprived of life, liberty, or property, without due process of law."[1] The Supreme Court has repeatedly held this to require that all criminal defendants be found guilty only when guilt is proven beyond a reasonable doubt.[2] The requirement of the beyond a reasonable doubt standard—the highest evidentiary burden in our legal system—is often attributed to "a fundamental value determination of our society that it is far worse to convict an innocent man than let a guilty man go free."[3] Our criminal system presumes innocence and by embracing the beyond a reasonable doubt standard, disproving innocence is an extremely difficult task, and for good reason. However, the current sentencing guidelines, which provide guidance to the federal judiciary in issuing criminal sentences, endorse a practice that allows individuals to be punished for crimes for which they have never been convicted.

Sean Michael Grier is a victim of this loophole. He was charged with a single crime.[4] He pled guilty to a single crime.[5] He was convicted of a single crime.[6] Yet the length of his current prison sentence is based on a court's finding that he

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1. U.S. Const. amend. V.

2. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

3. Justice Harlan emphasized that the requirement of the beyond a reasonable doubt standard in proving a criminal charge, "reflect[s] a very fundamental assessment of the comparative social costs of erroneous factual determinations." *Id.* at 370 (Harlan, J., concurring). Justice Harlan explained that the fact-finder in a judicial proceeding is never able to make a determination of fact based on actual knowledge, but rather his or her determination of fact is made on beliefs based on the evidence presented. *Id.* It therefore follows that "the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions." *Id.* The frequency of factually erroneous determinations is thus influenced by the burden of persuasion used in proving criminal guilt, and therefore embracing the highest evidentiary standard in making this determination reflects a core societal value. *Id.* at 372; *see also* Leland v. Oregon, 343 U.S. 790, 802–03 (1952) (Frankfurter, J., dissenting) ("It is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of due process."); Davis v. United States, 160 U.S. 469, 488 (1895) (stating the beyond a reasonable doubt requirement is implicit in "constitutions . . . [that] recognize the fundamental principles that are deemed essential for the protection of life and liberty").

4. Grier was also charged with violating 18 U.S.C. § 922(j), possession of a stolen firearm, but the charge was dropped pursuant to his plea agreement. *See* United States v. Grier, 475 F.3d 556, 559 (3d Cir. 2007), *cert. denied*, 76 U.S.L.W. 3159 (2007).

5. *Id.*

6. *Id.*

committed two separate crimes.[7] Under the current United States Sentencing Guidelines ("U.S.S.G."),[8] this practice has been deemed permissible.[9]

In *United States v. Grier*, the defendant Grier pled guilty to being a convicted felon in possession of a firearm,[10] a violation of 18 U.S.C. § 922(g)(1).[11] At sentencing the court imposed a four-level sentence enhancement[12] pursuant to section 2K2.1(b)(5) of the U.S.S.G.[13] based on its finding by a preponderance of the evidence,[14] rather than beyond a reasonable doubt,[15] that the appellant had committed a felony offense

7. *Id.* at 559–60.

8. The U.S.S.G. provides an advisory basis for the majority of sentences issued by federal courts. *Grier*, 475 F.3d at 560 (recognizing "that the Guidelines were advisory . . . "); United States v. Booker, 543 U.S. 220, 245–46 (2005). In Justice Breyer's majority opinion, the Court in *Booker* held that, as applied, the U.S.S.G. was unconstitutional, and instead held that the guidelines must instead be advisory. *Booker*, 543 U.S. at 145–46 ("We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e) . . . , which depends upon the Guidelines' mandatory nature. So modified, the federal sentencing statute, see Sentencing Reform Act of 1984 . . . as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well . . . .").

9. *See* U.S. Sentencing Guidelines Manual § 3E1.1 (2007).

10. *Grier*, 475 F.3d at 559.

11. 18 U.S.C. § 922(g)(1) makes it unlawful for

> any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1) (2006).

12. While the enhancement associated with this finding was a four-level increase, the court also granted a two-level downward departure based on the assault victim's partial responsibility for the assault at issue. *See Grier*, 475 F.3d at 560.

13. The enhancement was based on what was then U.S.S.G. § 2K2.1(b)(5), but what is now U.S.S.G. § 2K2.1(b)(6), which states:

> If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

U.S. Sentencing Guidelines Manual § 2K2.1(b)(6) (2007).

14. The "by a preponderance of the evidence" standard is a lower evidentiary burden than the beyond a reasonable doubt standard associated with determinations of guilt. *See* Black's Law Dictionary (8th ed. 2004) (citing Charles Herman Kinnane, A First Book on Anglo-American Law 562 (2d ed. 1952) (defining "preponderance of the evidence" as "the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.")).

