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No Mere Acquittal: *Pimentel-Lopez* and the Use of Declarations of Innocence to Clarify Sentencing

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ABSTRACT

When Jesus Pimentel-Lopez was found guilty of possession with the intent to distribute methamphetamine, the jury returned a special verdict declaring that he had possessed "less than 50 grams" of the drug in commission of the offense. The sentencing court, however, found that a preponderance of the evidence demonstrated that he had possessed a far greater amount and used this higher amount to calculate his sentence. This sentencing practice is not uncommon; Supreme Court precedent confirms that sentencing courts retain wide discretion to consider acquitted conduct—conduct for which the defendant was found not guilty—at trial as long as this conduct can be proven by a preponderance of the evidence. Further, multiple circuits, operating under the notion that special verdicts signify acquittals of the conduct they assess, leave sentencing courts free to consider facts alternative to those found in a special verdict when calculating a defendant's sentence.

But, in *United States v. Pimentel-Lopez*, the Ninth Circuit held that the sentencing court was bound by the jury's factual determination that Pimentel-Lopez possessed "less than 50 grams," precluding it from finding a contradictory amount. In its opinion, the Ninth Circuit emphasized that the jury's unanimous factual finding had not merely acquitted Pimentel-Lopez of possessing an amount lower than fifty grams. This finding is significant because, if the special verdict is neither acquittal nor a finding of guilt, the Pimentel-Lopez court appears to have recognized a novel verdict: a prejudgment declaration of factual innocence.

This Comment explores questions regarding declarations of innocence that surface in light of Pimentel-Lopez's apparent recognition of a prejudgment declaration of factual innocence. I point out that declarations of innocence could be used to provide clarity to juries, judges, and societal actors; give meaning to the rhetoric of innocence in American jurisprudence; ensure consistency with the current post-trial exoneration practice; and prevent judicial abuses. Yet, at the same time, these declarations of innocence could confuse jurors, usurp judicial authority, and disrupt current judicial practices. I ultimately conclude that declarations of innocence should be used only to determine a specific category of facts—specific offense characteristics and adjustments under the Federal Sentencing Guidelines—in order to optimize their benefits and minimize their negative consequences.

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INTRODUCTION

United States v. Pimentel-Lopez,[1] decided recently by the Ninth Circuit, signifies a potential reconceptualization of federal criminal sentencing. At the trial level, a jury returned a special verdict declaring beyond a reasonable doubt that Jesus Pimentel-Lopez possessed "[l]ess than 50 grams . . . of methamphetamine," as opposed to between "50 . . . [and] 500 grams" or "500 grams or more."[2] At sentencing, however, the district court found by a preponderance of the evidence that the defendant was accountable for 4.536 kilograms (4536 grams). The court then used the 4.536 kilograms to calculate the defendant's sentence, resulting in a much lengthier term than would have been imposed had the jury's finding of less than 50 grams been used.[3]

On appeal, the Ninth Circuit reversed this finding and held that the sentencing court could not deviate from the amount determined by the jury. In doing so, the court established "that the jury didn't merely acquit" the defendant of possessing an amount greater than or equal to 50 grams.[4] Instead, the panel bound the sentencing court to the jury's finding that the defendant possessed less than 50 grams—in effect, constructively declaring him innocent of possessing any other amount.

Conversely, other circuits interpret facts found in a special jury verdict as an acquittal of conduct not found beyond a reasonable doubt.[5] According to the sentencing principles laid out in *United States v. Watts*,[6] sentencing courts are free to find that a defendant in fact committed acquitted conduct, so long as they can support this determination under a preponderance of the evidence standard. This interpretation leaves sentencing courts free to find

1. (*Pimentel-Lopez I*), 828 F.3d 1173 (9th Cir.), *reh'g en banc denied*, *amended and superseded by* 859 F.3d 1134 (9th Cir. 2016).
2. *Id.* at 1175.
3. *Id.* The court used the commonly accepted practice, discussed further in Part I, that judges may use the preponderance of the evidence standard at sentencing. *See* Alan Ellis & Mark H. Allenbaugh, *Federal Sentencing: Standards of Proof at Sentencing* 24 Criminal Justice (2009), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_24_3_federalsentencing.authcheckdam.pdf ("[C]ourts have continued to assume that preponderance of the evidence is a sufficient evidentiary standard . . . ." at sentencing).
4. *Id.* at 1177.
5. *See, e.g.*, United States v. Webb, 545 F.3d 673, 677 (8th Cir. 2008); United States v. Magallanez, 408 F.3d 672, 685 (10th Cir. 2005); United States v. Goodine, 326 F.3d 26, 27, 33–34 (1st Cir. 2003); United States v. Smith, 308 F.3d 726, 745–46 (7th Cir. 2002).
6. 519 U.S. 148 (1997) (per curiam).

additional or alternative facts, and then use these facts to increase the defendant's sentence under the Federal Sentencing Guidelines so long as the sentence does not exceed the statutory maximum. Thus, in these circuits, if a jury were to find a defendant possessed between 0 and 50 grams of a substance in a special verdict, the sentencing court would be free to find that the preponderance of the evidence demonstrated that the individual instead possessed 100 grams. As a result, the court could give the defendant a longer sentence than he would have received under the jury's finding.

In *Pimentel-Lopez*, however, the Ninth Circuit found that the fact found by the jury—that the defendant specifically possessed "less than 50 grams"—bound the sentencing court, meaning the sentencing court could not find alternative or additional facts that were incompatible with those found in the special verdict. Under this determination, the *Pimentel-Lopez* sentencing court could not increase the defendant's sentence using facts not found by the jury. By binding the sentencing court, the Ninth Circuit affirmed that the jury did not merely acquit Pimentel-Lopez of possessing a greater amount. Instead, it went a step further, declaring him factually innocent of possessing more than 50 grams of a substance. Broadly speaking, then, this holding seemingly permits a jury to declare the defendant to be factually innocent of specific conduct that is irreconcilable with the facts found in the special verdict.

Pimentel-Lopez's precedential impact depends on whether the reader takes a narrow or broad view of the holding. A narrow reading would determine that special verdicts bind sentencing judges to facts found beyond a reasonable doubt in specifically crafted jury instructions. But a broader reading reveals the possibility that the court, in an unprecedented manner, recognized the power of a jury to declare a defendant factually innocent of certain conduct through the use of a special verdict. This reading not only suggests a possible doctrinal reform regarding the judge and jury's respective roles in federal criminal sentencing, but also signals a deviation from traditional sentencing practices—one that permits previously unheard of findings of innocence. Indeed, the court's insistence that this case is not a "mere acquittal"[7] recognizes the jury's ability to declare factual innocence, rather than just guilty or not guilty.

This broader view builds on the fact that juries currently possess the power to find facts through the use of a special verdict—a specific factual question presented to the jury. Some uses of special verdicts include

7. *Pimentel-Lopez I*, 859 F.3d at 1142 ("Here . . . the record is clear that the jury didn't merely acquit defendant of possessing 50 grams or more of methamphetamine . . . .").

providing more information for appellate review, helping clarify issues for the jury, or "provid[ing] information for the judge *to consider* in . . . sentencing the defendant."[8] *Pimentel-Lopez* goes further, suggesting that these factual findings are not mere considerations but instead serve to bind the sentencing judge. This binding effect elevates a special verdict's utility as a tool that can do more than merely provide guidance for sentencing courts.

This Comment confronts the use of a special verdict in *Pimentel-Lopez* and uses the declaration of factual innocence as a starting point for a broader inquiry into the role of the jury and findings of innocence in the broader American judicial system. Currently, juries have the power to render one of two verdicts: guilty or not guilty. A verdict of not guilty does not signify that the individual did not commit the crime. Instead, it signifies only that the prosecution failed to prove the defendant's guilt beyond a reasonable doubt. Without clear findings related to factual guilt or innocence, confusion remains regarding the accused's factual culpability: A verdict of not guilty occupies a wide spectrum between guilt and innocence, where actors cannot determine whether the accused is truly innocent or probably guilty, but whose guilt cannot be proven beyond a reasonable doubt.

The lack of clarity associated with a not guilty verdict carries significant procedural and societal ramifications. Procedurally, it leaves the sentencing court free to find alternative facts by a preponderance of the evidence at sentencing, which can be used to increase or decrease an accused individual's sentence.[9] Similarly, being found not guilty can have significant societal ramifications for the accused, including a mark on an individual's criminal record and effects of stigma that come with a criminal accusation.[10]

A not guilty verdict also belies the strong rhetoric of the American judicial system that defendants are presumed innocent until proven guilty—a concept reflected in the way the public (and sometimes even judges)[11] uses the

8. Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263, 297–98 (2003) (emphasis added).

9. *See* discussion *infra* Part I.

10. *See* discussion *infra* Part II; *see also* Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1305–07 (2000) (discussing the ramifications of professional and personal stigma after having been acquitted of a crime).

11. *See, e.g.*, Oregon v. Ice, 555 U.S. 160, 174 (2009) (Scalia, J., dissenting) ("[T]he difference between consecutive and concurrent sentences is more important than a jury verdict of innocence on any single count . . . ."); United States v. Young Bros., 728 F.2d 682, 686 (5th Cir. 1984) ("The jury returned verdicts of innocent on all counts with respect to defendants . . . ."); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329,

terms not guilty and innocent interchangeably.[12] Despite this rhetoric, in the United States a true finding of innocence—a finding that the defendant did not factually commit an offense—cannot be won at trial, although declarations of innocence may be available in certain post-conviction proceedings.[13] As such, *Pimentel-Lopez*'s binding declaration of innocence signifies a significant departure from current practices.

Part I provides a history of sentencing and a summary of sentencing procedures used in American federal courts today. Part II outlines the facts in *Pimentel-Lopez*, the legal background and history surrounding the sentencing issues in the case, the jury's special finding, the Ninth Circuit opinion, opposition to the holding, and the current state of the proceedings. Part III outlines arguments for and against allowing juries to declare factual innocence. First, it briefly demonstrates that a special verdict form is a constitutional means of declaring factual innocence. Then, the Part discusses the theoretical and policy arguments for and against introducing declarations of innocence. Ultimately, Part IV concludes that declarations of factual innocence should be used only in sentencing, as was done in *Pimentel-Lopez*, to maintain an efficient and effective trial system.

I. SENTENCING PRACTICE IN THE UNITED STATES

A deeper understanding of the federal sentencing practices and U.S. Supreme Court precedent clarifies the ramifications of *Pimentel-Lopez*. This Part provides a brief survey of these topics.

A. The Evolution of the Federal Sentencing Guidelines

The Federal Sentencing Guidelines set by the U.S. Sentencing Commission (U.S.S.C.) play an integral role in federal criminal sentencing. Born out of the Sentencing Reform Act of 1984, the U.S.S.C. formulated the Guidelines to achieve more certainty and eliminate disparate sentences for similar crimes throughout the country.[14] Though officially only advisory

378–79 n.232 (1995) (providing examples of judges using the term "innocent" rather than "not guilty").

12. *See generally* Laufer, *supra* note 11 (discussing the relationship between the concept of factual innocence and its use in practice).
13. *See id.* at 335.
14. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 2 (1998).

today, the Guidelines were mandatory when they were enacted in 1987.[15] Their introduction stripped judges of much of their discretion in criminal sentencing: Judges were no longer free to use broad discretion in sentencing, but were instead forced to adhere to the Guidelines' formulaic approach.

Though constrained by the Guidelines, judges remained free to consider acquitted conduct when calculating the sentence so long as they believed the conduct had been proven by a preponderance of the evidence. This use of acquitted conduct was established in *United States v. Watts*.[16] In the case, Watts was acquitted on a charge of using a firearm in relation to a drug offense, though he was convicted of the underlying drug offense.[17] At sentencing, the district court found by a preponderance of the evidence that Watts had possessed a gun in relation to the offense and increased his sentence accordingly.[18] The Supreme Court upheld this ruling, declaring that a sentencing court could consider conduct of which the defendant had been acquitted in imposing a sentence so long as the government proved the conduct by a preponderance of the evidence.[19] Referencing the "longstanding principle that sentencing courts have broad discretion to consider various types of information," the Court found that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion."[20] The Court went on to remark that an acquittal "can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt."[21] Thus, with a not guilty verdict, a jury could not have rejected any facts proven beyond a reasonable doubt, leaving judges free to find those facts to be proven under the lesser preponderance of the evidence standard.[22]

But three years later, the Court appeared to curtail this power to consider acquitted conduct in *Apprendi v. New Jersey*,[23] which held that any conduct that increased an individual's sentence above the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.[24] The Court clarified that not all facts used for sentencing must go

15. *See infra* note 32; Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 699–700 (2005).
16. 519 U.S. 148 (1997) (per curiam).
17. *Id.* at 149–50.
18. *Id.* at 150.
19. *Id.* at 149.
20. *Id.* at 151–52.
21. *Id.* at 155 (quoting United States v. Putra, 78 F.3d 1386, 1394 (9th Cir. 1996)).
22. *Id.* at 155–56.
23. 530 U.S. 466 (2000).
24. *Id.* at 490.

before a jury; rather, only facts that "expose[] a defendant to a punishment greater than that otherwise legally prescribed" required jury factfinding.[25]

Then, in *Blakely v. Washington*,[26] the Court invalidated Washington state's determinate-sentencing scheme—a scheme similar to the Federal Sentencing Guidelines—because it did not require juries to decide facts that increased the guideline sentence,[27] a result that seemed to suggest the Guidelines could face similar challenges.[28] In the case, the Court considered the sentence for an individual who was found guilty of kidnapping his wife. The sentencing court gave the defendant a ninety-month sentence for "deliberate cruelty," departing from the fifty-three-month sentence that would have been implemented under the mandatory guideline scheme.[29] On appeal, the Court held that the enhancement for deliberate cruelty violated the defendant's Sixth Amendment right to a jury trial.[30] Noting that the right to a jury was foundational to the Founding Father's conception of the separation of powers, the Court determined that any facts used to increase a sentence under the mandatory guidelines had to be presented to a jury.[31] The Court's holding had narrow application, as it only invalidated Washington state's system. Broadly speaking, however, *Blakely* and *Apprendi* together suggested that facts necessary to increase a mandatory guideline sentence required jury determinations.

