

COMMENTS

THE CONSTITUTIONAL INFIRMITY OF THE CURRENT FEDERAL SENTENCING SYSTEM: HOW THE USE OF UNCHARGED AND ACQUITTED CONDUCT TO ENHANCE A DEFENDANT’S SENTENCE VIOLATES DUE PROCESS

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I. INTRODUCTION

A jury found defendant John guilty of fraudulently forging and cashing checks, which were valued at approximately \$5,000 and made payable to Joan.¹ According to the United States Sentencing Guidelines,² the applicable sentencing range for John’s offense is between fifteen and twenty-one months.³ Assume, however, that at sentencing, the trial judge determined that John also killed Joan, as well as two other unrelated individuals, although John was never charged for those murders. Consequently, the judge increased John’s sentence to thirty years based on both the forged checks and the alleged murders. Under the current federal criminal sentencing system, such an increased sentence is permissible (provided that it remains within the prescribed statutory maximum), even though the judge is sentencing John for criminal conduct for which he was never tried and convicted.⁴

Further exacerbating matters, assume now that John was previously charged for these three murders, yet a jury of his peers acquitted him on all

1. This illustration is derived from the facts surrounding the sentencing procedure in *United States v. Mayle*, 334 F.3d 552 (6th Cir. 2003).

2. See U.S. SENTENCING GUIDELINES MANUAL (2005).

3. *Mayle*, 334 F.3d at 555.

4. See discussion *infra* Part II.C.

counts. Would the judge now be prohibited from considering such conduct in determining John's sentence for the fraudulent forgery and check cashing conviction? Surprisingly, the answer is no. If the judge disagrees with the jury's acquittal, he is allowed to enhance a defendant's sentence if he finds by a preponderance of the evidence that the underlying acts were indeed committed by the defendant.⁵ Consequently, John may be subject to a thirty-year sentence for a crime as minimal as forging checks based on conduct for which he was previously acquitted.

As this hypothetical situation illustrates, under the existing system of federal sentencing, a judge is permitted to consider both uncharged and acquitted conduct to increase a defendant's sentence.⁶ This Comment suggests that such procedures violate a defendant's right to due process and should not be allowed to continue. Furthermore, to the extent that judges continue to take such conduct into account, this Comment proposes an alternative procedure that satisfies rudimentary notions of fairness, justice, and due process of law.

Specifically, judges should not be allowed to enhance a defendant's sentence based on uncharged conduct if such conduct would otherwise constitute an element of a separate criminal offense. However, if uncharged conduct can be considered, this Comment proposes that such information be proven beyond a reasonable doubt at a post-trial sentencing hearing. At this hearing, a defendant will be permitted to offer all relevant information pertaining to the conduct at issue. Moreover, a defendant will be entitled to the same procedural safeguards that are available at trial.⁷ With respect to acquitted conduct, this Comment takes the categorical position that courts should never be permitted to enhance a defendant's sentence based on conduct that was the subject of an acquittal. By implementing these modifications, the federal criminal sentencing system would uphold a defendant's fundamental right to due process.

As a threshold matter, the Fifth Amendment of the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."⁸ Essentially, the touchstone of due process is the principle of fundamental fairness.⁹ Thus, the concept of

5. See *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (holding that the preponderance of the evidence standard at sentencing does not violate a defendant's right to due process); see *infra* notes 49-64 and accompanying text.

6. See discussion *infra* Part II.C.

7. For a description of the lesser procedural protections at sentencing, see *infra* notes 188-193 and accompanying text.

8. U.S. CONST. amend. V.

9. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

due process mandates that individuals receive the protection of fundamentally fair procedures. This includes, at a minimum, adequate notice of any charges or proceedings in which he or she is involved, as well as the opportunity to be heard at such proceedings.¹⁰ While this minimum guarantee applies to any government proceeding that may result in some loss to an individual,¹¹ due process protections must be more extensive in criminal trials and their consequent sentencing phase than in civil proceedings.¹²

The United States Supreme Court specifically stated that, with respect to a criminal trial, due process requires the observance of “the fundamental fairness essential to the very concept of justice.”¹³ Moreover, the Court subsequently provided that justice requires that a defendant have the opportunity to meaningfully participate in a judicial proceeding that may result in his or her deprivation of liberty.¹⁴ A judge’s unilateral increase of a defendant’s period of incarceration based on untried facts or facts that a jury has specifically deemed unproven is therefore inconsistent with the constitutional guarantee of due process.

Although the Supreme Court has described the requirements of adequate due process as “flexible”—in the sense that not all judicial proceedings require the same procedural safeguards¹⁵—such description does not justify the substantive violations that have occurred and continue to persist in the present process of criminal sentencing. The federal criminal sentencing system has a tumultuous history. It ranges from an era of indeterminate sentencing to a period in which uniform guidelines set forth the applicable standards and ranges for imposing a particular sentence.¹⁶ Importantly, in *United States v. Booker*, the United States Supreme Court declared the Federal Sentencing Guidelines advisory;¹⁷ as a result, judges again have broad discretion in determining a defendant’s

10. Saby Ghoshray, *Charting the Future of Online Dispute Resolution: An Analysis of the Constitutional and Jurisdictional Quandary*, 38 U. TOL. L. REV. 317, 337 (2006).

11. *Id.* at 338 (describing the scope of the protection as extending “from parole violation hearings to administrative hearings regarding government benefits and entitlements to full-blown criminal trials”).

12. *In Re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring); see also Scott M. Brennan, *Due Process Comes Due: An Argument for the Clear and Convincing Evidentiary Standard in Sentencing Hearings*, 77 IOWA L. REV. 1803, 1821 (1992) (arguing for a higher standard of proof at sentencing hearings than that used in civil litigation).

13. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

14. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

15. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

16. See discussion *infra* Part II.A-B.

17. *United States v. Booker*, 543 U.S. 220 (2005); see *infra* notes 147-168 and accompanying text.

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appropriate sentence.¹⁸ However, throughout each stage in the history of the federal criminal sentencing system, courts have deemed the consideration of uncharged and acquitted conduct for the purpose of increasing a defendant's sentence constitutional.¹⁹

Stated simply, even though the United States Sentencing Guidelines are no longer binding on federal courts, these courts continue to rely on the Guidelines to allow the use of both uncharged and acquitted conduct to serve as the basis on which to increase a defendant's sentence. In so doing, courts are not only violating the intent of *Booker*²⁰ and its predecessors, but they are engaging in a system of jurisprudence that should not withstand due process scrutiny.

Part II of this Comment provides a historical analysis of the federal sentencing system and examines landmark cases that have effectively perpetuated the use of uncharged and acquitted conduct considerations at sentencing. Part III discusses the unconstitutionality of using such conduct for the purpose of enhancing a defendant's sentence. It recommends that courts deem this consideration an unlawful violation of a defendant's due process rights. Part III further proposes that such conduct should no longer be allowed to serve as the basis for any post-trial sentencing enhancement; however, it offers the limited exception that, should the courts persist in their use of uncharged conduct, they must implement new procedures that comport with basic constitutional guarantees. Only through the implementation and administration of these procedures can the use of such information withstand the requirements of due process and uphold this nation's most basic liberties.

II. HISTORICAL DEVELOPMENT OF CRIMINAL SENTENCING PROCEDURES AND ASSOCIATED CONSTITUTIONAL CONCERNS

A. INDETERMINATE SENTENCING AND THE USE OF PRIOR UNCHARGED CONDUCT TO ENHANCE A DEFENDANT'S SENTENCE

At the beginning of the nineteenth century, the purpose of criminal

18. See discussion *infra* Part II.C-D. Specifically, since the Guidelines have been rendered advisory, courts are now free to sentence a defendant anywhere within the statutory range prescribed by Congress for the convicted offense. See *United States v. White*, 551 F.3d 381, 384-85 (6th Cir. 2008).