15. In criminal cases the prosecution is required to prove all elements of the crime charged beyond a reasonable doubt. *See* Black's Law Dictionary (8th ed. 2004) (defining "reasonable doubt" as "[t]he doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a

while unlawfully possessing a firearm.[16] The United States Court of Appeals for the Third Circuit applied a Sixth Amendment analysis in upholding the application of the preponderance standard, despite the appellant's challenge that the Due Process Clause of the Fifth Amendment required the sentencing factor instead be found by the beyond a reasonable doubt standard.[17] This case comment argues that the "commission of a separate felony" enhancement factor is distinguishable from all other U.S.S.G. enhancement factors because it is equivalent to a finding of guilt for the commission of a crime. Therefore, this particular enhancement should require the evidentiary standard constitutionally mandated for proving the commission of a crime. The *Grier* court's imposition of an enhanced sentence, based on a preponderance of the evidence that the appellant committed a felony separate from the crime for which he was convicted, was therefore a violation of the appellant's Fifth Amendment right to the due process of law.[18]

Sean Michael Grier's legal troubles began with a dispute over a cable bill.[19] Grier's girlfriend was holding a bike belonging to her brother Juan Navarro as security for his outstanding cable tab.[20] This angered Navarro, who approached Grier outside of Grier's girlfriend's home and demanded his bike be returned.[21] When Grier refused, Navarro threatened him.[22] Grier, however, continued to refuse to return the bike and, despite warnings from onlookers that Grier had a gun, Navarro swung at

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real possibility that a defendant is not guilty") (citing Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850) (Shaw, J.) ("Reasonable doubt . . . is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.")).

16. *Grier*, 475 F.3d at 560. The district court identified the "separate offense" as being aggravated assault a violation of 18 Pa. Cons. Stat. § 2702(a) which states:

> A person is guilty of aggravated assault if he:
> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life . . .
> (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon . . . .

Id. at n.2.

17. *Id.* at 561.

18. *Winship*, 397 U.S. at 364 ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

19. *Grier*, 475 F.3d at 559.

20. *Id.*

21. *Id.*

22. *Id.*

him.[23] Although Navarro missed Grier initially, the failed punch was enough to initiate a brawl and the two men quickly tumbled to the ground engaging in a physical struggle.[24] A shot was fired during the altercation, at which point the two men separated unharmed.[25] Upon separating, Grier pointed the gun at Navarro.[26] Navarro responded by trying to charge Grier, but in a scene resembling that of a Shakespearean tragedy, he was held back by members of the crowd.[27] Grier then fired a second shot into the air dispersing the crowd, again injuring no one.[28] Navarro and Grier fled the scene, and Grier dumped the gun into a trash can as he fled.[29]

Following the incident, local police initiated an investigation that eventually led to the discovery of the discarded gun.[30] Upon running a check on the weapon, the police learned that it had been stolen.[31] Grier was then arrested by local authorities for aggravated assault, receiving stolen property, and unlawful possession of a firearm.[32] The Commonwealth of Pennsylvania dismissed all three counts in August 2003.[33] Shortly thereafter, Grier was indicted on the federal charge of possession of a firearm by a convicted felon, to which he pled guilty.[34]

As is customary in preparation for a federal conviction,[35] the Department of Corrections issued a presentence report ("PSR").[36] The PSR suggested the court impose a four-level enhancement[37] to Grier's sentence for his use of a firearm in

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* It is unknown why the Commonwealth of Pennsylvania dropped the state charges against Grier.

34. *Id.*

35. Susan M. Kole, Annotation, *Right of Convicted Defendant or Prosecution to Receive Updated Presentence Report at Sentencing Proceedings,* 22 A.L.R. FED. 660 (1994).

> In the federal system, under Federal [Rule 32(c)(1)], the probation service of the court is directed to make a presentence report for all offenders . . . . Federal [Rule 32(c)(1)], specifically provides that the probation office "shall" make a presentence investigation and report to the court before a defendant is sentenced, unless the court finds that there is sufficient information in the record to enable meaningful exercise of sentencing authority and this finding is explained on the record. The determination that there is sufficient information in the record must be made before sentence is imposed.

Id.

36. *Grier*, 475 F.3d at 559.

37. Federal sentencing recommendations assess a sentence range based on the "applicable category of offense committed by the applicable category of defendant." 21A AM. JUR. 2d *Criminal Law* § 872 (2000). The

"connection with another felony offense," pursuant to section 2K2.1(b)(6).[38] The report detailed the other "felony offense" as felony assault under Pennsylvania law.[39] While the four-level sentence enhancement did not exceed the federal statutory maximum sentence associated with a violation of the crime for which Grier was convicted,[40] it exposed him to a fifty percent increase in recommended jail time.[41] The district court adopted the PSR and applied the four-level enhancement.[42] Grier objected to the enhancement and a sentencing hearing was held to determine the validity of his objection.[43]

At the sentencing hearing before the district court, both parties argued over the government's burden of persuasion in proving the facts necessary to establish grounds for the enhancement.[44] While it is customary to apply the preponderance standard in finding the existence of facts relevant to sentencing,[45] the defense argued that the particular sentencing factor at issue—that of the commission of another felony offense—requires proof beyond a reasonable doubt.[46] The court adopted the government's position that the preponderance standard should govern.[47]

The government's only evidence in support of its contention that Grier used the gun in commission of another felony was the testimony of Juan Navarro, the instigator of the assault at issue.[48] Navarro testified that he never saw Grier pull the gun from his clothing, and that the gun may have just fallen out of Grier's pockets at some point during the fight.[49] The defense then stated that even if Grier had pulled the gun on Navarro, he would have been acting in self-defense, as Navarro instigated the

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court may then enhance the sentence, or depart from the range, based on findings of sentencing factors. *Id.*

38. *Grier*, 475 F.3d at 559. The enhancement is currently codified under U.S.S.G. § 2K2.1(b)(6). *See supra* note 13.