Without clear guidance on the scope of *Blakely*, courts applied its holding inconsistently until 2005. That year, the Supreme Court decided *United States v. Booker*,[32] which held that the mandatory sentencing guidelines should not, in fact, be mandatory at all. Instead, the Court held that they were merely advisory.[33] This ruling had radical implications for *Blakely*. As discussed, *Blakely* suggested that any facts that could increase a mandatory guideline sentence had to be submitted to the jury. Under an advisory scheme, however, sentencing courts were free to disregard the

25. *Id.* at 483 n.10.
26. 542 U.S. 296 (2004).
27. *Id.*
28. *See* Blakely v. Washington, 542 U.S. 296 (2004) (O'Connor, J. dissenting) (noting that the structure of the Federal Guidelines could not be distinguished from the Washington sentencing scheme).
29. *Id.* at 296. As noted, this scheme was similar to the U.S. federal scheme in place at the time. *See supra* note 28.
30. *Id.* at 305.
31. *Id.* at 305–06.
32. 543 U.S. 220 (2005).
33. Mark S. Hurwitz, *Much Ado About Sentencing: The Influence of* Apprendi, Blakely, *and* Booker *in the U.S. Courts of Appeals*, 27 JUST. SYS. J. 81, 84–85 (2006).

sentence prescribed by the Guidelines. Thus, instead of requiring facts that would increase a sentence under the Guidelines to be proven by a jury, the Court instead only required a jury to find facts that would increase a sentence above the statutorily determined maximum.[34] In other words, under *Booker*, the sentencing judge remains free to depart from a Guideline sentence by a preponderance of the evidence, so long as the offense does not increase the statutory maximum.[35]

Yet the *Booker* Court still instructed judges to refer to the Guidelines when determining sentences,[36] leaving some confusion about how the Guidelines should be used.[37] The Court clarified this instruction in *Gall v. United States*,[38] when it stated that "a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."[39]

Thus, the result of *Apprendi*, *Blakely*, *Booker*, and *Gall* is as follows: If a court can provide written justification for increasing the sentence above the guideline, but within the statutory maximum, the court is free to use the acquitted conduct in sentencing, so long as the judge can (1) find the conduct by a preponderance of the evidence and (2) justify the departure from the Guidelines in a written opinion. In practice, then, the Guidelines prove to be a determinative starting point for many individuals' sentences. As evidence of this practical impact, courts delivered sentences within the Guidelines in 48.6 percent of cases between October 1, 2015, and September 30, 2016.[40]

B. Federal Sentencing Guidelines in Practice

As discussed above, sentencing courts must calculate the individual's sentencing range within the Guidelines. This guideline range is presented in

34. *See* Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 21 (2016).
35. *See* Ryan W. Scott, Booker*'s Ironies*, 47 U. TOL. L. REV. 695, 713 (2016).
36. *Booker*, 543 U.S. at 259;
37. *See also* Johnson, *supra* note 34, at 22 ("In the wake of *Booker*, it was not completely clear how the newly minted advisory Guidelines regime should operate.").
38. 552 U.S. 38 (2007).
39. *Id.* at 46.
40. U.S. SENTENCING COMM'N, QUARTERLY DATA REPORT: 4TH QUARTER RELEASE, 11 tbl.8 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_16_Final.pdf [https://perma.cc/EB4R-KS9R]. Interestingly, courts only made upward departures from the Guidelines in 2.4 percent of cases, while the majority of these departures actually resulted in shorter sentences for defendants. *Id.*

a Pre-Sentence Report (PSR) prepared by probation services to provide a baseline calculation of the sentence according to the Guidelines.[41] Using the Guidelines, courts first calculate the defendant's base offense level, as established by the underlying statutory offense.[42] The Sentencing Guidelines Manual shows a numerical "base offense level" for each statutory violation. To illustrate, "bribery to obtain public office" in violation of 18 U.S.C. §§ 210, 211 carries a base offense level of eight,[43] while "first-degree murder" carries a base offense level of forty-three.[44]

After finding the base offense level, the Guidelines instruct courts to examine the specific offense characteristics of the charged conduct. The special characteristics include, for example, the amount of a drug involved in a narcotics charge,[45] whether the individual brandished or discharged a gun,[46] or whether the offense involved bribery or intimidation.[47] These can increase or decrease the base offense level. For instance, if a defendant inflicts serious bodily injury as a result of an attempted first-degree murder, the base offense level increases from thirty-three to thirty-five.[48]

Next, the court determines whether there are further adjustments to the offense level. The adjustments include victim-related adjustments (for example if the victim of an "offense against the person" is an elected official, the sentence increases by six levels),[49] role-related adjustments (for example, if the individual was the organizer or leader of a crime against a person, the base level sentence will be increased four levels),[50] obstruction-related adjustments (for example, if the defendant provided false information to a judge in a case involving a crime against a person, then the sentence carries an increase of two levels),[51] and acceptance-of-responsibility adjustments (for example, if the defendant clearly takes responsibility for the offense, them the

41. 18 U.S.C. § 3552 (2012). If a more comprehensive report is needed, it is done by the Bureau of Prisoners or a psychiatric professional.
42. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 1B1.1(a) (2016).
43. *Id.* § 2C1.5.
44. *Id.* § 2A1.1.
45. *Id.* § 2D1.1(c).
46. *E.g.*, *id.* § 2A2.2(b)(2).
47. *E.g.*, *id.* §§ 2C1.1(b), 2C1.8(b)(5).
48. *Id.* § 2A2.1.
49. *Id.* § 3A1.2(b).
50. *Id.* § 3B1.1(a).
51. *Id.* § 3C1.1(4)(f).

sentence will be decreased by two levels).[52] The court also can also make adjustments for multiple-counts.[53]

After looking at the previously discussed adjustments, adjustments based on the individual's criminal history are considered. These adjustments can increase or decrease the sentence based on the frequency and severity of prior convictions.[54] Then, the court considers any grounds to depart from the guideline range (for instance, if the defendant has substantially assisted the authorities, then the court may depart from the guidelines).[55] This determination does not provide a definitive numerical increase or decrease based on conduct. Instead, it allows judges to exercise discretion based on the individual's conduct.[56] These grounds for departure provide ready-made explanations for judges who wish to depart from sentences since judges are not permitted to depart from the guideline range unless they elucidate reasons for doing so.[57]

Finally, once the previous steps have been taken, the court uses a table (see *infra* Table 1 below) to cross-reference the individual's offense level with their criminal history points to determine the sentence as a range of months.[58]

52. *Id.* § 3E1.1.
53. *Id.* § 3D1.3.
54. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 15–16 (2015).
55. GUIDELINES MANUAL, *supra* note 42, § 5K1.1.
56. As the Guidelines state, "[t]he appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of . . . [inter alia] the truthfulness, completeness, and reliability of any information or testimony provided by the defendant . . . ." *Id.* § 5K1.1(a).
57. Gall v. United States, 552 U.S. 38, 46 (2007) (holding that judges must explain the rationale behind any departures from the calculated offense in their opinion); GUIDELINES MANUAL, *supra* note 42, § 5K2.0(e).
58. FEDERAL SENTENCING: THE BASICS, *supra* note 54, at 16; U.S. SENTENCING COMM'N, CRIMINAL HISTORY PRIMER 1 (2015), http://www.ussc.gov/sites/default/files/pdf/training/primers/2015_Primer_Criminal_History.pdf [https://perma.cc/5T4T-89GE].

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
Zone B	9	4–10	6–12	8–14	12–18	18–24	21–27
	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
Zone D	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78

Table 1: A Cross Section of U.S.S.C., U.S. Sentencing Guidelines 2016 Sentencing Table

II. *PIMENTEL-LOPEZ*'S IMPACT ON SENTENCING

This Part examines *Pimentel-Lopez*'s development at each level of trial and appeal. It then goes on to examine the ramifications of *Pimentel-Lopez* for Ninth Circuit jurisprudence and that of the larger American legal system.

A. Trial: Jury Issues Special Verdict Finding Possession of Less Than 50 Grams

On June 4, 2014, a jury found Jesus Pimentel-Lopez guilty of one count of conspiracy to possess controlled substances with the intent to distribute methamphetamine and another count of possession of methamphetamine with intent to distribute.[59] As part of its finding, the jury issued a special verdict unanimously finding beyond a reasonable doubt that the amount of narcotics attributable to Pimentel-Lopez was "less than 50 grams of a substance containing a detectable amount of methamphetamine," *see infra* Figure 1 below.[60]

Figure 1: The special verdict form returned in *Pimentel-Lopez*

2a. Having found Jesus Pimentel-Lopez guilty of the charge in Count II of the Indictment, we unanimously find beyond a reasonable doubt the quantity of methamphetamine possessed with intent to distribute to be:

_X_ Less than 50 grams of a substance containing a detectable amount of methamphetamine.

_____ 50 grams or more, but less than 500 grams, of a substance containing a detectable amount of methamphetamine.

_____ 500 grams or more of a substance containing a detectable amount of methamphetamine.

Although the jury found this fact in a special verdict, the term special verdict is a misnomer. A special verdict (or special interrogatory) is not, in actuality, a verdict. Permitted by Federal Rule of Civil Procedure (FRCP) 49,[61] the special verdict is a tool by which a jury can issue a specific finding of fact, such as the amount of a drug possessed or whether the individual used a

59. Transcript of Record (Vol. 2) at 187, *Pimentel-Lopez I*, 828 F.3d 1173 (2016) (No. 14-30210).
60. *Id.*
61. FED. R. CIV. P. 49.

firearm in the commission of an offense.[62] Either the prosecution, defense, or the court can request the provision of specific instructions to the jury to obtain a specific factual finding. It may do so by "submitting written questions susceptible of a categorical or other brief answer," "submitting written forms of the special findings that might properly be made under the pleadings and evidence," or "using any other method that the court considers appropriate."[63] The jury can also submit a general verdict with a written explanation.[64] Thus, while a general verdict can only proclaim an individual guilty or not guilty, a special verdict can focus on the specific conduct. There are no specific prohibitions on their use.[65]

After the jury delivered the general and special verdicts in Pimentel-Lopez's case, the case proceeded to sentencing. Had the guideline sentence been calculated using the "less than 50 grams" found by the jury, Pimentel-Lopez's offense level would have been about twenty-eight, including adjustments.[66] Coupled with his criminal history level of three, this would have resulted in a maximum sentence of about 97–121 months.[67] The government, however, argued that Pimentel-Lopez possessed at least 1.5 kilograms (1500 grams) of methamphetamine but less than 5 kilograms (5000 grams).[68] After adjustments, the final offense level would be set at thirty-four, coupled with his criminal history level of three, resulting in a maximum sentence of 235 months.[69] The government took care to note that this did not run afoul of *Apprendi* because it did not increase the statutory maximum for the offense, which was twenty years.[70] The government believed that the judge could find this increased amount under the preponderance of the evidence standard, noting that the group of coconspirators claimed that Pimentel-Lopez regularly "had more meth on him" than was found by the jury.[71]

62. Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV 15, 21 (1990).
63. FED. R. CIV. P. 49(a)(1)(A)–(C).
64. *Id.* at 49(b).
65. United States v. Desmond, 670 F.2d 414, 416 (3d. Cir. 1982) (noting that although special verdicts are disfavored, there is no per se rule against their use).
66. GUIDELINES MANUAL, *supra* note 42, § 2D1.1(c)(6).
67. *Id.* § 5A.
68. Sentencing Memorandum at 6, *Pimentel-Lopez I*, 828 F.3d 1173 (9th Cir. 2016) (No. 14-30210).
69. GUIDELINES MANUAL, *supra* note 42, § 5A.
70. Indictment at 2, *Pimentel-Lopez I*, 828 F.3d 1173 (No. 14-30210).
71. Sentencing Memorandum, *supra* note 68, at 7.