19. See, e.g., *Williams v. New York*, 337 U.S. 241 (1949) (discussed *infra* at notes 32-45 and accompanying text); *United States v. Watts*, 519 U.S. 148 (1997) (discussed *infra* at notes 112-115 and accompanying text).

20. *United States v. Booker*, 543 U.S. 220 (2005).

punishment became rehabilitation,²¹ which replaced the previous goal of simply punishing the offender.²² In an effort to achieve this new purpose, judges were allowed broad discretion over sentencing.²³ This discretion ushered in a new system of indeterminate sentencing, under which judges imposed individualized sentences based on the characteristics and background of each defendant, with rehabilitation as the main focus of a particular punishment.²⁴

While the trial judge was wholly responsible for the sentence, both Congress and probation officers provided assistance.²⁵ The legislature enacted criminal statutes that set both the minimum and maximum ranges of incarceration for a given offense, and judges were permitted unfettered discretion to sentence a defendant within these ranges.²⁶ Additionally, a probation officer provided the judge with a presentencing report. This report included various information concerning the defendant's characteristics and behavioral background, so as to assist the court in determining a just, fair, and equitable sentence.²⁷

As individualized sentences became the norm, two defendants convicted of similar, if not identical, crimes commonly received significantly disparate punishments.²⁸ This consequence grew troublesome because judges were not required to provide any substantive explanations for the imposition of a particular sentence;²⁹ therefore, justifications for the

21. Jack H. McCall Jr., *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467, 476 (1993) (noting that convicted criminals were viewed as the basis of a social problem, requiring reformation in order to further society's goals of protection, deterrence, and improvement of the convicts' futures).

22. Previously, "[t]he primary sentences were death, corporal punishment such as whipping, and fines," which satisfied the extant purposes of sentencing—retribution, punishment, and deterrence. Bertrall L. Ross II, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 725, 736 (2006); see also Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892 (1990) ("Jails were still a novel concept, used primarily to hold those awaiting trial.").

23. Elizabeth T. Lear, *Is Conviction Relevant?*, 40 UCLA L. REV. 1179, 1186 (1993).

24. Laura Leigh Taylor & J. Richard Neville, *Mistretta v. United States: Upholding the Constitutionality of the Sentencing Guidelines*, 40 MERCER L. REV. 1429, 1430-31 (1989).

25. Lear, *supra* note 23, at 1186-87.

26. KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 20 (1998).

27. Lear, *supra* note 23, at 1187; see also FED. R. CRIM. P. 32(d)(2).

28. See *Mistretta v. United States*, 488 U.S. 361, 361 (1989) ("[T]he existing indeterminate sentencing system resulted in serious disparities among the sentences imposed by federal judges upon similarly situated offenders . . .").

29. Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 525 (1993).

resulting disparities were unlikely to exist.³⁰ As a result, appellate courts rarely overturned a sentencing decision, since there was little—if any—substantive record on which to base a reversal or uncover constitutional infirmities.³¹

1. THE SUPREME COURT UPHOLDS THE INDETERMINATE SYSTEM AND FACILITATES THE CONSIDERATION OF UNPROVEN CONDUCT AT SENTENCING

In 1949, the United States Supreme Court, in *Williams v. New York*, addressed a challenge on due process grounds to the indeterminate criminal sentencing system.³² Williams was convicted of first degree murder for the killing of a fifteen-year-old girl he claimed surprised him while he was committing a burglary.³³ While the jury recommended a punishment of life imprisonment, the trial judge disagreed with the jury's recommendation and instead sentenced Williams to death.³⁴ The judge explained his sentence for the record, stating that he relied heavily on several facts that were included in the presentence report, though not presented at trial.³⁵

The trial court's reasoning began by considering Williams's prior trouble with the law, which began when he was merely eleven years old.³⁶ Furthermore, the court considered allegations that Williams was involved in thirty additional burglaries as proven facts, despite Williams never being charged—much less convicted—for these crimes.³⁷ The judge also accepted an allegation by a seven-year-old girl that Williams sexually molested her in the course of one of these alleged burglaries.³⁸ The court then considered his past sexual history, which the judge said evinced that he

30. Reitz, *supra* note 29, at 525 n.7.

31. *Id.* (noting additionally that defendants had to show an abuse of discretion for an appellate court to invalidate a trial judge's sentence and suggesting that this standard, coupled with the allowance of unexplained sentencing opinions, provides for the limited impact of appellate review on federal sentencing); *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 42 (1973); WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.3(D), at 1100 (2d ed. 1992).

32. *Williams v. New York*, 337 U.S. 241 (1949).

33. Reitz, *supra* note 29, at 528-29 (citing Transcript of Proceedings on Sentence at 13, *Williams*, 337 U.S. 241 (No. 671) [hereinafter Sentence Proceedings]).

34. *Id.* at 529. New York law provided that the trial court was authorized to decide whether Williams should receive the death penalty or life imprisonment, after taking into consideration the jury's recommendation. *Id.* at 529 n.27.

35. *Id.* at 529 (citing Sentence Proceedings, *supra* note 33, at 18-19).

36. *Id.* (citing Sentence Proceedings, *supra* note 33, at 12). Williams was accused of involvement in a burglary with an adult man, but his juvenile court judgment was suspended. *Id.*

37. *Id.* (citing Sentence Proceedings, *supra* note 33, at 14; Petition by Appellant for Rehearing and for Stay of Mandate at 23-24, *Williams v. New York*, 337 U.S. 241 (No. 671)).

38. Reitz, *supra* note 29, at 529 (citing Sentence Proceedings, *supra* note 33, at 17).

was a “menace to society” because he possessed “a morbid sexuality.”³⁹ Finally, the court considered an assault on the murder victim’s brother, which occurred contemporaneous to the murder, but again, was an incident for which Williams was never charged nor convicted.⁴⁰ Moreover, the judge specifically remarked that the increased sentence was imposed not only for the murder, but also for the attack on the victim’s brother.⁴¹

Williams challenged his increased sentence, arguing that the judge’s consideration of information acquired from individuals outside of the trial denied him reasonable notice of those charges against him as well as the opportunity to confront and cross-examine those individuals, thereby violating his constitutional right to due process of law.⁴² When his challenge reached the United States Supreme Court, it rejected his claim, finding that the sentencing phase is distinct from the trial because the judge is not confined to the sole issue of guilt, and thus, the two are not subject to the same constitutional strictures.⁴³ The Court specifically stated that acquiring the most thorough information regarding a defendant’s background is not only pertinent to a judge’s consideration of a sentence, but also may in fact be necessary to impose an appropriate punishment.⁴⁴ Accordingly, the Court held that Williams’s right to due process was not violated by the judge’s use of outside information to assist in determining his sentence.⁴⁵

Through this decision, the Supreme Court not only approved of the indeterminate system of criminal sentencing, but it also countenanced the trial court’s use of information—which had never been the basis of a charge of conviction—to substantially enhance a defendant’s sentence. Subsequently, Congress enacted a statute that codified the rule set forth in

39. *Williams v. New York*, 337 U.S. 241, 244 (1949). Specifically, the probation department reported that Williams had been living with two women and brought various men to their apartment to engage in sexual intercourse with them, and that on one occasion, he visited a local public school for the purpose of photographing the young children’s genitals. *Reitz*, *supra* note 29, at 530 (citing *Sentence Proceedings*, *supra* note 33, at 16).

40. *Reitz*, *supra* note 29, at 530 (citing *Sentence Proceedings*, *supra* note 33, at 13-14, 19).

41. *Id.* The judge explicitly stated, “[h]e must pay the extreme penalty for his brutal murder of an innocent young girl and the injuries he inflicted upon her young brother.” *Id.* at 530 n.41 (citing *Sentence Proceedings*, *supra* note 33, at 19).