39. *Grier*, 475 F.3d at 559–60 (citing 18 Pa. Cons. Stat. § 2702(a)).

40. The statutory maximum associated with a violation of 18 U.S.C. § 922(g)(1) is a prison sentence of ten years. *Id.*

41. Without the four-level separate offense enhancement Grier's recommended imprisonment range would have been 84 to 105 months. With the four-level enhancement, Grier's recommended imprisonment range was between 120 to 160 months. *See id.* at 560.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 561 ("Under an advisory Guidelines scheme, district courts should continue to make factual findings by a preponderance of the evidence . . . .").

46. *Id.* at 560; *see also* Brief of Appellant at 11, United States v. Grier, 475 F.3d 556 (3d Cir. May 11, 2005) (No. 05-1698). The district court imposed the enhancement based on facts that it found using the preponderance of evidence standard instead of the required beyond a reasonable doubt standard. Brief of Appellant, *Grier*, 475 F.3d 556 (No. 05-1698).

47. *Grier*, 475 F.3d at 560.

48. *Id.*

49. *Id.*

fight.[50] As self-defense is a complete defense to aggravated assault, Grier argued that he could not be found to have committed the additional felony offense necessary to warrant the four-level enhancement.[51] Grier further argued that even if the court did not find that he had acted in self-defense, under Pennsylvania law he still had not committed the felony of aggravated assault but merely "simple assault by mutual consent."[52] Simple assault under Pennsylvania law is categorized as a misdemeanor and punishable by no more than a year in prison.[53] The offense, therefore, does not trigger the enhancement under the U.S.S.G.[54] Nevertheless, the court, in applying the preponderance standard, adopted the recommendations laid out in the PSR and applied the four-level enhancement under section 2K2.1(b)(5).[55] Grier was sentenced to 100 months in prison.[56]

This decision was appealed, but before analyzing the court of appeals decision, it is necessary to give some context for a discussion of the evidentiary burden of proof

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50. *Id.*

51. Brief of Appellant, *supra* note 46, at 7 ("Grier argued . . . that he acted in self-defense, which is a complete defense . . . .").

52. *Grier*, 475 F.3d at 560 n.3 (citing 18 Pa. Cons. Stat. §2701). Pennsylvania law defines simple assault as:

> a) Offense defined. A person is guilty of assault if he:
> (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
> (2) negligently causes bodily injury to another with a deadly weapon; [or]
> (3) attempts by physical menace to put another in fear of imminent serious bodily injury . . . .
> (b) Grading.-Simple assault is a misdemeanor of the second degree unless committed . . . in a fight or scuffle entered into by mutual consent, in which case it is a misdemeanor of the third degree . . . .

18 Pa. Cons. Stat. § 2701. This is opposed to aggravated assault, which is defined as an attempt: "(1) to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; [or] (4) [an] attempt[s] to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon . . . ." 18 Pa. Cons.Stat. § 2702(a)). It is worth noting that this particular issue is still unresolved. Upon further appeal, the Third Circuit remanded the issue of whether the assault enhancement was correctly applied based on an incomplete record in support of a finding of the commission of aggravated rather than simple assault. *See* United States v. Grier, No. 07-4671, 2008 WL 5114621 (3d Cir. Dec. 4, 2008). While the sentence may be reduced pending the outcome of this case, the issue of which evidentiary burden is appropriate has been fully resolved by the court. *Id.*

53. *Grier*, 475 F.3d at 560.

54. Brief of Appellant, *supra* note 46, at 8. A "felony" for the purpose of a Section 2K2.1(b)(5) four-level enhancement is a crime with a term of imprisonment that exceeds one year. *Id.* A felony offense is "any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained." *Id.* (citing U.S. Sentencing Guidelines Manual § 2K1.3 app. 4 (2007)).

55. *Grier*, 475 F.3d at 560.

56. The court's final sentence included a two-level downward departure as a result of the victim Juan Navarro's partial responsibility for the assault that served as the basis for the four-level enhancement. *Id.* at 560.

required in proving the existence of sentencing factors. The Supreme Court's jurisprudence in this area is muddled and contradictory.[57] Over the course of the past century the Court has spawned two schools of thought on evidentiary burdens required at sentencing. For the purposes of this comment, these two lines of cases will be referred to as the *Apprendi* line and the *McMillan* line. The *Apprendi* line of cases focuses on the effect constitutional safeguards have on the criminal defendant, as opposed to the *McMillan* line of cases, which takes a more formalistic approach to allocating burdens of proof and gives great deference to state legislatures. *Apprendi v. New Jersey* and its progeny have repeatedly held that defendants are entitled to jury findings by the beyond a reasonable doubt standard of any fact which exposes them to sentences exceeding statutory maximums.[58] In contrast, the *McMillan* line of cases has given states leeway in redefining elements of crimes as sentencing factors, in what can be described as an attempt to avoid granting constitutional safeguards to criminal defendants.[59]

The current prevailing rule, which follows the *Apprendi* line of cases, is that as long as the finding of sentencing factors does not increase the defendant's sentence beyond the statutory maximum associated with the defendant's conviction, a court may make its finding of said factors by the application of a lower evidentiary standard

57. *Compare* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), *and* Mullaney v. Wilbur, 421 U.S. 684, 704 (1975), *with* Patterson v. New York, 432 U.S. 197 (1997), *and* McMillan v. Pennsylvania, 477 U.S. 79, 81 (1986).