B. Sentencing Hearing: Court Finds a Greater Amount by the Preponderance of the Evidence and Increases Sentence

At the sentencing hearing, the government called a case agent to the stand to provide testimony regarding information in an unrecorded and unsworn video that indicated Pimentel-Lopez possessed large amounts of drugs, which the court then referenced in its sentencing decision.[72] The court also referenced testimony at trial that suggested Pimentel-Lopez may have possessed a greater amount of drugs. Ultimately, the court found that Pimentel-Lopez possessed between 1500 and 5000 grams, contradicting the jury's finding. The court noted that the "quantities that were calculated . . . were established through multiple sources and testimony."[73] Using this determination, the court sentenced Pimentel-Lopez to 240 months, the statutory maximum for the offense.[74] By refraining from exceeding the statutory maximum, the court ensured that it did not violate *Apprendi*.

Pimentel-Lopez appealed his sentence. He argued, that, since the jury determined that it was beyond a reasonable doubt that less than 50 grams were attributable to Pimentel-Lopez, it was an unconstitutional usurpation of the jury's factfinding role for the district court to determine by a lesser standard that he possessed 4536 grams.[75] According to Pimentel-Lopez, by selecting a range of "less than 50 grams" when they had the opportunity to select "50–500 grams" or "greater than 500 grams," the jury constrained the sentencing court. The amount used at sentencing should have fallen "within the range selected by the jury, because by selecting a range of drug amount the jury not only determines beyond a reasonable doubt a particular drug amount range, it also specifically determines beyond a reasonable doubt what the drug amount is not."[76] In other words, by unanimously selecting a specific range in lieu of other ranges, the jury ruled out any amounts outside of the range beyond a reasonable doubt.

The government, alternatively, again argued that, because the judge did not increase the sentence beyond the statutory maximum, the sentence was consistent with *Apprendi*.[77] The government instead argued that the

72. Appellant's Response to Petition for Rehearing En Banc at 7–8, *Pimentel-Lopez I*, 828 F.3d 1173 (No. 14-30210).
73. Sentencing Transcript at 5–6, *Pimentel-Lopez I*, 828 F.3d 1173 (No. 14-30210).
74. *Id.* at 28.
75. Appellant's Reply Brief at 2–3, *Pimentel-Lopez I*, 828 F.3d 1173 (No. 14-30210).
76. *Id.* at 4.
77. Answering Brief of the United States at 14–16, *Pimentel-Lopez I*, 828 F.3d 1173 (No. 14-30210).

sentencing court was free to find an alternative amount of drugs by a preponderance of the evidence at sentencing under Ninth Circuit precedent.[78]

C. Ninth Circuit Opinion: The Special Verdict Binds the Sentencing Court

On appeal, the Ninth Circuit agreed with Pimentel-Lopez and held that the sentencing judge was bound by the jury's determination. Judge Alex Kozinski, writing the opinion, stated that the *Apprendi* line of cases "is beside the point."[79] The opinion continues:

> This is not a case where the jury failed to find a fact under the exacting standard applicable to criminal cases. . . . The district court cannot attribute more than that amount to defendant without contradicting the jury on a fact it found as a result of its deliberations. District judges have many powers, but contradicting juries as to findings of facts they have been asked to make is not among them.[80]

The court explained that "there is no inconsistency between a jury's acquittal as to a particular fact that had to be proved beyond a reasonable doubt and a later finding that the same fact is proved by a preponderance of the evidence." "But," the court noted, "there *is* an inconsistency between a jury's finding that the amount is *less* than 50 grams and a later finding by the judge that the amount is *more* than 50 grams."[81] Under the court's logic, because the jury form stated that the jury unanimously found the "amount to be less than 50 grams," it would be impossible for the jury to have also found an alternative amount greater than 50 grams.

Kozinski's opinion states that the jury did not "merely acquit" Pimentel-Lopez of possessing an amount of 50 grams or more.[82] In doing so, the Ninth Circuit drew a distinction between affirmative findings and acquittals. Accepting the panel's logic, an acquittal constitutes what could be called a "non-finding," under which a judge can find alternative facts by a preponderance of the evidence at the sentencing. This acquittal does not

78. *Id.*
79. *Pimentel-Lopez I*, 828 F.3d 1173, 1176 (9th Cir.), *reh'g en banc denied*, *amended and superseded by* 859 F.3d 1134 (9th Cir. 2016).
80. *Id.*
81. *Id* at 1177.
82. *Id.*

exonerate the individual of the conduct for which he was found not guilty. According to the panel, such an acquittal did not occur in *Pimentel-Lopez*. Instead, the Ninth Circuit held that a jury's special verdict constituted an affirmative finding amounting to a declaration that the charged individual was factually innocent of the conduct addressed in the special verdict form. In other words, the jury's finding that Pimentel-Lopez possessed "less than 50 grams" was not an acquittal of possessing a greater amount, but rather was an irrefutable factual determination that Pimentel-Lopez could not have possessed an amount greater than 50 grams. In effect, then, the court exonerated Pimentel-Lopez, declaring him factually innocent of possessing any amount above 50 grams.

The court pointed to prior Ninth Circuit cases to support its holding. Referencing *Mitchell v. Prunty*,[83] the court considered the ramifications of a special verdict on a general verdict. There, the jury delivered a special verdict that an individual was not the driver of a car that ran over a murder victim's body. Although there was no other evidence of guilt, the jury then delivered a general verdict finding the individual guilty of murdering the victim by driving his car over her body—a general verdict inconsistent with its own special verdict.[84] The Ninth Circuit found that there was insufficient evidence to sustain the conviction, since the jury affirmatively found that he did not drive the car in its special verdict.[85] "Special findings," the court noted, "are dispositive of the questions put to the jury. Having agreed to the questions, the government cannot now ask us to ignore the answers; to do so would be a clear violation of petitioner's Sixth Amendment rights."[86]

Kozinski's opinion in *Pimentel-Lopez* briefly addressed cases from the First, Seventh, Eighth, and Tenth Circuits with opposite holdings. These cases held a jury's special verdict regarding the amount of narcotics possessed amounts to an acquittal, leaving the sentencing court free to find a greater amount by a preponderance of the evidence.[87] As an example, the opinion referenced

83. 107 F.3d 1337 (9th Cir. 1997), *overruled on other grounds by* Santamaria v. Horsley, 133 F.3d 1242, 1248 (9th Cir. 1998) (en banc).
84. *Id.* at 1339, 1342.
85. *Id.* at 1342.
86. *Pimentel-Lopez I*, 828 F.3d at 1176 (quoting Mitchell v. Prunty, 107 F.3d at 1339 n.2).
87. United States v. Webb, 545 F.3d 673, 677 (8th Cir. 2008) (holding that the drug type and quantity could be found by a preponderance of the evidence at sentencing); United States v. Magallanez, 408 F.3d 672, 685 (10th Cir. 2005) (holding that the sentencing court is not bound by jury acquittals regarding drug amounts); United States v. Goodine, 326 F.3d 26, 33–34 (1st Cir. 2003) (holding that finding an amount of drugs by the preponderance of the evidence did not violate *Apprendi*); United States v. Smith, 308 F.3d 726, 744–45 (7th Cir. 2002) (holding that the sentencing court was free to impose a

the Tenth Circuit case *United States v. Magallanez*,[88] where a jury declared in a special verdict that an individual possessed between 50 and 500 grams of a narcotic.[89] There, the Tenth Circuit found the jury's verdict merely acquitted the individual of possessing a larger amount, allowing the sentencing court to find that he possessed a greater amount of the drug.[90] The court held, "[w]hen we review a verdict where the jury did not find a *specific* amount of drugs attributable to the defendant, but a *range*, we only know that the jury found unanimously the amount at the bottom of the range."[91]

The *Pimentel-Lopez* court, however, pointed out that, in *Magallanez*, the jury found that the defendant possessed an amount within a range of drugs (50–500 grams) instead of a specific amount of drugs. The Ninth Circuit considered this to be a crucial distinction: In *Pimentel-Lopez*, the jury affirmatively found a specific amount—"less than 50 grams"—rather than a range.[92] The Ninth Circuit found this dispositive, noting that "where the jury makes no finding as to quantity or finds an unspecified amount, there would be no inconsistency between the verdict and any quantity that the judge finds during sentencing."[93] But, as the *Pimentel-Lopez* court stated:

> [T]he record is clear that the jury didn't merely acquit defendant of possessing 50 grams or more of methamphetamine; it made an affirmative finding "beyond a reasonable doubt" that the amount attributable to defendant was "[l]ess than 50 grams." Our own caselaw, and simple logic, precludes us from vouchsafing sentencing judges the power to make contradictory findings under these circumstances.[94]

sentence incongruous with the jury's findings so long as it did not go above the statutory maximum).

88. 408 F.3d 672.
89. *Id.* at 682.
90. *Id.* at 684.
91. *Id.* at 682.
92. Here, Kozinski finds a distinction between a range of 0 to 50 grams and the affirmative finding that the amount was a specific amount below 50 grams. Thus, the Ninth Circuit's opinion disposes of the idea that the jury's finding should be read as a range of 0 to 50 grams. The Ninth Circuit does not directly address this tenuous distinction, but one can surmise that it hinges on degrees of certainty; a finding of a range suggests a lack of certainty, whereas a finding of a specific amount speaks of something more incontrovertible.
93. *Pimentel-Lopez I*, 828 F.3d 1173, 1177 (9th Cir.), *reh'g en banc denied*, *amended and superseded by* 859 F.3d 1134 (9th Cir. 2016).
94. *Id.*

The court's determination that the sentencing court could not find a greater amount also relied on the fact that the verdict form contained an upper limit to the amount. It noted that "any jury finding that does not set an upper boundary would leave the district court free to find a greater quantity in determining the sentencing range."[95] But by including the upper range, the verdict form effectively permitted the jury to find that *Pimentel-Lopez* was factually innocent of possessing any amount of drugs greater than 50 grams.

D. Petition for Rehearing En Banc Denied

The government petitioned for rehearing en banc after the Ninth Circuit issued its opinion. In the petition, the government argued that the panel should have viewed the special finding as an acquittal of possessing a greater amount,[96] that the Court mistakenly found that *Watts* did not control,[97] and that this finding has long-ranging consequences because it usurped the sentencing court's ability to consider the broad conduct of the convicted at sentencing.[98] The Ninth Circuit requested a response, which Pimentel-Lopez filed. There, he argued that the Ninth Circuit's approach is "fundamentally more fair" than that of other circuits that treat factual findings of drug amounts as acquittals, noting that "it requires the government to offer its evidence at trial and face the rigors of a jury finding an amount beyond a reasonable doubt."[99] Pimentel-Lopez further argued that allowing sentencing courts to rely on hearsay evidence presented only at sentencing, rather than at the trial, was a type of sandbagging that prevents defendants from obtaining just outcomes.[100]

On June 1, 2017, the Ninth Circuit issued an order denying rehearing en banc.[101] The order included an amended opinion and a dissent from denial of rehearing authored by Judge Susan Graber and joined by five other judges.[102] The amended opinion incorporated a hypothetical sample jury

95. *Id.*
96. United States' Petition for Rehearing En Banc at 9–11, *Pimentel-Lopez I*, 828 F.3d 1173 (9th Cir. 2016) (No. 14-30210).
97. *Id.* at 11–14. Recall that *Watts* held that acquitted conduct could be used at sentencing. *See* discussion *supra* Part I.
98. *Id.* at 15–18.
99. Appellant's Response to Petition for Rehearing En Banc, *supra* note 72, at 6.
100. *Id.* at 8.
101. United States v. Pimentel-Lopez (*Pimentel-Lopez II*), 859 F.3d 1134, 1136 (9th Cir. 2017) (denying petition for rehearing en banc, amending and superseding prior opinion).
102. *Id.*

verdict form (one that was not used in the case) that, had it been presented to the jury, would have led to its holding that the jury had merely acquitted Pimentel-Lopez of possessing a greater amount. This form first asked whether the defendant was guilty beyond a reasonable doubt of possessing controlled substances, followed by the option to select either that the defendant possessed "50 grams or more" of the substance or "500 grams or more"—findings that did not incorporate an upper limit.[103] Under this formulation, the jury could not make an affirmative finding that the amount of drugs was less than a certain amount, resulting in an acquittal of possessing drugs greater than 50 grams.[104] Under *Watts*, this would allow the sentencing judge to find a greater amount at sentencing.

The dissent found fault with the panel's logic, arguing that it misunderstood the jury's intended response.[105] For the dissenters, the jury form indicated only that the jury found the government had proven, beyond a reasonable doubt, that Pimentel-Lopez possessed an amount of drugs below 50 grams. This should *not*, the dissent contended, be read as the jury finding, beyond a reasonable doubt, that he did *not* possess any amount *above* 50 grams.[106]

The dissent conceded that "the precise wording of the verdict form, read in isolation, does admit the construction that the panel gave it."[107] But the

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103. *Id.* at 1142. The entire suggested instruction read as follows:

> We, the Jury, unanimously find beyond a reasonable doubt the Defendant, Jesus Pimentel-Lopez:
>
> NOT GUILTY ____
>
> GUILTY ____
>
> of conspiracy to possess controlled substances with the intent to distribute, as charged in the Indictment.
>
> If you find Jesus Pimentel-Lopez not guilty, do not answer Question 1a. If you find Jesus Pimentel-Lopez guilty, then answer Question 1a.
>
> 1a. Having found Jesus Pimentel-Lopez guilty of the charge, do you also unanimously find that the government proved beyond a reasonable doubt that the amount of controlled substance attributable to Jesus Pimentel-Lopez was:
>
> 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine? Yes ____ No ____
>
> 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine? Yes ____ No _____

Id.