42. *Williams v. New York*, 337 U.S. 241, 244 (1949).

43. *Id.* at 246-47.

44. *Id.* (citing Myerson, *Views on Sentencing Criminals*, 7 *LAW SOC. J.* 854 (1937); Sheldon Glueck, *Principles of a Rational Penal Code*, 41 *HARV. L. REV.* 453 (1928); Sam B. Warner & Henry B. Cabot, *Administration of Criminal Justice During the Past Fifty Years*, 50 *HARV. L. REV.* 583, 607 (1937); Comment, *Reform in Federal Penal Procedure*, 53 *YALE L.J.* 773 (1944)).

45. *Id.* at 252.

the Court's holding.⁴⁶ Title 18 of the United States Code, in section 3661 provides, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."⁴⁷ Under the authority of this wide-ranging statute, sentencing judges continued to impose incongruent punishments for similar offenses using unproven and uncharged information as the basis for enhanced sentences.⁴⁸

2. FURTHER COMPROMISING DUE PROCESS RIGHTS: THE COURT DECLARES THAT A DEFENDANT'S SENTENCE CAN BE INCREASED BASED ON FACTS FOUND BY A PREPONDERANCE OF THE EVIDENCE

In 1986, the Supreme Court again addressed due process concerns in the context of the indeterminate sentencing system in *McMillan v. Pennsylvania*.⁴⁹ Here, the defendants challenged the Pennsylvania statute under which they were convicted, because it treated possession of a firearm as a sentencing factor to be evaluated by a preponderance of evidence, instead of as an element of the crime of conviction, which would require proof beyond a reasonable doubt.⁵⁰ Specifically, the statute provided that anyone convicted of one of its enumerated felonies would be automatically subject to a minimum incarceration period of five years if the sentencing judge found that the defendant "visibly possessed a firearm" while committing the offense.⁵¹ The judge's determination had to meet only the preponderance of evidence standard.⁵² The defendants argued that this statute allowed the State to improperly circumvent its burden of proving criminal conduct beyond a reasonable doubt by labeling possession of a

46. 18 U.S.C. § 3661 (1984). This statute was first codified in 1970 as 18 U.S.C. § 3577, then renumbered to its current designation by the Sentencing Reform Act of 1984. See Victims of Crime Act of 1984, Pub. L. No. 98-473, § 212(a)(1), 98 Stat. 1987 (1984).

47. 18 U.S.C. § 3661 (1984).

48. See Rebecca Poate, *Beyond Relevant Conduct—The Federal Sentencing Commission's (In)Discretion: How U.S.S.G. Section 2G2.2(B)(4) Illustrates the Future of the Sentencing Guidelines*, 51 HASTINGS L.J. 1363, 1373 (2000).

49. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

50. *Id.* at 83; see 42 PA. CONS. STAT. § 9712(a)-(b) (1982). Elements of a crime are facts necessary to constitute the crime itself. *Almendarez-Torres v. United States*, 523 U.S. 224, 240 (1998). They must be stated in the indictment and proven to a jury beyond a reasonable doubt. *Id.* at 239. In contrast, sentencing factors are merely specific facts to be taken into account by a sentencing judge in determining the penalty for a defendant found guilty of the charged crime. *Id.* at 228. They need not be present to prove the commission of the underlying crime; therefore, they are not required to be set forth in the indictment nor proven to a jury beyond a reasonable doubt. *Id.* at 228, 240.

51. *McMillan*, 477 U.S. at 81.

52. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

firearm as a sentencing factor rather than as an underlying element of the offense.⁵³ Additionally, the defendants asserted that even if the possession of a firearm is indeed a sentencing factor and not a statutory element of the offense, a judge's use of the preponderance of the evidence standard to evaluate such unproven facts violates the right to due process of law.⁵⁴

Again, as in *Williams*, the Court rejected both arguments and upheld the Pennsylvania statute.⁵⁵ The Court declared that, although due process does forbid the reassignment of burdens of proof in criminal cases to some extent, the statute in question did not reach the level of a constitutional violation.⁵⁶ Specifically, the Court expressed its reluctance to conclude that due process prohibits a State from choosing to either define certain conduct as an additional element of a crime or to prescribe a particular penalty in the event that such conduct occurs.⁵⁷ The Court further emphasized that, although the statute in question may have raised the minimum potential penalty for an offender, it did not alter the maximum prescribed sentence for one convicted of an enumerated felony and did not change the essential statutory elements of any such offense.⁵⁸ Instead, the statute merely defined the exact consequence of a sentencing judge's finding that an offender possessed a firearm during the commission of the offense, a customary consideration of sentencing courts, in order to determine an appropriate punishment.⁵⁹ In other words, even when the particular sentence "enhancement" applied, a defendant was still subject to the same maximum penalty for committing the underlying offense as if the additional factor had not been found. Accordingly, the Court concluded that the Pennsylvania statute was constitutional.⁶⁰

More importantly, however, the Court declared that the preponderance of evidence standard satisfied due process, particularly in light of cases such as *Williams*.⁶¹ Specifically relying on *Williams*, the Court stated that sentencing courts have traditionally determined facts relevant to the

53. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

54. *Id.*

55. *Id.* at 91.

56. *Id.* at 86.

57. *Id.*

58. *Id.* at 83.

59. *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986).

60. *Id.* at 91. For an argument that under *McMillan*, courts will rarely invalidate State legislative acts designating certain conduct as sentencing factors, see Reitz, *supra* note 29, at 545 ("If the *McMillan* factors are accurate indicators of the underlying due process standard, the Constitution will not interfere greatly or often with legislative decisions to locate important factfinding in the sentencing stage.").

61. *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986) (citing *Williams v. New York*, 337 U.S. 241 (1949)).

imposition of a proper sentence without *any* prescribed burden of proof.⁶² The Court considered the fact that criminal sentencing only occurs after a defendant is convicted beyond a reasonable doubt; therefore, once a legitimate conviction is obtained, the defendant is automatically subject to constitutional deprivation of his liberty within the prescribed statutory range for the offense.⁶³ Consequently, the Court rejected the claim that due process requires a heightened standard of proof for factual determinations at sentencing.⁶⁴

3. THE END OF THE INDETERMINATE ERA

Toward the end of the twentieth century, the rehabilitation theory behind the indeterminate sentencing system received intensified scrutiny.⁶⁵ Studies demonstrated that punishments did not reduce recidivism.⁶⁶ Commentators criticized the unwarranted disparity among sentences due to the unrestricted power of judges, and conservative political forces argued that the system produced sentences that were too lenient.⁶⁷ In response, Congress passed the Sentencing Reform Act (SRA) of 1984, which created the United States Sentencing Commission (Commission). The Commission's purpose was to devise sentencing guidelines for the federal courts⁶⁸ and to set forth an improved procedure for appellate review of imposed sentences.⁶⁹ Unfortunately, despite the drastic changes that would soon transform federal sentencing jurisprudence, the use of a defendant's background information as the basis for enhanced sentencing remained at the heart of federal sentencing policy, regardless of such information being unproved, unchanged and, in some cases, the basis of an acquittal.

B. THE FEDERAL SENTENCING GUIDELINES AND CONTINUED CONSIDERATION OF UNCHARGED AND ACQUITTED CONDUCT AT SENTENCING

In November of 1987, the Commission promulgated the United States

62. *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986) (citing *Williams v. New York*, 337 U.S. 241 (1949)) (emphasis added).

63. *Id.* at 92 n.8 (citing *Meachum v. Fano*, 427 U.S. 215, 224 (1976)).

64. *Id.* at 92.

65. *See* Ross, *supra* note 22, at 745-46.