58. *See* Blakely v. Washington, 542 U.S. 296, 303–04 (2004) (clarifying the rule set forth in *Apprendi* by holding: "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"); *Apprendi*, 530 U.S. at 490 (holding that, in determining whether New Jersey's hate crime statute, which allowed the sentencing judge to double the sentence range based on a finding by a preponderance of the evidence that the defendant committed the crime with bias towards a particular race, violated the Constitution, any fact that increases the maximum penalty to which the defendant is exposed must be proven beyond a reasonable doubt to a jury); Francis v. Franklin, 471 U.S. 307, 326–27 (1985) (extending the ideals of *Winship* to the presumption of innocence by holding it impermissible for the state to legislatively create mandatory presumptions that shift the burden of persuasion to the defendant for elements of the offense); *Mullaney*, 421 U.S. at 704 (holding, in striking down Maine's murder statute, which put the burden on the defendant to disprove the element that distinguished murder from the lesser crime of manslaughter, that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt . . . the mens rea component of the crime of murder"); *Winship*, 397 U.S. at 364 ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

59. *McMillan,* 477 U.S. at 81 (holding that the state's designation of "visible possession of a firearm" as an enhancement rather than an element of a crime was constitutionally permissible as it did not raise the ceiling of the defendant's potential sentence, but merely raised the floor if the fact was found by a preponderance of the evidence by a sentencing judge); *Patterson*, 432 U.S. at 207–08 (holding, by taking a formalistic approach, that the New York legislature's decision to place the burden on the defendant to prove extreme emotional disturbance in order to mitigate murder to manslaughter was constitutionally permissible, even though it was essentially the inverse to the *Mullaney* decision); *Leland*, 343 U.S. at 800 (upholding the state's decision to require defendants to prove the defense of insanity beyond a reasonable doubt because sanity hearings were collateral to criminal proceedings).

than would otherwise be necessary to prove guilt.[60] This comment argues that the "commission of a separate felony" enhancement factor is equivalent to a finding of guilt for the commission of a crime, and therefore should require proof by the evidentiary standard constitutionally mandated for proving all other elements of crimes charged, that is, beyond a reasonable doubt.[61]

On Grier's appeal, the United States Court of Appeals for the Third Circuit issued a two-to-one decision affirming the district court's legal findings.[62] Grier then petitioned for, and was granted, a rehearing en banc.[63] On February 5, 2007, the United States Court of Appeals for the Third Circuit, sitting en banc, issued its opinion, which affirmed the district court's holding that the preponderance standard is appropriate for the finding of sentencing enhancements that do not increase statutory maximums,[64] including its finding that Grier committed a crime separate from the one for which he was charged.[65] The Supreme Court of the United States denied certiorari.[66]

The Third Circuit held that the Due Process Clause does not require proof beyond a reasonable doubt of "facts relevant to enhancements under the U.S.S.G., particularly those that constitute a 'separate offense' under governing law," unless a finding of such facts would expose a defendant to a punishment exceeding the statutory maximum.[67] To support its holding, the court adopted the analysis set forth in *United States v. Booker*.[68] *Booker* presented the issue of whether imposing an enhanced sentence in accordance with the U.S.S.G.[69] violated the petitioners'[70] Sixth

60. *Apprendi*, 530 U.S. at 490 ("[A]ny fact that increases penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

61. *Winship*, 397 U.S. at 364 ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

62. Grier's appeal was originally argued on October 25, 2005, before three judges on the United States Court of Appeals for the Third Circuit. Following the death of one of the original three judges, the quorum was reconstituted so that a holding could be issued. *Grier*, 475 F.3d 556, *vacated*, 453 F.3d 554 (3d Cir. 2006).

63. *Grier*, 453 F.3d at 554.

64. *Grier*, 475 F.3d at 572. While the court affirmed the lower court's legal conclusions, the case was remanded so that the district court could "explain its decision on the record, specifically by reference to the factors of 18 U.S.C. § 3553(a) and further elaboration on its findings regarding the factual underpinnings of the assault enhancement." *Id.*

65. *Id.* at 561.

66. Grier v. United States, 76 U.S.L.W. 3159 (2007) (denying certiorari).

67. *Grier*, 475 F.3d at 561–62.

68. *Id.*

69. Prior to *Booker*, the U.S.S.G. were still mandatory under the Sentencing Reform Act of 1984. *Booker*, 543 U.S. at 227.