104. This is contrasted with the language of the form in the actual case—a verdict beyond a reasonable doubt that Pimentel-Lopez possessed "less than 50 grams" effectively precluded any amount beyond 50 grams.
105. *Pimentel-Lopez II*, 859 F.3d at 1136–37 (Graber, J., dissenting from denial of rehearing en banc).
106. *Id.*
107. *Id.* at 1137.

dissent supported an opposite conclusion by asserting that a verdict form should be interpreted in light of the "jury instructions and the context of the trial as a whole."[108] In the context of a drug trial in which the government offered evidence of several drug transactions, the dissent asserted, it was illogical to conclude that the jury found the amount of drugs could not be, beyond a reasonable doubt, more than 50 grams. Instead, the sentencing court should have been free to find a greater amount.[109]

This disagreement between the majority and dissent boils down to a difference of opinion regarding the jury's intended meaning. According to the majority, the jury found that Pimentel-Lopez had incontrovertibly possessed a specific amount—less than 50 grams—and intended to assert that he could not have possessed an amount in excess of 50 grams. The dissent, alternatively, asserted that the jury found that he possessed 50 grams or less, but did not intend to preclude a finding that he had possessed a greater amount, leaving the sentencing court free to make an alternative finding.[110] In other words, where the majority held that the jury constructively declared Pimentel-Lopez innocent of possessing any amount greater than 50 grams, the dissent reasoned that the jury had merely acquitted him of possessing a greater amount.

The dissenters further noted that the panel's attempt to distinguish from other circuits' decisions—circuit decisions holding that special verdicts did not bind the sentencing court—relied on faulty reasoning.[111] The panel had asserted that those decisions were mere acquittals because they did not involve an "affirmative finding by the jury" that "precluded" a finding of a higher amount at sentencing.[112] But the dissenters pointed out that jury

108. *Id.*
109. *Id.*
110. *Id.* at 1136–37. The dissent further illustrated its position with the following example:

> Suppose that the government offered evidence in this case of two drug transactions, each involving 45 grams of a substance containing a detectable amount of methamphetamine. Suppose further that the jury is persuaded beyond a reasonable doubt that one transaction occurred and that the amount was attributable to Defendant, but that the jury is persuaded to a lesser degree as to the second transaction. Under my reading of the verdict form, the jury would, as it did here, check the box for less than 50 grams. But under the panel's analysis, the jury could not check any box because it did not (and in this example it could not) find beyond a reasonable doubt that the amount attributable to Defendant did not exceed 50 grams.

Id. at 1137.
111. *Id.* at 1138 (finding it improbable that special verdict form similar to those in other circuits could be interpreted differently).
112. *Id.* at 1141.

forms in those cases had used nearly identical language to the special verdict form in *Pimentel-Lopez*, casting doubt on the conclusion that the *Pimentel-Lopez* jury form functioned in a different manner.[113] The dissent noted that the panel had justified these differing conclusions by asserting that the other circuits' decisions wrongfully "assumed" the similar jury findings were acquittals rather than findings beyond a reasonable doubt.[114] "That is one possibility," acknowledged the dissent. But the dissenters submitted that "a more likely possibility is that our sister circuits have *correctly* understood the meaning of the jury findings in the cases before them, and that it is the panel that erred."[115] For the dissent then, the panel's interpretation, rather than the other circuits', was likely incorrect.[116]

These inapposite means of interpreting the jury form led the dissent to conclude that the panel's decision had created an undesirable circuit split. The dissent continued, "[e]very circuit to consider the issue has held that a sentencing judge may find a higher drug amount than the amount found by the jury, even when the jury's finding sets an upper boundary."[117] Thus, the panel's decision resulted in the Ninth Circuit "alone on an island."[118]

The dissent went on to express concern that the verdict form in *Pimentel-Lopez* was "substantially similar" to the model form found in the Ninth Circuit Manual of Model Criminal Jury Instructions.[119] Noting that "many district courts" use the model instruction, the panel's opinion "casts doubt on a large number of sentences in drugs cases," inviting petitions for changes of sentences.[120] Again, the panel dismissed the dissenters'

113. *Id.* at 1138 (Graber, J., dissenting from denial of rehearing en banc). The dissent supported this view by referencing *United States v. Webb*, an Eighth Circuit case adopting an alternate interpretation of a verdict form similar to that found in *Pimentel-Lopez*. 545 F.3d 673, 676 (8th Cir. 2008). There, the jury found that the defendant had possessed "more than five grams but less than fifty grams" of a substance. Id. at 676. The sentencing court then sentenced the individual based on a finding of 50 to 150 grams. *Id.* The Eighth Circuit applied *Apprendi* and held that the judge did not err in sentencing the defendant based on the higher amount. *Id.* at 676–77.
114. *Pimentel-Lopez II*, 859 F.3d at 1138 (Graber, J., dissenting from denial of rehearing en banc).
115. *Id.*
116. *Id.*
117. *Id.* at 1138–39.
118. *Id.*
119. *Id.* at 1139.
120. *Id.*

concerns,[121] noting that the "committee [on sentencing] is constantly revising jury instructions in response to our opinions."[122]

E. *Pimentel-Lopez*'s Aftermath: A Circuit Split and Potential Impact on Litigation

The panel noted in its revised *Pimentel-Lopez* opinion that the Ninth Circuit would be free to respond to its interpretation of the jury instructions by changing the model instructions to prevent findings of innocence. It appears that the Ninth Circuit may have done just that. The jury instructions at the time of the decision read:

> We, the Jury, having found the defendant guilty of the offense charged . . . further unanimously find that [he or she distributed, possessed with intent to distribute, or conspired to possess with intent to distribute the substance] in the amount shown (place an X in the appropriate box).[123]

Notably these model instructions allow the jury to set an upper limit to the amount found beyond a reasonable doubt. The current model instructions, by contrast, state:

> If you find the defendant guilty . . . you are then to determine whether the government proved beyond a reasonable doubt that the amount of [the substance] equaled or exceeded [certain weights] . . . . Your decision as to weight must be unanimous.[124]

The revised model instruction prevents the jury from determining an upper limit, only a lower limit, thus avoiding the type of decision found in *Pimentel-Lopez*. Although the model forms have been revised, nothing prevents an attorney from straying from the model forms and proposing their own jury instructions that incorporate the language used in the *Pimentel-Lopez* forms. Indeed, a savvy defense attorney practicing in the Ninth Circuit

121. *Id.* at 1143 ("That the verdict form used in this case was similar to our circuit's model verdict form is of no consequence.").

122. *Id.* ("It would stand the model jury instruction process on its head to base our analysis on the model jury instructions.").

123. Steve Kalar et al., *Case o' the Week: The Sixth & the Ninth*—Pimentel-Lopez*, Jury "Drug Amount" Verdicts, and Guideline Sentences in Drug Cases*, NINTH CIRCUIT BLOG (July 17, 2016), http://circuit9.blogspot.com/2016/07/case-o-week-sixth-ninth-pimentel-lopez.html [https://perma.cc/R2DR-EWX7].

124. 9.16 DETERMINING AMOUNT OF CONTROLLED SUBSTANCE, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 458 (2017).

may choose to do so to prevent the judge from finding an increased amount at sentencing.

Apart from the jury instructions, *Pimentel-Lopez* still leaves major issues to be resolved: Specifically, a potential circuit split and the impact of *Pimentel-Lopez* on future litigation. First, a recent unpublished opinion out of the Third Circuit seems to affirm that *Pimentel-Lopez* has created a circuit split. In *United States v. Lopez-Esmurria*, the Third Circuit held that "the Ninth Circuit's ruling conflicts with our case law" and the case law of other circuits addressing the same question.[125] This issue of whether a jury may, in effect, make a declaration of factual innocence may continue to be litigated by reviewing courts around the country, and potentially reach the Supreme Court for its ultimate resolution.

It also appears that lawyers and jurists are taking note of *Pimentel-Lopez*'s potential impact on sentencing practice. The case has been cited in at least one Ninth Circuit decision to bind the sentencing judge to an amount found by a jury.[126] It has also been cited in appellate briefs arguing that such increases in sentences should not be permitted.[127] Though the long-term impact of the holding remains to be seen, these early references suggest that the case could come into more prominent use to bind sentencing courts to jury determinations. And if the practice continues, *Pimentel-Lopez* could signal the institutionalization of the use of declarations of factual innocence.

III. EXPLORING DECLARATIONS OF INNOCENCE

The combination of *Pimentel-Lopez's* impact on sentencing and an apparent circuit split leaves the legitimacy of declarations of factual innocence unresolved. Will reviewing courts interpret verdict forms similar to those found in *Pimentel-Lopez* as declarations of factual innocence? If so, will special verdicts proclaiming a defendant factually innocent of conduct be

125. No. 16-3838, 2017 WL 4772443, at *2 (3rd Cir. Oct. 23, 2017).

126. United States v. White, 698 F. App'x 917 (9th Cir. 2017) (mem.) (citing *Pimentel-Lopez* in support of its holding that "[t]he district court here erred by sentencing White based on a higher drug weight than the jury found in its special verdict")

127. *See, e.g.*, Brief of Appellant James Marvin Hawkins at 35–36, United States v. Hawkins, No. 17-11560-FF, 2017 WL 4404497 (11th Cir. Oct. 2, 2017) (arguing that the jury's specific verdict form bound the judge to that factual finding at sentencing); Appellant's Opening Brief at 43–44, United States v. Stewart, No. 16-50093, 2016 WL 5929176 (9th Cir. Oct. 7, 2016) (arguing that based on *Pimentel-Lopez*, the court "should create a similar common law rule for conduct outside the statute of limitations" that would prevent the judge from using such conduct at sentencing).

allowed for all charges? Would their use be limited to specific cases? Is this use of a special verdict even constitutional?

The remainder of this Comment grapples with these questions. In this Part, I advance arguments for and against the use of special verdicts as declarations of innocence. First, I demonstrate that there are no constitutional bars to using special verdicts to declare an individual factually innocent. I then move on to discuss the advantages and disadvantages of verdicts of innocence. I begin by noting that using of declarations of innocence could lead to reduced stigmatization, as greater information regarding an individual's perceived culpability is made readily available. I also point out that other legal systems, both domestic and international, use mechanisms that allow individuals to be found factually innocent of committing an offense. Finally, I point out that the jury exhibits qualities of group decisionmaking that cause it to be the body best equipped to make these determinations.

A. Procedural Justifications for Declarations of Innocence Through Special Verdict

The jury's special verdict determination in *Pimentel-Lopez* was held to be a virtual declaration of innocence that bound the sentencing court to the jury's finding of fact. Currently, special verdicts are most commonly used to provide judges with information to consider at sentencing.[128] For instance, special verdicts are used to determine aggravating or mitigating circumstances in death penalty cases, amounts of narcotics (as seen in *Pimentel-Lopez*), enhancements based on habitual offenses, the amount of a theft, the proximate cause of death, and whether a crime was one "of violence."[129]

In addition, limited precedent exists for allowing special verdicts to be used to determine which crimes were committed by the defendant. For instance, in an unpublished opinion, the Tenth Circuit remanded a case to the district court to determine which offense should form the basis for sentencing, suggesting that a special verdict be used to fulfill this purpose.[130] The record, however, does not suggest that the court's findings were meant to find the defendant innocent of any of the charges, but the special verdict

128. *See* Nepveu, *supra* note 8, at 269.
129. Nepveu, *supra* note 8, at 270–74.
130. United States v. Pickens, 991 F.2d 806, 1993 WL 125402, at *3 (10th Cir. 1993) (unpublished table decision).

merely provided more information to the sentencing court. The sentencing court remained free to find other facts by a preponderance of the evidence, thus distinguishing it from *Pimentel-Lopez*.