66. Recidivism is defined as "[a] tendency to relapse into a habit of criminal activity or behavior." BLACK'S LAW DICTIONARY 597 (3d pocket ed. 2006); *see* ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 12-18 (photo. reprint 1986) (1976) (discussing the ineffectiveness of the rehabilitative methods of the criminal sentencing system).

67. *See* STITH & CABRANES, *supra* note 26, at 31.

68. 28 U.S.C. § 991 (2006).

69. *See* 18 U.S.C. § 3742 (2006) (subpart (e) invalidated by *United States v. Booker*, 543 U.S. 220 (2005)).

Sentencing Guidelines, which provide a detailed sentencing procedure to be used by the federal courts.⁷⁰ In an effort to reduce the unwarranted disparity of the indeterminate system and to promote fair and proportionate sentences,⁷¹ the Guidelines contain a complex grid used to determine the appropriate sentencing range for a defendant.⁷² The grid is composed of a vertical axis, which is labeled the “offense level” and represents the severity of the convicted offense, and a horizontal axis, which is labeled the “criminal history category” and corresponds to the offender’s criminal history.⁷³ The Guidelines further specify several mitigating and aggravating factors that affect a defendant’s position on each axis.⁷⁴ The intersection of the locations on each axis provides the range, in months, within which a judge has the discretion to sentence the defendant.⁷⁵ A judge could depart from the applicable range provided by the grid, but only in the limited instance where a specific case involved factors that were not adequately considered by the Commission.⁷⁶ Such departures were subject to a de novo standard of review on appeal.⁷⁷

Importantly, the new system specifically requires a probation officer to calculate the applicable sentencing range in the presentence report, identifying all factual findings that would result in an adjustment to the offense level or criminal history category.⁷⁸ Ordinarily, the sentencing judge accepts the facts set forth in the report as well as the calculation of the guidelines range.⁷⁹ While either party may object to the information contained in the presentence report, the sentencing court is not required to

70. See U.S. SENTENCING GUIDELINES MANUAL (2005).

71. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2004).

72. See U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A, sentencing table (1992).

73. See *id.*

74. Such factors include the offender’s role in the offense, the use or taking of a dangerous weapon, hate crime motivation or a vulnerable victim, and acceptance of responsibility. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (1992); § 2A4.1(b)(3) (2003); § 2B2.1(b)(3) (2001); § 2B3.1(b)(2)(A)-(C) (2001); § 3A1.1 (2000); § 3E1.1 (2003).

75. See U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A, sentencing table (1992).

76. 18 U.S.C. § 3553(b)(1) (2006), *invalidated by* United States v. Booker, 543 U.S. 220 (2005); see generally U.S. SENTENCING GUIDELINES MANUAL § 5K (2004).

77. 18 U.S.C. § 3742(e) (2006), *invalidated by* United States v. Booker, 543 U.S. 220 (2005); see also Farnaz Farkish, *Docking the Tail that Wags the Dog: Why Congress Should Abolish the Use of Acquitted Conduct at Sentencing and How Courts Should Treat Acquitted Conduct After United States v. Booker*, 20 REGENT U. L. REV. 101, 107-08 (2007).

78. See FED. R. CRIM. P. 32(d)(1). To make such findings, a probation officer would generally interview the defendant and then review the prosecutor’s files, placing the greatest emphasis on the contents of those files in forming his conclusions. See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 172-74 (1991).

79. Heaney, *supra* note 78, at 169 n.22 (describing a 1989 study where only ten percent of sentencing courts in that year varied from the range set forth in the presentence report).

hold an evidentiary hearing to resolve such contentions.⁸⁰ In fact, such hearings are extremely rare.⁸¹

However, the most significant portion of the Guidelines regarding the consideration of unproven facts at sentencing is the relevant conduct provision.⁸² This provision allows for adjustments to a defendant's offense level based on conduct related to the convicted offense, even though such conduct may not necessarily constitute an underlying element of the offense.⁸³ Specifically, the provision encompasses any accomplices' conduct for which the defendant may be held liable, as well as any act undertaken by the defendant in furtherance of the offense, i.e., in preparation, during, or subsequent to its commission, regardless of whether such conduct served as the basis for the defendant's conviction.⁸⁴ Additionally, the relevant conduct provision allows a defendant's offense level to be increased based on acts that form the same course of conduct, common scheme, or plan as the offense of conviction.⁸⁵ This portion of the provision applies exclusively to crimes such as thefts or drug distribution offenses⁸⁶ because the significance of these offenses is better determined by assessing the scheme in its entirety, regardless of the number of counts for which a defendant was actually indicted or convicted.⁸⁷

Additionally, sentencing courts can take into account information that exceeds the boundaries of the relevant conduct provision, as the following section provides: "the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."⁸⁸ Unlike the relevant conduct provision, this information cannot serve as the basis for an adjustment of a defendant's offense level;⁸⁹ however, judges can consider the additional conduct to determine an appropriate sentence within the

80. See Katlin McKelvie et al., *Sentencing Guidelines*, 88 GEO. L.J. 1483, 1519 n.2052 (2000).

81. Heaney, *supra* note 78, at 174.

82. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2003). Ironically, this provision has been considered by scholars as the "cornerstone" of the system. See William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 495 (1990).

83. See Wilkins & Steer, *supra* note 82, at 504.

84. See Wilkins & Steer, *supra* note 82, at 504; U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2003).

85. Lear, *supra* note 23, at 1196.

86. *Id.* at 1195-96.

87. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. background (2004).

88. U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2004).

89. *Id.*

applicable Guideline range.⁹⁰ More significantly, a sentencing judge can consider this information in determining whether a departure from the prescribed range is warranted, and if so, in deciding the extent of such departure.⁹¹

Consequently, the promulgation of the Guidelines exacerbated the problem of due process violations in the context of criminal sentencing. The new system provided sentencing courts with the authority to use unproven conduct to increase a defendant's range of punishment, yet it did not require that those courts provide a defendant with a full opportunity to rebut such sentencing enhancements.⁹² However, while the relevant conduct provision clearly encompasses acts for which the defendant was never charged, the federal appellate courts were in conflict as to whether the consideration of acquitted conduct was implicit in that provision or whether such conduct should be considered at all.⁹³ The majority of the circuits, however, found that the relevant conduct provision, and the sentencing system as a whole, included the use of conduct for which a defendant was acquitted in determining sentencing adjustments.⁹⁴

For example, in *United States v. Boney*,⁹⁵ co-defendants Boney and Holloman were each charged with distributing .199 grams of cocaine and possession with intent to distribute 12.72 grams of cocaine.⁹⁶ A jury convicted Boney on both counts, but only found Holloman guilty of distribution and acquitted him of possessing the 12.72 grams with the intent to distribute.⁹⁷ Nevertheless, the presentence report submitted to the judge

90. U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2004).

91. *Id.*

92. See discussion *supra* Part II.B.

93. Marvin Sprouse, Note, *A Sentence for Acquittal: The Supreme Court Holds That Sentences May Be Enhanced for "Conduct" for Which Persons Have Been Tried and Acquitted*: *United States v. Watts*, 117 S. Ct. 633 (1997), 28 TEX. TECH. L. REV. 963, 974-87 (1997).

94. See, e.g., *United States v. Boney*, 977 F.2d 624 (D.C. Cir. 1992); *United States v. Rodriguez-Gonzalez*, 899 F.2d 177 (2d Cir. 1990); *United States v. Fonner*, 920 F.2d 1330 (7th Cir. 1990); *United States v. Mocchiola*, 891 F.2d 13 (1st Cir. 1989); *United States v. Ryan*, 866 F.2d 604 (3d Cir. 1989); *United States v. Isom*, 886 F.2d 736 (4th Cir. 1989); *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989). But see *United States v. Brady*, 928 F.2d 844, 851-52 (9th Cir. 1991) (refusing to increase defendant's sentence on the basis of acquitted conduct and stating that doing so would "pervert our system of justice"), *abrogated by Nichols v. United States*, 511 U.S. 738 (1994).