70. The appeal was heard on behalf of two petitioners: Freddie J. Booker and Ducan Fanfan. *Id.* at 220.

Amendment rights.[71] The Court in *Booker* cited its holdings in *Blakely*[72] and *Apprendi*[73] to support its holding that in order to protect a defendant's Sixth Amendment right to a jury trial, any fact that exposes a defendant to a sentence that exceeds the statutory maximum must be found by a jury.[74] As Grier's sentence did not exceed the statutory maximum associated with the offense to which he plead guilty, the protections implicated in *Booker*, as well as in *Apprendi* and *Blakely*, were not triggered by the issue presented in *Grier*.[75]

While the Court in *Booker* conducted a thorough analysis of whether the petitioner's Sixth Amendment rights were violated, it never reached the issue of whether the Due Process Clause of the Fifth Amendment requires proof beyond a reasonable doubt of the separate offense sentencing factor.[76] And yet the court in *Grier* held that "the discussion in *Booker*, regarding the Jury Clause of the Sixth Amendment applies with equal force to the Due Process Clause of the Fifth Amendment."[77] The *Grier* court justified using a Sixth Amendment analysis for a Fifth Amendment issue based on an unsubstantiated finding that the two amendments are similar.[78]

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71. *Id.* at 226. Booker was tried by a jury of his peers and found guilty of "possessing at least fifty grams of crack in violation of 21 U.S.C. § 841(b)(1)(A)(iii) based on evidence" presented at trial. *Id.* at 235. Based on the facts found by the jury as well as the offense category of the crime and Booker's criminal history, Booker was exposed to a sentence of 210–265 months. *Id.* However, the sentencing judge imposed a sentence of 360 months based on his own factual findings never presented to the jury. *Id.*

72. In *Blakely*, the statute defining the crime committed by the defendant allowed for a sentence of up to ten years imprisonment. Based on the facts proven to the jury, the defendant's sentence was capped at fifty-three months. However after making additional findings, the sentencing judge added three years to the fifty-three month maximum. The Court held the three year increase to be a violation of the defendant's Sixth Amendment rights and clarified the rule set forth in *Apprendi* by holding that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (emphasis in original).

73. *Apprendi*, 530 U.S. at 490 (holding 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").

74. *Booker*, 543 U.S. at 243–44. ("All of the foregoing supports our conclusion that our holding in *Blakely* applies to the Sentencing Guidelines. We recognize, as we did in *Jones, Apprendi,* and *Blakely,* that in some cases jury fact-finding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.").

75. *Grier*, 475 F.3d at 561 ("The primary issue in this case is whether the Due Process Clause requires facts relevant to enhancements under the United States Sentencing Guidelines, particularly those that constitute a 'separate offense' under governing law, to be proved beyond a reasonable doubt.").

76. *Booker*, 543 U.S. at 226 ("The question presented in each of these cases is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment.").

77. *Grier*, 475 F.3d at 561.

78. *Id.* ("The constitutional guarantees of 'trial . . . by an impartial jury,' U.S. Const. amend. VI, and 'due process of law,' U.S. Const. amend. V, stand as a bulwark of individual liberty. They interpose between the legislature and the court the community's own judgment as to the existence of a crime."); *see also*

In her concurring opinion, Judge Ambro criticized the majority's contention that "the Supreme Court's *Apprendi* line of cases, culminating at the federal level with *Booker*, dictates the answer to the question presented here."[79] She believed that the majority's application of a Sixth Amendment analysis to a Fifth Amendment issue was "too sweeping."[80] Instead, she would have had the court apply the Fifth Amendment standard set forth in *McMillan v. Pennsylvania*.[81] Judge Ambro wrote that "*McMillan*, unlike *Booker*, provides the most complete answer to the question presented here."[82] In her opinion, *McMillan* stands for the proposition that the Due Process Clause protects the finding, beyond a reasonable doubt, of "some facts below the statutory maximum, even if the Sixth Amendment (pursuant to *Apprendi*) does not."[83] Although Judge Ambro disapproved of the majority's analysis,[84] as well as its acquiescence to a federal practice that imprisons individuals such as the appellant, in part for crimes for which they were "never indicted, never tried, and never convicted,"[85] Judge Ambro unfortunately did not find that the facts at issue in the present case were among the protected factors under the *McMillan* standard and ultimately concurred with the majority's opinion.[86]

Judge Sloviter, in a dissenting opinion joined by Judge McKee, found that the majority's holding "abrogates one of the most important, if not *the* most important, of the rights that the Constitution affords criminal defendants: the right to be found guilty only by a finding beyond a reasonable doubt."[87] Judge Sloviter further criticized the holding as being "without any support or precedent,"[88] attacking not only the majority's "expansive interpretation of the language in the *Booker* opinion,"[89] but also

Apprendi, 530 U.S. at 484 (characterizing the Due Process Clause of the Fifth Amendment and the Jury Trial Clause of the Sixth Amendment as "associated" provisions).

79. *Grier,* 475 F.3d at 575 (Ambro, J., concurring).

80. *Id.* at 577.

81. *Id.* at 578–80 (citing *McMillan,* 477 U.S. at 88 ("The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.")) (discussing the three considerations of *McMillan* which have been distilled into the single metaphorical standard which bars the use of a lower evidentiary standard in finding enhancement factors when the finding of such factors is akin to "a tail which wags the dog").

82. *Id.* at 577 (Ambro, J., concurring).

83. *Id.*

84. *See id.*

85. *Id.* at 573 (finding that while "[t]his practice may be efficient . . . it is not consistent with our Bill of Rights").

86. *Id.* at 583.

87. *Id.* at 589 (Sloviter, J., dissenting) (emphasis added).

88. *Id.* at 591.