Notably, some circuits disfavor the use of special verdicts in criminal cases, holding that their use can overburden juries by requiring them to provide an explicit rationale for their general verdicts.[131] For instance, in *United States v. Wilson*,[132] the Sixth Circuit noted that the jury "has a general veto power, and this power should not be attenuated by requiring the jury to answer in writing a detailed list of questions or explain its reasons."[133] The *Wilson* court, however, explicitly mentioned that special verdicts could be permitted in some federal criminal proceedings.[134]

Other circuits hold that special verdicts are appropriate, and even preferable, in certain circumstances.[135] The Second Circuit states a preference for special interrogatories in particularly complex criminal cases.[136] Other circuits tout the ability of special verdicts to clarify factual findings in complex cases with multiple charges.[137] Indeed, no circuit explicitly prohibits or limits the use of special verdicts; there is no bright line rule for determining their applicability.[138] Rather, courts universally possess the broad discretion to approve their use.[139]

131. *See, e.g.*, United States v. Stegmeier, 701 F.3d 574, 581 (8th Cir. 2012) (noting that special verdicts are disfavored in criminal cases); United States v. Blackwell, 459 F.3d 739, 766 (6th Cir. 2006) (same).
132. 629 F.2d 439 (6th Cir. 1980).
133. *Id.* at 443.
134. *Id.* ("For limited purposes in federal criminal proceedings special questions have been permitted, but the cases are rare . . . .").
135. *See, e.g.*, United States v. Melvin, 27 F.3d 710, 716 (1st Cir. 1994) ("[T]here may be circumstances in which eliciting particularized information from the jury will be permissible."); United States v. Martinez, 7 F.3d 146, 148 n.1 (9th Cir. 1993) (noting that, in a complex criminal case, a judge can exercise the option to elicit responses to a special interrogatory to determine the type of weapon used in a conflict); United States v. Sims, 975 F.2d 1225, 1235 (6th Cir. 1992) (noting that a special verdict form should be provided in complicated criminal cases with multiple counts).
136. United States v. Ogando, 968 F.2d 146, 148–49 (2nd Cir. 1992).
137. *See, e.g.*, United States v. Stegmeier, 701 F.3d 574, 581 (8th Cir. 2012) (quoting United States v. Reed, 147 F.3d 1178, 1181 (9th Cir. 1998)) ("Where a special verdict form requires the jury to determine the occurrence of any of a series of acts, each of which is sufficient to constitute the indicted crime, the traditional concerns regarding special verdicts are not implicated."); United States v. Starks, 472 F.3d 466, 471 (7th Cir. 2006) ("The judge wisely went further by using the special verdict form so that the record clearly reflect[ed]" the jury's unanimous findings in a case with a duplicitous indictment.).
138. *See Ogando*, 968 F.2d at 149.
139. *See id.*; United States v. Ramirez, 537 F.3d 1075, 1083–84 (9th Cir. 2008).

In sum, although courts may hesitate to use special verdicts, there are no explicit prohibitions or rules surrounding when they can or cannot be used. In the remainder of Part III, I advocate that the use of special verdicts could clarify complex criminal litigation and empower juries to make critical decisions regarding an individual's innocence or guilt.

B. Advantages and Disadvantages of Using Declarations of Innocence

In this Part, I discuss innocence declarations' advantages and disadvantages. I begin by pointing out that declarations of innocence could provide societal actors with a powerful signal that accused individuals are factually innocent, mitigating the effects of stigma that accompany a criminal charge. At the same time, I point out that there is no indication that a verdict of innocence would be powerful enough to overcome the stigma currently attached to a criminal arrest or charge. I then move on to discuss the impact declarations of innocence have on the rhetoric of innocence, noting that it could give meaning to the maxim "innocent until proven guilty," but could also overly complicate an already obtuse area of American litigation, especially for jurors charged with interpreting the presumption of innocence and burdens of proof. I then discuss Scotland's usage of a verdict system that permits juries to more conclusively delineate guilt or innocence, noting that the use of such a system in the United States could provide clearer instructions for sentencing courts but may only serve to shift current understandings of guilt and innocence without decreasing stigma in any meaningful way. At the same time, I point to current domestic practices that support the practicality of implementing declarations of innocence in the United States.

1. Stigma and Innocence: Declarations of Innocence May Provide Societal Benefits for Factually Innocent Defendants, But May Not Be Powerful Enough to Contradict Stigma Associated With Criminal Charges

Under the current two-verdict system, defendants can be found guilty or not guilty in a criminal trial. And although a defendant is innocent until proven guilty, a not guilty verdict is not equivalent to declaring an individual innocent. Instead, it only signifies that the court or jury found that the prosecution failed to prove, beyond a reasonable doubt, that the individual

committed the charged crimes. Thus, a finding of not guilty does not signal the defendant's lack of blameworthiness,[140] and jury acquittals fail to provide clear statements of factual guilt or innocence.[141] This lack of clarity poses difficulties for sentencing courts, societal actors (such as potential employers and housing providers), and the defendants themselves. Specifically, under the current system, societal actors cannot be sure whether individuals found not guilty of a crime were acquitted because they were factually innocent or because their guilt simply was not proven beyond a reasonable doubt. Under this two-verdict system, societal actors may falsely believe that an innocent, acquitted defendant "got away with" the charged offense.

Moreover, acquittals have little impact on an individual's criminal record. Currently, criminal records contain every criminal arrest, regardless of whether the defendant eventually was acquitted.[142] To remove a felony charge, individuals must petition for an expungement—even then, some circuits hold that an acquittal is not sufficient to warrant removing the charge from the record.[143] Defendants saddled with these criminal records report being denied opportunities in employment, housing, and education.[144] These denials can be attributed to the fact that societal actors equate acquitted individuals with those who are, in fact, guilty.[145] In other words, under the current scheme, stigma often follows not only a guilty verdict but also a simple criminal accusation and arrest.[146]

140. *See* Leipold, *supra* note 10, at 1301–04; Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 733 (1990) ("Does the failure to condemn . . . follow from the *propriety* of the actor's conduct, or from the actor's blamelessness for admittedly *improper* conduct?").

141. *See* Robinson, *supra* note 140 ("Instead of restating, reinforcing, and refining society's rules of conduct, acquittals at public trials . . . frequently serve only to create ambiguity and confusion regarding those rules.").

142. *See* United States v. Linn, 513 F.2d 925, 927–28 (10th Cir. 1975); Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/VY5G-67U7].

143. *See, e.g.*, *Linn*, 513 F.2d at 927–28 ("[A]n acquittal, standing alone, is not in itself sufficient to warrant an expunction of an arrest record."). There is no overriding federal law on expungement proceedings. Sharon Dietrich, *Why We Need a Federal Expungement Law*, COLLATERAL CONSEQUENCES RESOURCE CENTER (June 3, 2015), http://ccresourcecenter.org/2015/06/03/why-we-need-a-federal-expungement-law [https://perma.cc/V3LV-7E6T].

144. *See* Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 CRIMINOLOGY 387, 388 (2016).

145. *See* Leipold, *supra* note 10, at 1305–07, 1309–11.

146. *See* Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 391, 395–97 (2009) (discussing the ramifications of an accusation on the reputations of those arrested and charged).

The introduction of declarations of factual innocence would provide societal actors with more information about the defendant's culpability. This could prove beneficial to defendants who are able to win declarations of innocence. For instance, employers may be more willing to hire an individual if it is made public that a jury declared him innocent—that he did not, in fact, commit a crime. In this way, a declaration of innocence could be an important step in helping remove negative stigma and improve economic outcomes for innocent defendants, especially in cases where the declaration of innocence is made public.[147]

More significantly, declarations of innocence could result in an easier path to expungement for innocent individuals. Though there is little consensus among state laws permitting individuals to seek exoneration,[148] almost every state allows individuals to seek expungement of arrest records not resulting in conviction.[149] But, on the federal level, there is no statute that expressly permits expungement, with some circuits allowing petitions for expungement and others refusing to permit expungement in any circumstance.[150] The circuits that deny expungement, however, often claim they lack statutory authority unless the case is one of wrongful prosecution or arrest.[151] Here, delivering a declaration of innocence would signal a wrongful

147. *See* Meyli Chapin et al., *A Cost-Benefit Analysis of Criminal Record Expungement in Santa Clara County*, STAN. U. UNDERGRAD. PUB. POL'Y SR. PRACTICUM 23 (March 2014) (describing study results showing that the benefit of criminal expungements, a current practice that would be similar to declarations of innocence, results in net societal gains of $5760 per client due to numerous factors related to a reduction in stigma, including increased income and tax revenues and reduction in government assistance); Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal* Stigma, 10 SOC. PROBS. 133, 137 (1962) (discussing federal certificates of an exonerated individual's innocence and claiming that "[p]ossession of such a document might be expected to alleviate post-acquittal deprivations"); Isabella M. Blandisi et al., *Public Perceptions of the Stigmatization of Wrongly Convicted Individuals: Findings From Semi-Structured Interviews*, 20 QUALITATIVE REP. 1881, 1890 (2015) (suggesting that, based on subject interviews, "being tied to a criminal conviction may facilitate the negative framing of exonerees, and may overshadow the knowledge of their innocence").

148. *See* Amy Shlosberg et al., *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 355–56 (2014).

149. Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 32 (2008).

150. *Expungement*, ELECTRONIC PRIVACY INFO. CTR., https://epic.org/privacy/expungement [https://perma.cc/LRS7-GRBH] ("The First, Third, Sixth, Eighth, and Ninth Circuits . . . have held that federal courts do not have jurisdiction to consider expunging criminal records unless there is a claim of unlawful arrest or prosecution. The Second, Fourth, Fifth, Seventh, Tenth and D.C. Circuits have held that federal courts may consider expungement of criminal records for equity reasons.").

151. *See, e.g.*, United States v. Wahi, 850 F.3d 296, 302–03 (7th Cir. 2017) (holding that statutory authority is necessary in equitable expungement proceedings); United States v.

arrest, potentially providing the necessary justification for expungement. Additionally, the widespread use of declarations of innocence may spur federal legislation that would allow felony charges to be expunged more easily. Indeed, there would probably be public outcry if individuals declared innocent bore a black mark on their criminal record, prompting legislative action.

One could argue that having a criminal record could be enough of a black mark to deny employment even if an individual were declared innocent. One might also question whether a declaration of innocence would be a more powerful antidote to the social stigma stemming from a criminal charge than the existing not guilty verdict. While one could arguably assume that a declaration of innocence would be a stronger indication of guiltlessness than the current verdict of not guilty, there is no telling that a declaration of innocence would do so. And even if they did possess this curative power, their impact would only be felt if the verdict were made public enough to ensure that negative stigma did not attach to an accused individual. Furthermore, the legislature's response to their institutionalization would depend on myriad factors, none of which are easily foreseeable. Given this, it is apparent that one cannot easily predict the impact declarations of innocence would have on social stigma.

2. Redefining Innocence: Declarations of Innocence Could Provide Meaning to the Rhetoric of Innocence, But Could Confuse an Already Complicated Understanding of Guilt and Innocence

Declarations of innocence are consistent with the rhetoric of innocence in the American judicial system. This rhetoric is based in the presumption of innocence that plays a fundamental role in jury trials, where the court is compelled to instruct the jury that the defendant is presumed to be innocent. A failure to provide these instructions amounts to a violation of due process rights.[152] A commonsense understanding of this principle would lead one to believe that an individual is considered factually innocent of a crime, so long as the prosecution cannot prove guilt beyond a reasonable doubt.

Cosme-Rivera, 556 F. Supp. 2d 66, 67 (D.P.R. 2008) (holding that the court did not have jurisdiction over an acquitted individual's expungement petition).

152. Taylor v. Kentucky, 436 U.S. 478, 490 (1978).

In actuality, however, "the presumption of innocence does not work as a true presumption" that on the facts of the case, the defendant is innocent.[153] It merely serves as a reminder that the prosecution must prove the defendant's guilt beyond a reasonable doubt, serving an "expressive and educative function" of reminding the jury that they are not to predetermine the guilt of the accused.[154] Often, the presumption of innocence fails in this educative role, as common sense usually leads jurors to believe that an individual charged with a crime is actually guilty.[155] Thus, one sees disconnects in American jurisprudence: one between the alleged presumption of innocence and juries' assumption that the accused is actually guilty; another based on the idea that, even if a jury believes a defendant is factually innocent, it can still only find him not guilty. In this way, the rhetoric which pins innocence as a central tenet of jurisprudence may occupy a position of false prominence.[156]

Some scholars propose that this discontinuity between the rhetoric of presumed innocence and its application in practice should result in dismantling the presumption,[157] while others suggest that the judicial system should assume a presumption of factual innocence to bring the concept of innocence in line with current practice.[158] Each of these solutions leaves something to be desired. First, the presumption of innocence is a foundational tenet of American jurisprudence and would be difficult to

153. William F. Fox, Jr., *The "Presumption of Innocence" as Constitutional Doctrine*, 28 CATH. U. L. REV. 253, 261 (1979).

154. Laufer, *supra* note 11, at 340–45 (explaining that some scholars regard the presumption of innocence as a proxy for the reasonable doubt rule, while others advocate for a more symbolic meaning of the presumption).

155. *See* Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 264 (2002); *see also* Joseph N. Sorrentino, *Demystifying the Presumption of Innocence*, 15 GLENDALE L. REV. 16, 25 (1996) (quoting CHARLES T. MCCORMICK, § 309 ON EVIDENCE 647 (1954) ("As applied to the accused, any assumption, or 'presumption' of innocence, in the popular sense of an inference based on probability, is absurd.").

156. *See* Laufer, *supra* note 11, at 388–91; *see generally*, Kitai, *supra* note 155 (presenting the current operation and public understanding of the presumption of innocence and distinguishing a model that would prioritize a presumption of factual innocence); *cf.* Sorrentino, *supra* note 155, at 16–17 (commenting that overuse of the phrase "presumption of innocence" has led to its "becoming a hollow phrase perfunctorily uttered by lawyers").

157. *See, e.g.*, Fox, Jr., *supra* note 153, at 254–56 (noting that the reasonable doubt standard is sufficient for the jury).