95. *Boney*, 977 F.2d 624.

96. *Id.* at 627.

97. See *id.* The court noted that the jury's incongruent verdict was "puzzling," as a third co-defendant, Marks, was acquitted on both counts. *Id.* However, in an earlier decision denying Holloman's motion for a new trial, the United States District Court for the District of Columbia stated that the jury must have rejected the notion that the three defendants were acting together. *United States v. Holloman*, No. 89-381 SSH, 1990 WL 678953, at *2 (D.D.C. Nov. 5, 1990).

concerning Holloman aggregated the weight of the drugs involved in both counts and determined the applicable sentencing range to be sixty-three to seventy-eight months.⁹⁸ The sentencing judge found by a preponderance of the evidence that Holloman also possessed the 12.72 grams of cocaine, and considering such fact under the relevant conduct provision of the Guidelines, imposed a sentence of sixty-three months.⁹⁹ Although this sentence fell within the statutory maximum prescribed by Congress for the distribution count,¹⁰⁰ it greatly exceeded the ten to sixteen month range that would have applied if the report only used the crime of conviction in its calculation.¹⁰¹ Essentially, the court subjected Holloman to the same Guidelines range that would have applied had he been convicted on the possession with intent to distribute count, despite the fact that a jury previously found him not guilty of that offense.¹⁰²

Holloman appealed his increased sentence, claiming that the Guidelines do not allow consideration of acquitted conduct and that the court's use of such conduct in the calculation of his punishment violated his right to due process under the Fifth Amendment.¹⁰³ The United States D.C. Circuit Court of Appeals rejected both contentions and upheld the procedure used by the court in determining Holloman's sentence.¹⁰⁴ The court began by noting that an overwhelming majority of the federal appellate courts had previously sanctioned the use of acquitted conduct under the Guidelines.¹⁰⁵ Furthermore, the court found that the language of the relevant conduct provision itself fully supports such a conclusion.¹⁰⁶ Specifically, the broad terms of the portion providing for acts that form the

98. United States v. Boney, 977 F.2d 624, 635 (D.C. Cir. 1992).

99. *Id.*

100. See 21 U.S.C. § 841(b)(1)(C) (2006).

101. *Boney*, 977 F.2d at 635.

102. *Id.*

103. *Id.* Holloman also asserted that the court's use of conduct for which he was acquitted violated the Double Jeopardy Clause of the Fifth Amendment. *Id.* The use of acquitted conduct at sentencing does implicate this constitutional concern; however, this Comment restricts its focus to due process violations. Similarly, the use of acquitted conduct at sentencing raises res judicata issues, though this procedural mechanism is also beyond the scope of the Comment. For a full discussion addressing these issues, see Cynthia L. Randall, Comment, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283 (1992); see also Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 350-54 (1992); Jeff Nicodemus, *Watts v. United States: The Misguided Approval of a Sentencing Court's Authority to Consider Acquitted Conduct During Sentencing*, 25 AM. J. CRIM. L. 437, 457-461 (1998).

104. *Boney*, 977 F.2d at 637.

105. *Id.* at 635 (citations omitted); see *supra* note 94.

106. *Boney*, 977 F.2d at 635.

same course of conduct, common scheme, or plan as the convicted offense clearly encompass conduct for which the defendant has been acquitted.¹⁰⁷ The court additionally pointed out that the application notes following the provision make clear that a defendant need not be convicted of certain conduct for the underlying acts to be considered relevant at sentencing.¹⁰⁸

In rejecting Holloman's due process argument, the court stated that the basis for such a claim is the fallacious assumption that an acquittal represents a finding of absolute innocence.¹⁰⁹ Instead, the court explained, a finding of not guilty merely means that all of the elements of the offense were not established beyond a reasonable doubt, not that the defendant was completely uninvolved with the charged conduct.¹¹⁰ Moreover, the court declared that the consideration of conduct underlying an acquittal for the purpose of enhancing a defendant's sentence *does* comport with due process requirements, as long as it meets the preponderance of the evidence standard.¹¹¹

Ultimately, the United States Supreme Court, in *United States v. Watts*, addressed the issue of whether a sentencing court can properly consider acquitted conduct in determining an appropriate punishment for a defendant.¹¹² The case involved a consolidated petition from two United States Court of Appeals for the Ninth Circuit decisions, which held that sentencing courts could not consider the underlying conduct of charges for which a defendant had been previously acquitted.¹¹³ The Court reversed the decisions of both cases, finding that the Ninth Circuit's holdings conflicted with the clear implications of 18 U.S.C. § 3661, the Federal Sentencing Guidelines, and prior Supreme Court jurisprudence.¹¹⁴ Specifically, the Court held that a sentencing court may consider conduct that served as the basis for a charge that resulted in an acquittal, as long as the court finds by a preponderance of the evidence that the defendant did in fact engage in such conduct.¹¹⁵

107. *United States v. Boney*, 977 F.2d 624, 635 (D.C. Cir. 1992).

108. *Id.*; see U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. application Note 2 (2004).

109. *Boney*, 977 F.2d 624 at 635.

110. *Id.*

111. *Id.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986); *United States v. Burke*, 888 F.2d 862, 869 (D.C. Cir. 1989)).

112. *United States v. Watts*, 519 U.S. 148 (1997).

113. *Id.* at 149 (citing *United States v. Putra*, 78 F.3d 1386 (9th Cir. 1996); *United States v. Watts*, 67 F.3d 790 (9th Cir. 1995)).

114. *Id.*

115. *Id.* at 157. As noted above, the Court previously determined that the preponderance of evidence standard at sentencing did not violate Due Process. See *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

As a result, regardless of whether a defendant has been charged, tried, or convicted of criminal wrongdoing, a sentencing court can still use any conduct relating to that offense for the purpose of enhancing the defendant's period of incarceration. While the Guidelines system may have achieved its goal of reducing unwarranted sentence disparity, it perpetuated due process violations in the context of criminal sentencing, as it provided courts with an even broader range of unproven conduct that could be considered as a basis for increasing a defendant's sentence. However, the ease of sentence enhancement under the Guidelines provoked the Supreme Court to begin considering exactly how far upward sentence adjustments could reach.

**C. THE SUPREME COURT LIMITS THE APPLICATION OF THE
GUIDELINES PRECEDING ITS SEMINAL DECISION IN *UNITED STATES V.
BOOKER***

The Supreme Court first addressed the extent to which courts could impose upward sentence adjustments under the Guidelines in *Apprendi v. New Jersey*.¹¹⁶ A New Jersey grand jury indicted Apprendi on twenty-three counts, including charges for various shootings and unlawful possession of several weapons.¹¹⁷ Apprendi, however, entered into a plea agreement and pled guilty to two counts of possession of a firearm for an unlawful purpose, which carried a statutory sentencing range of five to ten years, and one count of unlawful possession of an antipersonnel bomb, which carried a statutory sentencing range of three to five years.¹¹⁸ The plea agreement permitted the State to seek an enhanced sentence on the basis that one of the firearm offenses was committed with a biased purpose, i.e., Apprendi fired a gun into the home of an African-American family.¹¹⁹ In return, Apprendi maintained the right to challenge the constitutionality of the New Jersey statute that provided for such enhancement.¹²⁰

After the trial judge accepted Apprendi's plea, the prosecutor filed for the enhanced sentence.¹²¹ The judge rejected Apprendi's claims of the statute's unconstitutionality and found by a preponderance of the evidence

116. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

117. *Id.* at 469.