89. *Id.* at 589 ("Neither of the Supreme Court's *Booker* decisions discussed the Fifth Amendment nor did they suggest that it had no role in sentencing.").

its reliance on the commentary to section 6A1.3 of the U.S.S.G. as support.[90] Judge Sloviter wrote:

> The majority's statement that its adoption of the preponderance-of-the-evidence standard "is suggested by the Guidelines," its first purported authority, is just flat out wrong. There is no Sentencing Guideline that addresses the issue of the standard of proof in a criminal case. Indeed, that would be beyond the authority granted to the Sentencing Commission.[91]

Finding no authority for the majority's holding, Judge Sloviter held that the Due Process Clause requires proof beyond a reasonable doubt for the finding of the separate offense sentencing enhancement.[92]

However, although he criticized the majority for supporting its conclusion with cases addressing Sixth Amendment challenges,[93] Judge Sloviter falls into the same trap as the majority in his own analysis. The dissent relies on cases such as *Cunningham v. California*,[94] *Apprendi*,[95] and even *Booker*[96] to support its conclusion that the Due Process Clause of the Fifth Amendment requires a heightened burden of proof in establishing the separate offense enhancement factor.[97] While these cases do focus on the effect of depriving criminal defendants of certain constitutional rights, they do not address Fifth Amendment challenges specifically.

While the dissent[98] reaches what this comment argues to be the correct conclusion, it fails to apply the correct analysis. The dissent, like the majority, applied a Sixth Amendment analysis to a Fifth Amendment issue. The concurring

90. *Id.* at 591.

91. *Id.* at 592. This is not the first time the commentary to section 6A1.3 has come under scrutiny. *See, e.g.*, *Booker*, 543 U.S. at 319 n.6 (Thomas, J., concurring) ("The commentary to § 6A1.3 states that the Commission believes that use of a preponderance of the evidence standard is appropriate . . . . The Court's holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt . . . ."); Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System,* 43 Hous. L. Rev. 341, 387 (2006) ("[T]hough the commentary to Guidelines' § 6A1.3 states that the Commission 'believes that use of a preponderance of the evidence standard is appropriate' . . . in resolving factual disputes, this provision is overdue for reexamination in the wake of the Supreme Court's decisions in *Apprendi, Blakely*, and *Booker*.").

92. *Id.* at 593 (Sloviter, J., dissenting) ("Grier's guilty plea to one offense (for which he would have been entitled to the beyond-a-reasonable doubt standard) cannot justify diminution of the applicable standard of proof applied by a judge for a separate offense.").

93. *Id.* at 589.

94. 127 S. Ct. 856, 860 (2007) ("The question presented is whether the DSL [California's determinate sentencing law], by placing sentence-elevating fact-finding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. We hold that it does.").

95. *See, e.g.*, *Aprendi*, 530 U.S. at 490.

96. *See Booker*, 543 U.S. at 234–44.

97. *See Grier*, 475 F.3d at 588–604 (Sloviter, J., dissenting).

98. Judge McKee, in a separate dissenting opinion to which Judge Sloviter joined, also falls into the trap of applying Sixth Amendment precedent to a Fifth Amendment issue. *See Grier*, 475 F.3d at 604–21 (McKee, J., dissenting).

opinion of Judge Ambro correctly advocates for the application of a separate analysis for a Fifth Amendment issue, but misapplies the appropriate Fifth Amendment test, and thus reaches the wrong conclusion. To correctly resolve the issue presented in *Grier*—that of whether the Due Process Clause of the Fifth Amendment requires that the separate offense sentence enhancement factor be found by the beyond a reasonable doubt standard—the Third Circuit should have applied the Supreme Court's only articulated Fifth Amendment analysis related to this issue: that which was presented in *McMillan*. *McMillan* provides the analytical guidance necessary to correctly decide the Fifth Amendment issue presented in *Grier*. The Court in *McMillan* expressly stated that it did not, and could not, create a bright line rule for determining which sentencing factors allow a preponderance standard and which require proof beyond a reasonable doubt in order to comport with due process. The Court did offer some guidance, however, by pointing to several factors which, if satisfied, could trigger a heightened evidentiary standard.[99] Had the court in *Grier* applied the Fifth Amendment standard set forth in *McMillan*, it would have found that the commission of a separate offense as a sentence enhancement factor requires proof beyond a reasonable doubt in order to comport with the Due Process Clause.

The Court's discussion in *McMillan* suggested that a heightened evidentiary burden would be required by the Due Process Clause if a sentencing factor was "a tail which wags the dog of the substantive offense."[100] Although this metaphor may be ambiguous on its face, the Court outlined several circumstances that illustrate the standard it created.[101] For example, if the sentencing factor effectively "discard[s] the presumption of innocence" or "reliev[es] the prosecution of its burden of proving guilt," then the factor would need proof by an evidentiary standard higher than the preponderance standard.[102] The Court also created a possible exception to its use of the preponderance standard for sentencing factors which "alter[ ] the maximum penalty for the crime committed[ ]or create[ ] a separate offense calling for a separate penalty."[103] Finally, the Court reserved another possible exception to the preponderance standard when the sentencing factor could be construed as an attempt "to evade the commands of *Winship*."[104]

McMillan recognized a distinction between the rights protected under the Fifth Amendment and those provided by the Sixth Amendment that the court in *Grier*

99. *McMillan*, 477 U.S. at 91 ("Our inability to lay down any 'bright line' test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results.").

100. *Id.* at 88; *see also Grier*, 475 F.3d at 580 (Ambro, J., concurring).