158. *See* Laufer, *supra* note 11, at 403 ("Presumption of innocence rhetoric may be given meaning only by moving away from the notion that this assumption is a burden allocation device, and toward the view that factual innocence of the accused must be assumed.").

dismantle.[159] Similarly, it would be difficult to remove the stigma associated with an accusation and force jurors to adopt a presumption of factual innocence without a commensurate cultural shift in the way that society views criminality and the judicial system. The jury's task is already a daunting one. Uprooting and redefining a fundamental belief hammered into jurors by civics classes and pop culture could further confuse and complicate their decisionmaking.

Pimentel-Lopez lays out another option: allowing juries to find factual innocence. This solution acknowledges that the presumption of innocence does not operate as a presumption of factual innocence because it requires jurors to declare innocence explicitly. At the same time, it provides a pathway to demonstrate a belief in innocence consistent with commonsense understandings of the presumption of innocence. In other words, allowing declarations of innocence would help resolve the discontinuities between the rhetoric of innocence and its practical application.

But while the use of declarations of innocence may give meaning to the rhetoric of innocence, it is just as likely that their use would introduce new confusion to an already-complicated understanding of innocent until proven guilty. As jurors are already frequently confused about the meaning of beyond a reasonable doubt under the current two-verdict system,[160] introducing a more complicated system of guilt and innocence may prove overly burdensome.

Specifically, the use of declarations of innocence may introduce confusion regarding the burden of proof, leading juries to believe that defendants bear the burden of proof to show innocence. Theoretically, the defendant would not have to provide any evidence for the jury to find him or her innocent.[161] Juries may, however, desire more proof from the defendant to make a declaration of factual innocence, since intuitively one would suppose that the defendant would need to satisfy a higher bar to win a declaration of innocence, as opposed to a mere finding of not guilty. Courts have held,

159. *See generally* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723 (2011) (discussing the historical importance of the presumption of innocence and advocating for providing it greater weight in the current system).

160. Tarika Daftary-Kapur et al., *Jury Decision-Making Biases and Methods to Counter Them*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 133, 135 (2010); *See* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 80, 85 (1988).

161. This assumes that courts would not take it upon themselves to establish a higher burden of proof for determining innocence. If courts chose to adopt a higher burden of proof for declarations of innocence, this point would be mooted.

however, that special verdicts cannot shift the burden of proof to the defendant.[162] Were a judge to conclude that the burden had been shifted by a special verdict declaring the defendant guilty, the case would have to be retried.

United States v. Wilson,[163] a case out of the Sixth Circuit, provides an example of what may happen if special verdict declarations of factual innocence were to be put into widespread use. There, the court requested a special verdict form, asking whether the jurors unanimously found the defendant to have suffered a mental illness. The circuit court found that the "use of the word 'unanimous' could easily mislead the jury" into believing that the "burden of proof [had] shifted to the defendant to prove her insanity."[164] Because the special verdict form confused the jury regarding the burdens of proof, the court reversed and remanded.[165] Outcomes like *Wilson* would likely increase were declarations of innocence to be more widely implemented.

The introduction of an "innocence" verdict also has the potential to confuse jurors in terms of the ramifications of their verdicts. Under the current system, a verdict of not guilty signifies that the case is over and the individual cannot be retried for the same offense. Studies show, however, that the three-verdict system in Scotland leads some jurors to erroneously believe that individuals found "not proven" (the Scottish equivalent of not guilty if declarations of innocence were to be introduced, to be discussed in the next section) could be retried for the same offense in the future.[166] The introduction of the declarations of innocence could bring about the same result in the United States, proving to confuse jurors more than it would clarify.

162. *See, e.g.*, United States v. Wilson, 629 F.2d 439, 439 (6th Cir. 1980).
163. *Id.*
164. *Id.* at 441–42.
165. *Id.* at 444.
166. A public opinion poll found that 48 percent of those surveyed believed that individuals could be retried if fresh evidence emerged. Joseph M. Barbato, *Scotland's Bastard Verdict: Intermediacy and the Unique Three-Verdict System*, 15 IND. INT'L & COMP. L. REV. 543, 556–57 (2005). *See also* Lorraine Hope et al., *A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making*, 32 L. & HUM. BEHAV. 241, 249 (2008) (finding that 37 percent of students eligible to be jurors believed that an individual could be retried after a finding of "not proven") The Scottish system will be discussed more thoroughly in the next Subparts.

3. Declarations of Innocence in Practice: Scotland's Controversial "Not Proven" Verdict and Domestic Practices That Support the Practicality of Declarations of Factual Innocence.

The introduction of a declaration of factual innocence would essentially introduce a new verdict—innocence—to the American judicial system. Currently, though verdicts other than guilty and not guilty are "exceptional in American criminal law," other legal systems "routinely use more than two verdicts."[167] For example, in Scotland, juries may return a verdict of "not proven" in addition to verdicts of not guilty and guilty. A not proven verdict is the same as an American verdict of not guilty, entitling the defendant to go free and providing protection from double jeopardy.[168] But this verdict allows the jury to note its doubt as to the factual innocence of the accused by signaling that it found that the prosecution could not adequately meet the burden of proof. In doing so, a Scottish jury verdict of not guilty is elevated to a virtual declaration of factual innocence.[169] Although the verdict has come under scrutiny in recent years for being confusing and having the potential to stigmatize individuals whom the jury thought was guilty but lacked sufficient evidence to convict,[170] it has survived repeal efforts and is used in criminal trials in Scotland today. The existence of this practicable three-verdict system supports the idea that a similar system could be implemented in the United States.

Notably, by introducing declarations of innocence, the current verdict of not guilty would assume new meaning: It would signal that the defendant should be treated with a certain level of culpability and suspicion. In discussing three-verdict systems, scholar Samuel Bray notes that by providing greater information about the jury's perception of the accused's level of culpability, a third verdict redistributes the stigma that is currently attached solely to a verdict of not guilty.[171] In other words, providing for widespread declarations of innocence may cause greater stigmatization for individuals who do not receive a verdict of innocence but receive a not guilty verdict. The

167. Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1299 (2005).
168. G.C. Gebbie et al., *'Not Proven' as a Juridical Fact in Scotland, Norway and Italy*, 7 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 262, 266 (1999).
169. J. Ross Harper, *Not Proven—A Unique Verdict*, 13 INT'L LEGAL PRAC. 49, 50 (1988).
170. *Scotland's Not Proven Verdict 'On Borrowed Time', Say MSPs*, BBC NEWS (Feb. 9, 2016), http://www.bbc.com/news/uk-scotland-scotland-politics-35527022 [https://perma.cc/EW9Y-YJGE].
171. *See* Bray, *supra* note 167, at 1323–25.

stigma currently attached to the not guilty verdict could intensify if society understood that the verdict of innocence was available but not obtained.

Moreover, juries may be hesitant to make declarations of innocence if they were widely used. Studies on the three-verdict system in Scotland suggest that jurors would more frequently determine that an individual was not guilty of the crime (as opposed to findings of innocence) if a third verdict were introduced.[172] Thus, an increasing number of defendants who are innocent in fact but receive a verdict of not guilty would likely face greater ostracization on a societal level. In light of these challenges, then, the introduction of a three-verdict system in the United States may be impractical.

But while a scheme identical to a Scottish three-verdict system may prove unworkable in the American context, United States jurisdictions already employ practices that essentially permit findings of factual innocence. These practices lend support to the idea that a model incorporating declarations of factual innocence could be put into practice in the United States.

Currently, these findings of factual innocence typically arise in post-conviction habeas corpus petitions. In this context, a habeas petitioner may demonstrate that he is factually innocent by introducing new evidence showing he did not commit the crime, with this innocence determination serving as the "gateway through which [he] must pass to have his otherwise barred constitutional claim considered on the merits."[173] The petitioner must present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[174] If he can do so, the court may consider his claim under the fundamental miscarriage of justice exception.[175]

The Court established the standard for habeas petitions in *Schlup v. Delo*, where it held that the petitioner must show that "a constitutional

172. *See* Hope et al., *supra* note 166, at 244–46. In this study, mock jurors were first asked to determine an individual's guilt or innocence using a two-verdict system of "guilty" or "not guilty." There, they found the defendant not guilty 39 percent of the time, while finding the defendant guilty 61 percent of the time. Then, mock jurors were given the option of selecting either "guilty," "not guilty," or "not proven." There, they found "not proven" 42 percent of the time, while they found the defendant not guilty (the equivalent of "innocent") only 7 percent of the time. Jurors were 10 percent less likely to find that an individual was proven "guilty" in the three-verdict system.

173. Schlup v. Delo, 513 U.S. 298, 315 (1995) (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

174. *Id.* at 324.

175. *Id.* at 326–27; *see also* McQuiggin v. Perkins, 569 U.S. 383, 392–93 (2013).

violation has probably resulted in conviction of one who is actually innocent."[176] This standard of actual innocence is satisfied by a finding that "no reasonable juror would have found the defendant guilty."[177] The Court noted that "[i]t is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do."[178]

In his dissenting opinion, Chief Justice Rehnquist pointed out the difficulty of putting this standard into practice, noting that "[t]he reviewing court must somehow predict the effect that this new evidence would have had on the deliberations of reasonable jurors. . . . and may need to make credibility determinations as to witnesses who did not appear before the original jury."[179] He pointed out that judges are often forced to decide the matter without a hearing, but ideally, the actual innocence claim would be raised at a special hearing where the court may cross-examine witnesses crucial to showing actual innocence to examine their reliability and veracity.[180]

Thus, judges are entrusted with making determinations of factual innocence, even though prominent jurists acknowledge that these determinations are best made through the eyes of a juror. Allowing jurors themselves to declare factual innocence at the trial stage avoids any difficulties associated with current judicial prediction or speculation. Indeed, in light of Chief Justice Rehnquist's preference for hearings and the presentation of witnesses, jurors are better equipped to find innocence, as the group nature of the jury allows for multiple perspectives regarding credibility and quality of the evidence upon which to base a conclusion.[181] This group nature is discussed more in the next Subpart, but the existence of habeas petitions demonstrates that findings of innocence already appear in the American legal system, lending support to the idea that a more widespread use could be built on this foundation.

176. *Schlup*, 513 U.S. at 328.
177. *Schlup*, 513 U.S. at 329.
178. *Id.*
179. *Id.* at 341 (Rehnquist, C.J., dissenting).
180. *Id.* at 341–42.
181. Pre-judgment findings of innocence should not supplant current habeas petitions. Certainly, if new evidence is found post-conviction, that individual should be able to have it considered by the court. Here, instead, I mean to point out that if a judge has the ability to make an innocence determination based on the introduction of new evidence, a jury should also be able to make a similar determination based on the evidence it hears during trial.

Declarations of innocence also exist in state courts. Under California Penal Code § 851.8, an individual arrested for a charge that was subsequently dismissed or for which they were acquitted may prove their factual innocence in order to seal and destroy a record of arrest.[182] The burden is on the defendant to prove factual innocence by demonstrating that the evidence proves "no reasonable cause exists to believe that [they] committed the offense for which the arrest was made."[183] The standard for finding innocence under this statute is more stringent that the federal standard for finding factual innocence in habeas petitions. Here, individuals must show that the evidence is so strong as to show that there is no reasonable cause to have subjected the individual to the criminal justice system in the first place.[184]

California courts have established that a mere acquittal is insufficient to support a finding of factual innocence. Instead, individuals must show that "no objective factors justified official action."[185] Factual innocence "'does not mean a lack of proof of guilt beyond a reasonable doubt or even by "a preponderance of evidence. . . . [T]he record must exonerate, not merely raise a substantial question as to guilt."[186] A declaration of innocence would seem to serve this function—it would demonstrate that the jury believed that the individual should be exonerated. Thus, a declaration of innocence can be viewed as being consistent with the standard for California Penal Code § 851.8.

Additionally, similar to federal habeas proceedings, though the judge has discretion to determine whether the individual is factually innocent,[187] this determination may be best performed by the jury. Indeed, some have criticized the statute as providing the judge with too much power, as it does not clarify whether the judge is able to consider evidence that was not presented to the jury and does not provide the individual with a hearing on the motion to present evidence of innocence.[188] Here, a jury may be better equipped to make these fact-intensive determinations due to its collective

182. CAL. PEN. CODE § 851.8 (West 2008).
183. *Id.* § 851.8(b); People v. Adair, 62 P.3d 45, 49 n.2 (Cal. 2003).
184. *See Adair*, 62 P.3d at 52.
185. *Id.* at 54 (quoting People v. Scott M., 213 Cal. Rptr. 456, 463 (Cal. Ct. App. 1985)). *See also* People v. Matthews, 9 Cal. Rptr. 2d 348, 350 (Cal. Ct. App. 1992) (holding that, to establish innocence, an individual must show that there was "no reasonable cause to arrest him in the first place"); *Scott M.*, 213 Cal. Rptr. at 462 (holding that the jury's verdict does not prove innocence nor does it address the question of innocence).
186. *Adair*, 62 P.3d at 54 (internal quotations omitted) (quoting People v. Glimps, 155 Cal. Rptr. 230, 235 (Cal. Ct. App. 1979)).
187. Robin Pulich, Note, *The Rights of the Innocent Arrestee: Sealing of Records Under California Penal Code Section 851.8*, 28 HASTINGS L.J. 1463, 1486, 1490 (1977).
188. *See id.* at 1490–91.

decisionmaking ability, as discussed below. Additionally, the ability to decide innocence at trial offers the advantage of a ready-made opportunity to present evidence of innocence. Thus, not only does the existence of California Penal Code § 851.8 demonstrate that declarations of innocence are possible in the American judicial scheme, but it also provides a strong argument for juries to make this determination.