118. *Id.* at 469-70. The firearm charge was brought according to section 2C, section 39-4a of the New Jersey Statutes and the bomb charge brought under section 39-3a. *Id.*

119. *Id.* at 470. Title 2C, section 44-3(e) of the New Jersey Statutes, which authorized a sentencing enhancement of ten to twenty years if the court found by a preponderance of the evidence that the crime committed was motivated with the purpose to intimidate based on race, color, gender, handicap, religion, sexual orientation or ethnicity, was deleted by the 2002 amendment of the statute.

120. *Id.*

121. *Id.*

that the offense was committed with the purpose to intimidate.¹²² As a result, the judge sentenced Apprendi to twelve years in prison for that particular charge, even though the statutory maximum prescribed by the New Jersey legislature for possession of a firearm was ten years.¹²³

Apprendi unsuccessfully appealed, arguing that due process required that a jury find beyond a reasonable doubt that he committed the crime with the intent to intimidate.¹²⁴ The New Jersey appellate court, relying on *McMillan*,¹²⁵ deferred to the State legislature's classification of the enhancement as a sentencing factor and not an element of the underlying offense, effectively relieving the State from having to prove such conduct beyond a reasonable doubt.¹²⁶ Additionally, the court stated that although the statute providing for such enhancement allowed for a defendant's sentence to be increased beyond the convicted offense's maximum penalty, this fact alone was insufficient to render the statute unconstitutional.¹²⁷ The New Jersey Supreme Court affirmed.¹²⁸

The United States Supreme Court, however, reversed, recognizing that the case involved constitutional protections of "surpassing importance," including the right not to be deprived of one's liberty without due process of law.¹²⁹ Specifically, the Court stated that the protections of due process, as well as the right to a jury, extend beyond determinations of a defendant's guilt or innocence—they also apply to sentencing.¹³⁰ Accordingly, the Court limited the extent to which a judge alone could increase a defendant's sentence to the prescribed statutory maximum for the convicted offense.¹³¹ Any fact that would increase a sentence beyond that limit, with the exception of a prior conviction, had to be proven beyond a reasonable doubt

122. *Apprendi v. New Jersey*, 530 U.S. 466, 470-71 (2000).

123. *Id.* at 471.

124. *Id.*

125. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

126. *Apprendi*, 530 U.S. at 471.

127. *Id.* at 472.

128. *Id.* *But see* *State v. Apprendi*, 731 A.2d 485, 497 (N.J. 1999) (Stein, J., dissenting) (concluding that the New Jersey statute was unconstitutional under the Due Process Clause of the Fifth Amendment, among others, and emphasizing the importance of the reasonable doubt standard in establishing facts which serve as the basis for a defendant's increased period of incarceration), *rev'd*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

129. *Apprendi*, 530 U.S. at 476.

130. *Id.* at 484 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).

131. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Therefore, the judge's imposition of a twelve year sentence was unconstitutional, as it exceeded the ten year maximum prescribed by the New Jersey legislature for the crime of possession of a firearm. *See id.*

to a jury.¹³² However, the Court emphasized that its holding did not affect a judge's consideration and use of relevant, unproven conduct to increase a defendant's sentence *within* the range set forth by the legislature.¹³³

The Supreme Court expanded the restriction set forth in *Apprendi*¹³⁴ in *Blakely v. Washington*,¹³⁵ in which the Court addressed the constitutionality of the sentencing system of Washington State. Blakely pled guilty to second-degree kidnapping, involving domestic violence, and second-degree assault, concerning domestic violence and use of a firearm.¹³⁶ Under Washington law, Blakely's punishment could not exceed ten years imprisonment.¹³⁷ However, under the Washington Sentencing Reform Act, which provided guidelines further limiting sentence ranges, Blakely was subject to an incarceration period of forty-nine to fifty-three months.¹³⁸ The guidelines did permit an upward departure from such range if a judge found "substantial and compelling reasons justifying an exceptional sentence."¹³⁹ Although the State recommended a sentence within the applicable range, the sentencing judge enhanced Blakely's sentence to ninety months, based on his finding by a preponderance of the evidence that Blakely had acted with deliberate cruelty.¹⁴⁰

Blakely challenged his increased sentence, claiming that Washington's sentencing procedure violated his constitutional right to have a jury determine every fact legally essential to his sentence beyond a reasonable doubt.¹⁴¹ The United States Supreme Court agreed, declared Blakely's sentence invalid, and clarified the meaning of the statutory

132. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Accordingly, as long the sentence remains within the prescribed statutory range, the defendant's Sixth Amendment right to a jury is not violated by a judge's evaluation of unproven facts as sentencing enhancements. *See id.*; *see also* *United States v. White*, 551 F.3d 381, 385 (6th Cir. 2008) (stating the same conclusion post-*Booker*).

133. *Apprendi*, 530 U.S. at 481.

134. *Id.* at 466.

135. *Blakely v. Washington*, 542 U.S. 296 (2004).

136. *Id.* at 298-99. *See* WASH. REV. CODE ANN. §§ 9A.40.030(1), 10.99.020(5)(p), 9A.36.021(1)(c) (2000) for the charges involving domestic violence, and § 9.94A.125 (2000) (recodified as § 9.94A.602 (2001)) for the firearm charge.

137. *See* WASH. REV. CODE ANN. § 9A.20.021(1)(b) (2003).

138. *Blakely*, 542 U.S. at 299; *see* WASH. REV. CODE ANN. § 9.94A.320 (1981) (recodified at 9.94A.515 (2001)).

139. *Blakely*, 542 U.S. at 299. The statute containing this enhancement provision is not contained in the current sentencing provision of the Washington guidelines. *See* WASH. REV. CODE ANN. § 9.94A.505 (2007).

140. *Blakely v. Washington*, 542 U.S. 296, 300 (2004). Deliberate cruelty was a statutorily permitted basis for departure in cases involving domestic violence. *See* WASH. REV. CODE ANN. § 9.94A.535(3)(h)(iii) (2001).

141. *Blakely*, 542 U.S. at 301.

maximum limit as defined in *Apprendi*.¹⁴² Specifically, under a guidelines scheme, the “statutory maximum” is the maximum period of incarceration provided not by the relevant criminal statute, but instead by the applicable guidelines range determined by the facts found in the jury verdict or admitted by the defendant.¹⁴³ Here, Blakely was subject to a guidelines range of forty-nine to fifty-three months for the offenses to which he pled guilty; therefore, any increase above fifty-three months had to be predicated on facts found by a jury beyond a reasonable doubt.¹⁴⁴ Simply put, the Court held that a judge could not increase a defendant’s sentence beyond the applicable guidelines range provided by the facts found in the jury verdict or admitted by the defendant on account of his own independent findings.¹⁴⁵ Accordingly, the Court declared unconstitutional those portions of the Washington sentencing guidelines that allowed for punishment to be increased based on additional facts found by a judge.¹⁴⁶ Although this decision solely concerned state sentencing procedures, it evoked a serious question as to the fate of the Federal Sentencing Guidelines.

The Court provided the answer in *United States v. Booker*,¹⁴⁷ when it declared several provisions of the Guidelines constitutionally infirm and, as a solution, rendered them advisory.¹⁴⁸ *Booker* involved the consolidation of two separate sentencing cases, each concerning charges of possession with intent to distribute controlled substances.¹⁴⁹ The maximum sentence under the Guidelines for Booker’s offense was 262 months.¹⁵⁰ The trial judge, however, sentenced Booker to 360 months, based on his findings by a preponderance of the evidence that Booker possessed an additional 566 grams of crack cocaine and was guilty of obstruction of justice.¹⁵¹ On appeal, the United States Court of Appeals for the Seventh Circuit relied on the *Blakely* decision and reversed the trial court’s sentence.¹⁵² The Seventh Circuit found that the trial judge improperly used his own independent

142. *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see generally* *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

143. *Blakely*, 542 U.S. at 303-04.

144. *See id.*

145. *Id.* at 304.

146. *Id.* at 305.

147. *United States v. Booker*, 543 U.S. 220 (2005).