101. *McMillan*, 477 U.S. at 88; *Grier*, 475 F.3d at 580 (Ambro, J., concurring).

102. *McMillan*, 477 U.S. at 86–87.

103. *Id.* at 87–88.

104. *Id.* at 89 (citation omitted).

failed to see.[105] In so doing, the *Grier* court failed to recognize the significant difference between a Fifth and Sixth Amendment analysis, mainly that "*McMillan* provided caveats to its general Fifth Amendment rule—caveats which the *Apprendi* line does not create in the Sixth Amendment context,"[106] and caveats that trigger the use of a higher evidentiary standard in a variety of sentencing hearings.[107] This is a mistake. The caveats set forth in *McMillan* protect a defendant's Fifth Amendment rights to the due process of law, a right different from those protected under the Sixth Amendment.

The Supreme Court has expressly refused to overrule *McMillan*,[108] arguably because it provides the Court's only articulated Fifth Amendment standard on the burden of persuasion necessary for proving the existence of facts pertaining to sentencing.[109] While *McMillan* states that the preponderance standard is generally acceptable, it sets out factors that, when satisfied, provide an exception to the general rule and trigger the need for a heightened evidentiary standard.[110] The court's consideration in *Grier* of whether the appellant committed a crime separate from the one for which he was charged for the purposes of determining sentencing met three of the requirements necessary under *McMillan* to satisfy an exception to the Court's general preponderance rule, thereby requiring a heightened evidentiary standard.

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105. The court in *Grier* applied the bright line rule set forth in *Apprendi*. *See Grier*, 475 F.3d at 578–79 (Ambro, J., concurring); *see also supra* note 73 (noting that *Apprendi's* beyond a reasonable doubt requirement is only implicated in situations where the sentence imposed exceeds the statutory maximum).

106. *Grier*, 475 F.3d at 578–79 (Ambro, J., concurring).

107. Many courts have applied the "tail that wags the dog" standard articulated in *McMillan*. *See, e.g.*, United States v. Mezas de Jesus, 217 F.3d 638, 642–45 (9th Cir. 2000) (requiring the finding of an uncharged kidnapping be found by clear and convincing evidence when the finding would result in a nine-level enhancement under the U.S.S.G., increasing the sentencing range from 31–27 months to 57–71 months (citing United States v. Restrepo, 946 F.2d 654, 659–60 (9th Cir. 1991) (adopting *Kikumura*)); United States v. Paster, 173 F.3d 206, 216–17 (3d Cir. 1999) (noting that the government, in seeking a nine-level departure from the sentencing range prescribed by the U.S.S.G., conceded that it should prove all necessary sentencing factors by a clear and convincing standard); United States v. Seale, 20 F.3d 1279, 1287–89 (3d Cir. 1994) (requiring proof by clear and convincing evidence of all factors relevant to the seven-fold increase to the fine calculated under the U.S.S.G. as sought by the government); United States v. Kikumura, 918 F.2d 1084, 1110 (3d Cir. 1990) ("[I]f the magnitude of the contemplated departure [from the range prescribed by the U.S.S.G] is sufficiently great that the sentencing hearing can fairly be characterized as a 'tail which wags the dog of the substantive offense' [then] . . . the factfinding underlying that departure must be established at least by clear and convincing evidence.").

108. *Grier*, 475 F.3d at 578 (Ambro, J., concurring) ("*Apprendi* and *Harris* made clear that *McMillan* still sets out the Fifth Amendment rule applicable to the burden of proof for sentencing factors."); Harris v. United States, 536 U.S. 545, 550, 568 (2002) (reaffirming *Winship* after considering "whether *Winship* stands after *Apprendi*."); *Apprendi*, 530 U.S. at 487 ("We limit [*McMillan*'s] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself.").

109. *Grier*, 475 F.3d at 578 (Ambro, J., concurring) ("[I]t is not *Apprendi, Blakely*, or *Booker* that solve the due process question here, as suggested by the majority. Instead, it is *McMillan*.").

110. *McMillan*, 477 U.S. at 84.

The "commission of a separate offense" enhancement factor[111] requires proof by an evidentiary standard higher than the preponderance of the evidence standard because it has the effect of "relieving the prosecution of its burden of proving guilt,"[112] "create[es] a separate offense calling for a separate penalty,"[113] and most importantly could be construed as an attempt on the part of the government "to evade the commands of *Winship*."[114]

The facts in *Grier* clearly establish the existence of the first two *McMillan* factors. By proving the existence of the separate offense enhancement to the sentencing judge by a preponderance of the evidence, the government was relieved of its burden to prove beyond a reasonable doubt that Grier had committed the crime of aggravated assault.[115] Furthermore, the government was able to effectively punish Grier for conduct associated with a separate crime.[116] This point was best articulated by Judge Ambro in her concurrence:

> [I]f our society, through its law, deems a certain fact worth punishing (or warranting additional punishment), then the Constitution commands certain procedural protections attending the finding of that fact. Rather than following this principle of fundamental fairness, however, our law—through use of the Federal Sentencing Guidelines—criminalizes activity "on the cheap." Despite *Apprendi* and its progeny, we continue to allow sentencing judges, once a jury has found beyond a reasonable doubt that a defendant has committed *one* crime, then to find him guilty by a preponderance of the evidence of *other* crimes for which he was *not* tried—or worse, tried and acquitted—and to sentence him as if he had been convicted of *them* as well. In effect, we have a shadow criminal code under which, for certain suspected offenses, a defendant receives few of the trial protections mandated by the Constitution.[117]

Satisfying the third *McMillan* factor—that of an attempt on the part of the government to "evade the commands of *Winship*"[118]—is somewhat more complicated. The Court in *Winship* confirmed that the beyond a reasonable doubt standard was not merely a constitutional assumption, but rather a constitutional requirement under the Due Process Clause,[119] and therefore extended the requirement not only to all

111. *See supra* note 13.