At the same time, however, a jury's use of a special verdict to make a declaration of factual innocence would occur at a different stage in the judicial process than habeas petitions or findings under California Penal Code § 851.8—during the trial, rather than in post-sentencing procedures. Permitting the usage of declarations of factual innocence at the trial level through jury special verdicts may prove impracticable as it could usurp judicial expertise, damage trust in the U.S. judicial system, and negatively overburden judicial proceedings.

First, judges are thought to possess ultimate discretion to consider numerous factors at sentencing.[189] Implementing declarations of factual innocence at the trial phase would prevent judges from exercising this discretion at sentencing, as occurred in *Pimentel-Lopez*. Thus, the implementation of a special verdict to bind the sentencing court could be seen as an unwelcome usurpation of the judicial authority, whereby judges would be prevented from carrying out their traditional mandate to determine sentences at their discretion.[190]

Moreover, habeas petitions are most commonly successful with the introduction of new DNA evidence that clearly indicates blamelessness. A declaration of factual innocence, on the other hand, could occur without such strong assurances of a lack of culpability. Indeed, the jury would be free to make the determination without strong evidence of innocence. While American society appears to be ready to accept a finding of factual innocence based on incontrovertible, scientific evidence, it may spurn findings of innocence based on a jury's seemingly more subjective decision.

Additionally, if the declaration of innocence through a special verdict were put into practice at the trial level, numerous questions about its application and the procedural aspects of the practice would arise. For

189. *See* 18 U.S.C. § 3661 (2012) (noting that there is not limitation on the information concerning the "background, character, and conduct of a person convicted of an offense" that can be presented at sentencing.).

190. *See* Circuits Note: Criminal, *Sentencing*, 66 GEO. L.J. 601, 601–02 (1977) (commenting that it is "the traditional view of the sentence as being within the sound discretion of the sentencing judge").

instance, some could argue judges should be able to make declarations of innocence sua sponte during a bench trial or during summary judgment motions, while others would contend that their use should be left to a jury. Some would question whether the declarations could be used broadly, or only in specific criminal offenses or with specific defendants. Still other issues, such as the appellate standard of review, would need to be resolved. This process would probably be lengthy and complicated.

Declarations of innocence at the trial phase also have the potential to extend the length of trial and increase the expenditure of resources. As either party can request the use of a special verdict under the current system, one would assume that almost every defendant would file a request for a special verdict declaration of innocence to reap the benefits it could confer. These requests would largely increase the size of the judge's docket and could require hearings to argue the merits of their use. This increased tax on judicial resources could add to the already crowded dockets of courts around the country.[191]

Additionally, defendants could put undue pressure on their attorneys to introduce proof of innocence at trial, causing increased expenditure on the part of defense attorneys. Even if the burden remained on the prosecution to present evidence of guilt, the defendant would likely want to provide an even stronger case so as to cast any questions of guilt aside and obtain a declaration of innocence. In the United States, criminal defense is largely conducted by public defenders, and 73 percent of public defenders' offices exceeded the maximum recommended level of cases in 2007.[192] The system, in its already

191. Many lament the overcrowded federal court system, calling attention to the numerous vacancies on federal circuit and appellate courts. Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Sept., 30, 2015, 2:15 PM ET), https://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b [https://perma.cc/Z4HE-ST84]; Sudhin Thanawala, *Wheels of Justice Slow at Overloaded Federal Courts*, CHI. TRIB. (Sept. 28, 2015, 12:32 AM), http://www.chicagotribune.com/news/nationworld/sns-bc-us-federal-case-backlog-2015 0927-story.html [https://perma.cc/KC54-4QCP]. For instance, in the twelve-month period ending September 30, 2016, the Courts (on average) saw 573 actions filed, equating to more than one action being filed per day. U.S. COURTS, UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE (2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2016.pdf [https://perma.cc/WZ9Y-6NYX]. Despite this heavy caseload, there were 120 vacant district court positions as of January, 2018 out of a total of 677 authorized judgeships, almost 20 percent. U.S. COURTS, JUDICIAL VACANCIES (Jan. 21, 2018), http://www.uscourts.gov/judges-judgeships/judicial-vacancies [https://perma.cc/5SPM-6URY].

192. BUREAU OF JUSTICE STATISTICS, COUNTY BASED AND LOCAL PUBLIC DEFENDER OFFICES 2007 1, https://www.bjs.gov/content/pub/pdf/clpdo07.pdf [https://perma.cc/2LQB-AKK2]; Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*,

overburdened state, probably does not have the bandwidth to support increased investigation and trial time.

Finally, the introduction of widespread declarations of innocence, as with any significant change to the American legal framework, would elicit pushback from judges, victims, advocates, community members, and defendants, many of whom may find its addition to be a foreign and unwelcome addition to the system. In any transitional period, then, the judicial community would have to modify its practices, expectations, and theories. While this concern in and of itself is a poor justification for resisting change, one must ask whether the difficulty of introducing the verdict would be worth the benefit. Due to the potential confusion and negative outcomes for victims and defendants, it is difficult to justify such a substantial reform.

C. The Role of the Jury: Juries Are Likely Better Equipped to Determine Innocence Than Judges

The previous Part outlined some advantages and disadvantages to implementing declarations of factual innocence. This Part builds on that conversation, discussing whether juries, rather than judges, are better equipped to make determinations of factual innocence. Primarily, I argue that fundamental attributes of juries—namely, their ability to mitigate biases and provide a community perspective in the judicial process—would allow them to generate more accurate findings of factual innocence.

Juries are foundational to American jurisprudence and serve as a critical check on judicial abuses. As scholar Suja Thomas points out, the founding fathers envisioned the jury as a constitutional right intended to prevent "judicial despotism."[193] The jury still occupies this essential role in checking judicial abuses of power.[194]

One way in which the jury keeps judicial power in check is by preventing a judge's personal biases from impacting a verdict. Research shows that some judges possess implicit biases that can reveal themselves

GUARDIAN (June 17, 2015, 7:30 EDT), https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked [https://perma.cc/H84B-JXT2] (reporting that 80 percent of those charged with felonies are indigent and unable to afford a private lawyer).

193. SUJA A. THOMAS, THE MISSING AMERICAN JURY 64 (2016) (quoting THE FEDERALIST NO. 83 (Alexander Hamilton), http://avalon.law.yale.edu/18th_century/fed83.asp [https://perma.cc/S6HD-HCG7]).

194. *See* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 28 (2003).

during a trial or at sentencing.[195] This may stem from the lack of diversity in the American judiciary. A recent report put forth by the American Constitution Society found that men and women of color made up only 17 percent of state trial court judges, while white men made up 57 percent of the same group.[196] These demographics are highly disproportionate, given the fact that people of color make up 39 percent of the national population.[197] Thus, it is not an overstatement to say that the racial and ethnic backgrounds of the judiciary do not accurately reflect the backgrounds and diversity of the individuals who come before them. While judges probably attempt to leave their biases outside of the courtroom, it is undeniable that individual experiences and cultural backgrounds shape judicial decisionmaking.

Juries help mitigate these predispositions. Professor Michael Risinger notes that the group nature of the jury tends to represent different perspectives, leading them to possess a "special competence" when it comes to factfinding.[198] In other words, "[p]erhaps the only entity in the system that might avoid the influence of the bigot in the brain is a diversely composed jury."[199] Moreover, a jury has a collective knowledge base to draw upon when deciding whether an individual should be declared factually innocent. For instance, a juror from the defendant's community may possess a stronger factual understanding of the circumstances surrounding the crime than would the judge. These qualities could promote more accurate factfinding than would exist if a single judge were charged with making a declaration of innocence.

Juries also provide a critical opportunity for "community participation in the determination of guilt or innocence."[200] Here, a declaration of innocence would leave the defendant free to resume his public life without restriction. The jury—a body composed of community members with whom

195. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1214–17 (2009) (noting research results that show that judge's implicit biases can influence their judgement, but that these biases can be overcome with sufficient motivation).

196. AMERICAN CONSTITUTION SOCIETY, *The Gavel Gap: Who Sits in Judgement on State Courts?* at 7, fig.6 (2016). A similar statistic for minorities sitting on the federal bench could not be found.

197. THE HENRY J. KAISER FAMILY FOUNDATION, POPULATION DISTRIBUTION BY RACE/ETHNICITY (2016), http://kff.org/other/state-indicator/distribution-by-raceethnicity/?currentTimeframe=0&selectedRows=%7B%22wrapups%22:%7B%22united-states%22:%7B%7D%7D%7D [https://perma.cc/K42M-L9FG].

198. D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1308–09 (2004).

199. Rachlinski et al., *supra* note 195, at 1222.

200. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

the individual may be interacting upon release—has a significant stake in the defendant's freedom. Thus, jurors may consider facts with more intense scrutiny than would a judge in determining innocence. Ultimately, this could lead to more accurate findings of fact.[201]

Critics argue that juries are inefficient, expensive, and ill-equipped to make difficult decisions.[202] But the little empirical evidence in the area suggests that juries and judges come to the same conclusion the majority of the time. The seminal study in the area, performed by Harry Kalven and Hans Zeisel, found that judges and juries agreed on the verdict 78 percent of the time.[203] Other studies show similar results, suggesting that judges and juries typically come to the same conclusion on the merits of a trial.[204] The similarity of judge and jury decisionmaking supports the conclusion that judges and juries' overall decisionmaking is of a similar quality. But the jury's ability to consider information in a group setting, as well as its ability to represent the communities to which the accused will return, give the jury certain decisionmaking benefits over judges. In determining innocence, these characteristics would likely ensure a fairer and more accurate finding.[205]

IV. A MODEST USE OF DECLARATIONS OF INNOCENCE

After viewing arguments for and against the use of special verdicts to declare factual innocence, it seems clear that their use has potential benefits for the criminal justice system but could prove problematic. Thus, if the Supreme Court agrees to hear a case that would resolve the current circuit split resulting from *Pimentel-Lopez*, it should permit declarations of

201. *See, e.g.*, Justice Antonin Scalia, Testimony before the United States Senate Judiciary Committee on the Constitutional Role of Judges (Oct. 5, 2011) (available at http://fija.org/document-library/essays-editorials/quotes-on-jury-authority-and-jury-nullification/) [https://perma.cc/9WC5-45V7] ("The jury is a check on . . . the judges. I think the Framers were not willing to trust, in criminal cases, the judges to find the facts. . . . And this was a way of reducing the power of the judges to condemn somebody from prison.").

202. *See* Donald M. Haskell, *Our Jury System*, 9 INCL BRIEF 2, 2 (1980). *See also* Jonakait, *supra* note 194, at xxiii (noting that critics of juries sometimes suggest experts would be better equipped to make difficult decisions).

203. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

204. *See* THOMAS, *supra* note 193, at 228 (citing Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 48 tbls.12–13 (1994) & Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's "The American Jury,"* 2 EMP. LEG. STUD. 171, 173, 182 tbl.2 (2005)).

205. Notably, juries possess these decisionmaking attributes in criminal proceedings today.

innocence but only a modest application of their use. Specifically, I propose that juries' special verdicts be used to declare innocence only for specific offense characteristics and adjustments under the Federal Sentencing Guidelines so as to bind the sentencing courts to these factual findings.

Under this proposal, either a prosecutor or defender could request a special verdict if they foresaw a finding of fact resulting in an increase or decrease in a sentence due to a specific offense characteristic or adjustment in sentencing guidelines.[206] As demonstrated by the specific wording in *Pimentel-Lopez*, the requesting party would have to ensure that the special verdict form was worded in a way that could only be interpreted as a finding of incontrovertible fact.[207] Then, the judge would have the discretion to approve or deny the requested instruction. If the judge approved the use of the form, it would be presented to the jury. Each party would retain an ability under Federal Rule of Criminal Procedure 30 to object to the instruction before the jury begins deliberations, thus preserving the record for an appeal.[208]

The exact questions and wording of the form would be fact- and case-specific. To provide one illustration, imagine a case where an individual was found with a gun in the vicinity of a burglary but vehemently declared that he did not use the firearm. The defense attorney could request a special verdict be provided to the jury regarding the use of the firearm. The judge would have the ability to deny the request, but she would also be free to allow the instruction. If the instruction were permitted, the jury could find that the defendant either used, should be acquitted of, or is factually innocent of using the gun. And while the *Pimentel-Lopez* form did not explicitly ask whether the individual was innocent of specific conduct, there is nothing stopping the parties from making a more overt inquiry. For instance, the special verdict form may read:

> If the defendant is found guilty of burglary, we the jury unanimously find that (a) the defendant, in fact, used a firearm in commission of the offense, (b) the prosecution has failed to prove,

206. Here, one notes that both prosecutors and defense attorneys may find the use of a special verdict advantageous to their position. A prosecutor may want to bind a sentencing judge to a specific amount of drugs, just as a defense attorney would.