148. *Id.* at 245.

149. *Id.* at 227-28. Booker was found guilty of possession with intent to distribute 92.5 grams of crack cocaine, while Fanfan had been found guilty of possession with the intent to distribute and conspiracy to distribute 500 grams of cocaine. *Id.*; *see* 21 U.S.C. § 846 (1988); 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii) (2006).

150. *Booker*, 543 U.S. at 227.

151. *Id.* at 221.

152. *Id.* at 227-28.

findings to increase Booker's sentence beyond the applicable Guidelines range by relying on the ruling in *Blakely* that such facts must be found beyond a reasonable doubt by the jury.¹⁵³

Fanfan, the other defendant in the consolidated case, was subject to a maximum Guidelines sentence of seventy-eight months for his convicted offense.¹⁵⁴ However, in a separate sentencing hearing, the trial judge found by a preponderance of the evidence that Fanfan possessed additional controlled substances and organized the criminal activity at issue.¹⁵⁵ These findings more than doubled the maximum sentence that the judge could impose under the Guidelines.¹⁵⁶ Nevertheless, the judge followed the decree of *Blakely* and sentenced Fanfan in accordance with the facts found in the jury verdict, thereby rendering a seventy-eight month punishment.¹⁵⁷

The United States Supreme Court granted writ of certiorari in both cases and delivered a split majority opinion, each comprised of almost wholly dissimilar Justices.¹⁵⁸ The first opinion by Justice Stevens focused on the substantive issues, and the latter by Justice Breyer addressed the remedy.¹⁵⁹ Stevens's opinion held that both lower courts properly concluded that the Sixth Amendment guarantee to a sentence based solely on facts found by a jury beyond a reasonable doubt or admitted by the defendant as interpreted in *Blakely* applied to the Federal Sentencing Guidelines.¹⁶⁰ Therefore, the sentencing procedure under the Guidelines was unconstitutional, as it allowed a judge to increase a defendant's sentence beyond the maximum range determined by the jury's findings or admitted by the defendant on account of his own independent findings.¹⁶¹

153. *United States v. Booker*, 543 U.S. 220, 227-28 (2005) (emphasis added)

154. *Id.* at 228.

155. *Id.*

156. *Id.*

157. *Id.* at 228-29. The United States Supreme Court granted writ of certiorari before the United States Court of Appeals for the First Circuit rendered judgment. *See United States v. Fanfan*, 542 U.S. 956 (2004).

158. *Booker*, 543 U.S. at 229. Justice Stevens's opinion was joined by Justices Scalia, Souter, Thomas and Ginsburg, while Justice Breyer's opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg. *Id.* at 225.

159. *United States v. Booker*, 543 U.S. 220, 229 (2005). For a discussion about the absence of congruence among the opinions, see Ross, *supra* note 22, at 729.

The primary reason for the lack of relationship between the two opinions is that the two majorities were concerned with different aspects of sentencing. The majority in *Booker I* was concerned about the substantive role of the jury under the Sixth Amendment while the majority in *Booker II* was concerned about maintaining real offense sentencing and particularly the need to individualize sentences while limiting prosecutorial discretion. *Id.*

160. *Booker*, 543 U.S. at 226-27.

161. *Id.* at 244.

However, instead of incorporating Sixth Amendment protections into the Guidelines, Breyer's opinion excised the provision of the Sentencing Reform Act that made the Federal Guidelines mandatory, thereby rendering them advisory.¹⁶² The Court required sentencing judges to consider the Guidelines provisions, yet such a consideration was merely a factor in the determination of an appropriate sentence.¹⁶³ Additionally, the provision setting the standard of appellate review for Guideline departures as de novo was severed.¹⁶⁴ In its place, the Court substituted a "practical" standard for reviewing sentences—a review for unreasonableness.¹⁶⁵

Importantly, the Court explained that one of its main reasons for refusing to include the Sixth Amendment right within the Guidelines was to allow sentencing judges to continue considering information relevant to both the offense and the offender to determine an appropriate sentence.¹⁶⁶ The Court pointed out that Congress's incorporation of 18 U.S.C. § 3661 into the Sentencing Reform Act expressly demonstrated its intent for this procedure to be used within the federal criminal sentencing system.¹⁶⁷ Additionally, previous Supreme Court decisions, as well as several Guidelines provisions, allowed this method of sentencing to persist.¹⁶⁸ Consequently, the Court's decision declared the Guidelines an unconstitutional violation of the Sixth Amendment. However, the decision left considerable leeway for judges to continue increasing defendants' sentences based on facts never presented to a jury, as well as conduct that a jury specifically found unproven beyond a reasonable doubt.

D. THE CONTINUED USE OF UNCHARGED AND ACQUITTED CONDUCT IN THE AFTERMATH OF *UNITED STATES V. BOOKER*

The remedial scheme promulgated in *Booker* did not ameliorate the problem of courts using prior uncharged and acquitted conduct to increase a defendant's sentence. Although *Booker* rendered the Guidelines "effectively advisory,"¹⁶⁹ decisional law in the case's aftermath specifically held that courts must continue to consult the Guidelines when imposing a

162. *United States v. Booker*, 543 U.S. 220, 245 (2005).

163. *Id.*

164. *Id.* at 261.

165. *Id.* The Court subsequently provided that a sentence that falls within the applicable range under the Guidelines is presumed to be a reasonable sentence for the purposes of appellate review. *See Rita v. United States*, 551 U.S. 338, 341 (2007).

166. *See United States v. Booker*, 543 U.S. 220, 249-51 (2005).

167. *Id.*

168. *Id.* at 251-52 (citing *United States v. Watts*, 519 U.S. 148 (1997); U.S. SENTENCING GUIDELINES MANUAL §1B1.3 (2004)).

169. *Id.* at 245.

particular sentence.¹⁷⁰ In connection with this responsibility, judges are required to calculate the defendant's applicable range of incarceration, as if the now "advisory" Guidelines in fact remain mandatory.¹⁷¹ Importantly, in making this requisite calculation, courts continue to consider both uncharged and acquitted conduct as a basis to increase the defendant's applicable sentencing range, and they continue to do so using a preponderance of the evidence standard.

For example, in *United States v. Vaughn*,¹⁷² the United States Court of Appeals for the Second Circuit specifically stated that nothing in *Booker* or its predecessors undermined its prior decisions that a judge's determination of relevant sentencing factors by a preponderance of the evidence satisfied due process.¹⁷³ The court then referred to its recent decision in *United States v. Crosby*,¹⁷⁴ which explicitly held that the authority of judges to make factual findings by this standard survives *Booker*.¹⁷⁵ Accordingly, the court held that a sentencing judge can still evaluate unproven conduct by a preponderance of the evidence to enhance a defendant's sentence, and such practice does not violate the Due Process Clause of the Fifth Amendment.¹⁷⁶

Similarly, in *United States v. Magallanez*,¹⁷⁷ the United States Court of Appeals for the Tenth Circuit held that district courts are still required to consider Guidelines ranges, with sentencing factors determined by a preponderance of the evidence, just as if the provision of the Guidelines rendering them mandatory had not been invalidated by *Booker*.¹⁷⁸ Moreover, the court specifically countenanced the use of uncharged and acquitted conduct at sentencing by emphasizing that 18 U.S.C. § 3661 "remains in full force."¹⁷⁹ In *United States v. Ibanga*,¹⁸⁰ the United States Court of Appeals for the Fourth Circuit found, based on 18 U.S.C. § 3661, that the district court committed significant error in its sentencing procedure by prohibiting consideration of acquitted conduct at sentencing.¹⁸¹

170. *United States v. Davidson*, 409 F.3d 304, 310 (6th Cir. 2005).

171. *Id.*

172. *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005).

173. *Id.* at 525.