112. *McMillan*, 477 U.S. at 86–87.

113. *Id.* at 87–88. The government never has to prove beyond a reasonable doubt that the appellant committed the crime of aggravated assault under 18 PA. CONS. STAT § 2702(a).

114. *Id.* at 89 (citation omitted).

115. *See Grier*, 475 F.3d at 559. Grier had been charged with aggravated assault by Pennsylvania authorities, but for reasons not indicated in the record, those charges were dropped. *Id.*

116. *Id.* at 574 (Ambro, J., concurring).

117. *Id.*

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

119. *Winship*, 397 U.S. at 364 ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction

facts necessary to constitute the crime charged, but also to all factors that would have the same effect on a defendant's liberty and societal reputation as those of a criminal conviction.[120] In other words, the finding of any factor that would increase a defendant's loss of liberty or negatively stigmatize an individual in a way that is similar to the stigmatization associated with a criminal conviction should comport with the requirements necessary to ensure the due process of law—including the right to have the aforementioned factors be proven beyond a reasonable doubt.[121]

The Court's due process concerns in *Winship* apply with even greater force to the sentencing factor found by a preponderance of the evidence in *Grier*. While affirming the district court's finding that the appellant in *Grier* committed aggravated assault under Pennsylvania law did not expose him to a prison sentence that exceeded the statutory maximum (and thus comported with *Apprendi*),[122] the finding impacted his loss of liberty[123] and carried with it the same stigmatization as an aggravated assault conviction. The separate offense sentence enhancement gave the court the opportunity to make a determination that the defendant was guilty of aggravated assault based on a preponderance of the evidence, whereas the same determination would have required guilt beyond a reasonable doubt had the appellant been charged with aggravated assault.[124] In *Winship*, Justice Harlan made a similar observation

> about the juvenile delinquency determination at issue in that case and found that a statute that permits a determination of juvenile delinquency, founded on a charge of criminal conduct, to be made on a standard of proof that is less rigorous than that which would obtain had the accused been tried for the same conduct in an ordinary criminal case . . . offends the requirement of fundamental fairness embodied in the Due Process Clause . . . .[125]

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except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

120. *Id.* at 366–68.

121. *Id.* at 363–64. The Court in *Winship* stated that:

> The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

Id.

122. *Supra* notes 58–61 and accompanying text.

123. The four-level enhancement increased the recommended prison sentence by fifty percent. *Grier*, 475 F.3d at 560.

124. *See Grier*, 475 F.3d at 593 (Sloviter, J., dissenting) ("Although Grier pled guilty to possession of a firearm by a convicted felon . . . no jury found him guilty of aggravated assault, a different and independent offense. Grier's guilty plea to one offense . . . cannot justify diminution of the applicable standard of proof applied by a judge for a separate offense.").

125. *Winship*, 397 U.S. at 369 (Harlan, J., concurring).

Although Justice Harlan's finding was made on the grounds that the statute at issue violated the Due Process Clause of the Fourteenth Amendment, the conclusion is certainly applicable under the Fifth Amendment to the parallel circumstances presented in *Grier*.

The separate offense sentence enhancement found by a preponderance of the evidence in *Grier* exposed the appellant to punishment for a crime for which he was never convicted.[126] The separate offense enhancement thus relieved the prosecution of its burden to prove beyond a reasonable doubt that Grier was guilty of aggravated assault. The separate offense enhancement also met the second factor necessary to create an exception under *McMillan*, warranting the use of the beyond a reasonable doubt standard,[127] in that it allowed the court to punish Grier for a separate crime defined by the legislature of Pennsylvania without convicting him of that second crime. The separate offense enhancement also triggers the third exception described in *McMillan*, in that it is an attempt by the legislature to "evade the commands of *Winship*."[128] The commands of *Winship* serve to safeguard the due process rights of criminal defendants when liberty and stigmatization are at stake, as they were for Grier.[129] Sentencing factors that satisfy exceptions under *McMillan* require a heightened evidentiary standard[130] and the dual aims of *Winship* require the proof beyond a reasonable doubt standard.[131] It follows that in order to comport with due process under the Fifth Amendment, the finding of the commission of a separate offense as grounds for an enhancement to Grier's sentence should have been proven beyond a reasonable doubt.

126. *See Grier*, 475 F.3d at 574 (Ambro, J., concurring).

127. *McMillan*, 477 U.S. at 87–88.

128. *Id.* at 89.

129. *Winship*, 399 U.S. at 363–64.

130. *McMillan*, 477 U.S. at 88; *Grier*, 475 F.3d at 580 (Ambro, J., concurring).

131. *Winship*, 397 U.S. at 363–68.