207. For instance, as discussed in Part I, in a case involving the possession of narcotics, the form could not propose ranges of amounts of the substance; it would instead indicate a specific amount of a drug. "Less than" or "more than" would however be sufficient under *Pimentel-Lopez*.

208. FED. R. CRIM. P. 30(d). (Stating that any party may object to a jury instruction, thus preserving the objection for appeal).

> beyond a reasonable doubt, that the defendant used a firearm in commission of the offense (i.e., we cannot be sure whether or not the individual used a firearm), or (c) the defendant did not use a firearm in commission of the offense and should be considered innocent of that conduct.

The instructions could clarify that the jury should only pick the third option if, in light of all of the evidence providence by the prosecution, the jury finds it factually impossible that the defendant exhibited the specific offense characteristic.

If the jury chose option (b), thus acquitting the defendant of using the gun, the sentencing judge would still be able to find that the individual used the gun by a preponderance of the evidence. If the jury chose option (c) and found the defendant factually innocent of using the firearm, however, the judge would be prohibited from increasing the sentence with that particular enhancement. This system complies with both *Apprendi* and *Pimentel-Lopez*.

This proposal builds on the foundational sentencing concepts provided in *Apprendi.* As previously mentioned, the *Apprendi* court held that any "fact[] that increase[d] the prescribed range of penalties to which a criminal defendant is exposed, other than the fact of a prior conviction" has to be submitted to the jury.[209] By using special verdicts, attorneys and judges would have the ability to bind sentencing courts to jury declarations of innocence based on specific factual findings when calculating the guideline range. Thus, the special verdict gains new significance as a tool to empower the jury to bind the sentencing court. One could even say that, given the Ninth Circuit's denial of rehearing in *Pimentel-Lopez*, prudent defense attorneys (coupled with willing judges) have already gained a tool to better control the sentencing outcomes of their client's case.

But while courts should uphold *Pimentel-Lopez*'s legitimization of declarations of innocence, they should limit their use. Specifically, the court should limit the types of conduct subject to declarations of factual innocence and only allow declarations of innocence for conduct that constitutes a "specific offense characteristic" or "adjustment" under the current Federal Sentencing Guidelines. A declaration of factual innocence should not be employed to find an individual innocent of an underlying offense if declaration would have no impact on sentencing adjustments.

For instance, if an individual were charged with aggravated assault with the specific offense characteristic of discharging a firearm, a jury could not

209. *Apprendi*, 530 U.S. at 490.

find the defendant factually innocent of the base offense of aggravated assault (they would be limited to a verdict of guilty or not guilty), but they could find that the defendant was factually innocent of discharging a firearm.

By limiting the application of declarations of factual innocence to specific offense characteristics and adjustments, attorneys and courts could craft special verdict forms in a way that limits juror confusion. Essentially, the jury would be required to find that the individual engaged or did not engage in limited types of conduct defined by the Guidelines. The simplicity of inquiries for specific offense characteristics and adjustments would allow questions to be targeted and specific. By contrast, inquiries in a general verdict would probably be more complicated, evaluating mens rea, actus reas, causation, as well as a number of associated factors. By keeping the use of declarations or innocence limited to specific offense characteristics and adjustments, the confusion associated with their use would be kept to a minimum.

Additionally, this limited application would discourage defendants from overusing special verdicts in every case, which would moderate any undue impact on judicial economy. In many cases, the facts of the case would make the relative utility of a declaration of innocence clear. For instance, where there is no question that a firearm was not involved in the commission of a crime, a declaration of innocence regarding the individual's brandishing of a firearm would be unnecessary.

A. Benefits of the Proposal: Clarifying Sentencing Practices

Under this proposal, judges would be provided with a declarative statement of culpability regarding certain types of conduct. This practice would have numerous benefits. Specifically, the proposal would combat imprecise and unpredictable sentencing practices currently at play, including the use of acquitted conduct at sentencing.

Numerous scholars have demonstrated the need to end the use of acquitted conduct at sentencing.[210] They note that the practice "impairs the substantive criminal law by weakening the foundational principal of the

210. *See, e.g.*, Johnson, *supra* note 34 (discussing the proposals for the eradication of acquitted conduct at sentencing, including doing away with the Guidelines and formally ending the use of acquitted conduct); Orhun Hakan Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 SANTA CLARA L. REV. 675 (2014) (discussing that the use of acquitted conduct, among other things, undermines justifications for punishment by the state and undermines the role of the jury).

American criminal justice system."[211] It does so by "giving prosecutors a proverbial second bite at the apple by permitting factors already rejected by the jury to influence the defendant's punishment."[212] Most recently, in 2016, the National Association for Criminal Defense Lawyers submitted an amicus curiae brief urging the Supreme Court to consider prohibiting the use of acquitted conduct at sentencing, but the relevant case was denied certiorari.[213] Thus, despite opposition to the practice, the U.S. Congress and the courts have yet to disallow its use.[214]

Scholars suggest numerous remedies that would clarify the blameworthiness of a defendant's conduct at sentencing proceedings, such as the introduction of a third verdict of "not proven,"[215] or "innocent,"[216]—the pros and cons of which have been explored above. Other suggestions rely upon constitutional interpretation to end the use of acquitted conduct (though scholars note that these efforts will likely be unsuccessful) or changing the Guidelines to disallow acquitted conduct.[217]

Pimentel-Lopez's use of special verdicts provides an unconventional means of preventing judges from considering certain types of conduct at sentencing. It produces a similar result to a straightforward prohibition on the use of acquitted conduct, provided this conduct be a specific offense characteristic or adjustment. Because the Ninth Circuit denied rehearing en banc, thus affirming the holding in *Pimentel-Lopez*, special verdicts—when worded in a specific manner—now can be used to declare defendants innocent of certain conduct in the Ninth Circuit. Therefore, instead of attempting to obtain a jury's acquittal, savvy attorneys could request a special verdict form that would affirmatively preclude the sentencing court from considering that conduct. This procedural tactic has the same effect as ending the unpopular use of acquitted conduct in sentencing. Moreover, by adopting this proposal, no constitutional interpretation or overturning of precedent would be required to, in effect, prevent sentencing courts from considering acquitted conduct.

211. Yalinçak, *supra* note 210, at 726.
212. Johnson, *supra* note 34, at 26.
213. Brief of the National Association for Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner, Bell v. United States, 795 F.3d 88 (D.C. Cir.), *reh'g en banc denied*, 808 F.3d 926 (D.C. Cir. 2015) (per curiam), *cert. denied*, 137 S. Ct. 37 (2016) (mem.).
214. *See* Johnson, *supra* note 34, at 27.
215. *See generally* Bray, *supra* note 167. *See also* discussion *supra* Subpart III.B.
216. *See* Leipold, *supra* note 10, at 1300.
217. *See* Johnson, *supra* note 34, at 29.

B. Judicial Authority Maintained

Similarly, judges would retain the broad authority provided them under the law under this proposal. The United States codified the principle that sentencing courts have broad discretion to consider without limitation an individual's background, character, and conduct to determine an appropriate sentence so that judges remain free to consider any previous crimes, acts, and omissions.[218] Only those facts put to a jury in a special verdict form would be binding on the sentencing court, thus reserving broad judicial authority to consider the full range of the convicted individual's conduct.

C. Sentencing Imbued With Benefits of Jury Decisionmaking

Declarations of factual innocence would imbue the sentencing process with the benefits of collective jury decisionmaking, helping to prevent judicial abuses at the sentencing level and providing credence to the jury's constitutional role as arbiter of facts. The Sixth Amendment right to an impartial jury would be carried out through sentencing and would ensure that the community-representing jury has a larger role in sentencing. Moreover, as previously noted, the jury, comprised of community members with whom the defendant may interact upon release, has a stake in determining the defendant's culpability, which could help promote more accurate factfinding and allow the jury to play a direct role in determining the conduct for which the defendant should receive retribution.[219]

D. Small Step Toward Changing the Stigma Associated With Arrests

It is true that limiting the scope of the application of declarations of innocence to specific offense characteristics and adjustments would also limit its benefits. For instance, one could assert that the path to exoneration would only be clarified if special verdicts were used to declare individuals innocent of underlying offenses, rather than specific offenses characteristics and adjustments. They would similarly argue that social stigma may not be as significantly reduced under this limited scope. But, while its effects may not

218. *See* 18 U.S.C. § 3661 (2012).

219. *Cf.* Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 134 n.169 (quoting NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 78 (1974)) ("Retribution . . . not only limits the worst suffering we can inflict on the criminal, but also sometimes dictates the minimum sanction a community will tolerate.").

be as strong, its presence could still play an important role in changing the culture to one that does not associate an arrest with guilt. Stigma would be at least partially reduced if a defendant were found innocent of certain special characteristics. One would expect, for example, that society would be marginally more accepting of an individual declared innocent of brandishing a firearm during an assault. In this way, declarations of innocence for certain conduct would help give some degree of life to the rhetoric of innocence. These small changes could lead to a broader eventual impact.

E. Potential Problems With the Proposal: Necessary Buy-In From Stakeholders

The application of this practice would carry with it some challenges. For instance, if the special verdict became common practice, prosecutors could choose to withhold evidence related to specific offense characteristics or adjustments until sentencing. In doing so, they would prevent juries from being able to consider this conduct and potentially deliver a limiting verdict of innocence. Judges would then be free to consider this information in calculating the defendant's charges.

However, a prudent defense attorney could request the instruction at the trial stage in anticipation of a prosecutor's withholding of the evidence until sentencing. One could anticipate that courts would find it appropriate to require prosecutors to introduce evidence that would impact a defendant's sentence at trial. Recognizing the potential unfairness that could be brought about by withholding evidence until sentencing, and given the benefits of clarified factual findings provided by a special verdict, judges may be motivated to permit their use.

Another potential problem could be judges' categorical rejection of proposals for special verdicts, as they would retain their current abilities to exercise their discretion in allowing them. But while some judges may engage in this practice, it is likely that other judges would find that special verdicts embody Sixth Amendment principles and that their usage provides fairer outcomes. Thus, while individual judges would remain free to oppose their usage, it is equally likely that many would find the use of declarations of innocence to be desirable.

Moreover, even if the judge denied the instruction, the attorney would be permitted to object so as to preserve the record on appeal. In the beginning, appellate courts would be hard-pressed to find a reason to reverse the trial court's decision, since judges retain the broad authority to reject

special verdicts. Over time, however, if appellate courts saw the number of appeals based on rejected special verdicts reach a critical mass or recognized the benefits of the declarations of innocence, they may be prompted to reconsider the current standards and reinforce the use of declarations of innocence vis-à-vis the common law. Even though this process may take years, or even decades, a strong movement supporting the use of declarations of innocence could ultimately prevail.

Overall, the use of special verdicts to declare defendants innocent of special circumstances and to make adjustments under the Guidelines provides certainty for sentences, maintains the jury's role as the ultimate factfinder, and could ultimately benefit the American judicial system. Although this proposal is not immune from problems—most new proposals rarely are—the benefits associated with its implementation would likely outweigh the negative consequences.

CONCLUSION

The Ninth Circuit's decision in *Pimentel-Lopez* presents a novel application of special verdicts. In holding that the special verdict could be used to declare an individual factually innocent of specific conduct, the court precluded the sentencing judge from coming to his own, inapposite conclusion for the sentencing determination. As there are no procedural bars to finding and individual factually innocent of committing any crime, this holding raises questions about the viability of introducing binding declarations of factual innocence to the American judicial system. On one hand, a finding of factual innocence could clarify the accused's level of culpability, give credence to the presumption of innocence currently in practice in the American judicial system, and give the jury the power to determine guilt or innocence imagined by the Sixth Amendment and the Constitution. On the other hand, its use would inevitably prove confusing for jurors and substantially impede judicial economy when trying cases. After weighing these benefits against the potential problems with the use of declarations of factual innocence, a compromise reveals itself: Special verdicts could be used to find defendants factually innocent, but only of specific offense characteristics and adjustments that could be used to calculate an individual's sentence under the Federal Sentencing Guidelines, as occurred in *Pimentel-Lopez*.

This system would provide clarity to the sentencing practices currently used in the American criminal justice system. Juries, serving in their primary

roles as fact-finders, would be able to exercise their ability to declare specific levels of culpability to sentencing courts, imbuing sentences with the benefits of group-based decisionmaking. At the same time, this limited scope both minimizes juror confusion and permits the sentencing court to retain the broad authority issued by statute and traditional American jurisprudence. In effect, then, this solution maximizes the benefits of declarations of innocence, while minimizing any detrimental impact of their implementation.

As noted, the *Pimentel-Lopez* decision appears to have created a circuit split with sister circuits that interpret similar verdict forms as acquittals, rather than declarations of innocence. Thus, should the Supreme Court decide to take up the issue, it should affirm but not expand the Ninth Circuit's holding, cementing the idea that juries' special verdicts can be used to declare an individual factually innocent of specific conduct adjustments under the Guidelines. In doing so, declarations of innocence provide a new tool to clarify sentencing procedures, prevent judicial abuses, and uphold the jury's position as a fundamental attribute of the American judicial system.