174. *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

175. *Vaughn*, 430 F.3d at 525 (citing *Crosby*, 397 F.3d 103 (finding that courts remain obliged to consider the Guidelines in sentencing as they would before *Booker*)).

176. *Id.*

177. *United States v. Magallanez*, 408 F.3d 672 (10th Cir. 2005).

178. *Id.* at 685.

179. *Id.* at 684.

180. *United States v. Ibanga*, 271 F. App'x 298 (4th Cir. 2008).

181. *Id.* at 301 (citing *Gall v. United States*, 128 S.Ct. 586, 597 (2007)).

Additionally, because the Guidelines are now advisory, courts are only required to ensure that the enhanced sentence does not exceed the statutory maximum provided by the criminal statute under which the defendant was convicted.¹⁸² The Court's decision in *Booker* therefore leaves defendants in a more precarious position because of the widely disparate ranges characteristic of criminal statutes and the potentially long periods of incarceration to which they may be subjected.¹⁸³ Essentially, post-*Booker* defendants are now in the same position as they were in the pre-Guidelines era.¹⁸⁴

Thus, while *Booker* deemed certain aspects of the federal sentencing jurisprudence constitutionally infirm, it did not—and has not—affected that aspect of sentencing which allows judges to unilaterally enhance a defendant's sentence based on information never proven beyond a reasonable doubt in a court of law. As set forth below, such a system requires the implementation and administration of a new paradigm that comports with the fundamental constitutional protection of due process. This can only be accomplished by eliminating the use of acquitted conduct at sentencing and allowing defendants the right, at a post-trial sentencing hearing, to contest each and every instance of uncharged conduct that may be used as a predicate to enhance his or her sentence.

III. INHERENT DUE PROCESS VIOLATIONS AS A RESULT OF CONSIDERING UNCHARGED AND ACQUITTED CONDUCT AT SENTENCING

Despite the Court's admonition in *Booker* that the Guidelines serve an advisory role, lower courts continue to use relevant conduct, including both uncharged and acquitted conduct, to enhance a defendant's sentence. Such increased sentences are often given a presumption of reasonableness on appeal, provided that they remain within the otherwise applicable

182. *United States v. White*, 551 F.3d 381, 384-85 (6th Cir. 2008).

183. For example, under the Guidelines, an individual convicted of mail fraud with the amount valuing \$5,000 or less would be subject to a sentencing range of zero to twenty-one months; however, the statutory maximum provided by Congress for any crime of mail fraud regardless of the amount involved is twenty years. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2004); 18 U.S.C. § 1341 (2008), *unconstitutional as applied by* *United States v. Saathoff*, No. 06cr43-BEN, 2010 WL 1406327 (S.D. Cal. Apr. 6, 2010).

184. See Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY, 653, 676 (2005); Jonathan Chiu, Comment, *United States v. Booker: The Demise of Mandatory Federal Sentencing Guidelines and the Return of Indeterminate Sentencing*, 39 U. RICH. L. REV. 1311, 1311 (2005); Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615, 616 (2006). For a description of sentencing procedure in the pre-Guidelines era, see *supra* Part II.A.

sentencing range under the Guidelines.¹⁸⁵ Furthermore, recent decisional law mandates that if a sentence is to survive constitutional scrutiny, it simply cannot exceed the statutory maximum prescribed by the legislature for the convicted offense.¹⁸⁶ This Comment argues that the process of enhanced sentencing based on uncharged and acquitted conduct is patently unconstitutional, even if the ultimate sentence remains within the statutory range of the offense for which the defendant was originally convicted. Specifically, the consideration of unproven conduct under a preponderance of the evidence standard at sentencing denies individuals of proper procedural protections, thereby violating the fundamental right to due process.¹⁸⁷

A. THE USE OF UNCHARGED AND ACQUITTED CONDUCT TO ENHANCE A DEFENDANT'S SENTENCE VIOLATES DUE PROCESS

In addition to the lower standard of proof for fact determinations, several other constitutional and procedural protections are either altogether absent or significantly diminished at sentencing. For example, the right to cross-examine witnesses pursuant to the Confrontation Clause¹⁸⁸ is unavailable,¹⁸⁹ hearsay evidence is admissible,¹⁹⁰ and the exclusionary rule barring evidence obtained as the result of an illegal search and seizure is generally inapplicable.¹⁹¹ Additionally, although a defendant has the right to challenge any facts presented at sentencing, a judge is not required to hold a separate evidentiary hearing to resolve such disputes.¹⁹² A defendant is therefore rarely provided with the opportunity to proffer testimony or to adduce any evidence whatsoever to contest the information that the courts use as a basis for sentence enhancements.¹⁹³ Consequently, defendants are afforded considerably fewer safeguards regarding determinations made at

185. *Rita v. United States*, 551 U.S. 338, 341 (2007); *see supra* note 165.

186. *See generally* *United States v. Booker*, 543 U.S. 220 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

187. *See generally* Heaney, *supra* note 78; Herman, *supra* note 103, at 323-43; Lear, *supra* note 23; *see also* Note, *Winship on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 HARV. L. REV. 1093, 1100-02 (1993).

188. The Confrontation Clause refers to the Sixth Amendment provision which guarantees a criminal defendant the right to confront and cross-examine adverse witnesses. *See* U.S. CONST. amend. VI.

189. *United States v. Mitchell*, 484 F.3d 762, 776 (5th Cir. 2007) (citing *United States v. Navarro*, 169 F.3d 228, 236 (5th Cir. 1999)).

190. *United States v. Bras*, 483 F.3d 103, 109 (D.C. Cir. 2007).

191. *United States v. Ryan*, 236 F.3d 1268, 1272 (10th Cir. 2001) (holding that evidence obtained by an illegal search and seizure may be considered at sentencing, unless such was gathered with the intent to secure an increased sentence).

192. *See* McKelvie et al., *supra* note 80, at 1519 n.2052.

193. Heaney, *supra* note 78, at 174.

the sentencing phase as opposed to at trial. These infirmities are particularly troublesome in the areas of uncharged and acquitted conduct.

Specifically, allowing courts to consider uncharged conduct at sentencing under these relaxed procedures permits prosecutors to circumvent the criminal justice system by declining to formally charge a defendant with certain conduct yet introducing evidence of that conduct at sentencing. The prosecutor escapes the burden of proving such conduct beyond a reasonable doubt, while at the same time obtains the punitive benefit as if the conduct had been proven—essentially achieving a “double conviction”—because the sentencing court will almost always rely on that conduct to increase the defendant’s sentence.¹⁹⁴ The prosecutor also has the advantage of the limited constitutional and procedural protections available to the defendant at sentencing, which would be in full effect at trial if the prosecutor actually filed charges against the defendant. Simply stated, as long as these relaxed procedures remain in place while judges continue to consider uncharged conduct, this common, unconstitutional manipulation of the criminal sentencing process can persist.

Even greater concerns arise when the conduct at issue has in fact been charged, but the jury determines that the defendant is not guilty of the offense. In these situations, sentencing judges can effectively overturn the jury’s determination, by using conduct that served as the basis for the acquittal to nevertheless increase the defendant’s sentence.¹⁹⁵ This procedure allows prosecutors a second chance to obtain punishment for an offender, in spite of a jury’s previous finding that the defendant should not be punished for such conduct. Moreover, the lower standard of proof at sentencing unequivocally permits this practice, as conduct previously determined unproven beyond a reasonable doubt may nevertheless be established under the much lower threshold of preponderance of the evidence.

Additionally, in *Boney*,¹⁹⁶ the D.C. Circuit upheld the use of acquitted conduct at sentencing, stating that an acquittal signifies merely that the jury did not find all the elements of the charged offense beyond a reasonable

194. See David Yellen, *Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 275 (2005); see also Heaney, *supra* note 78, at 169, 172-74.

195. See Reitz, *supra* note 29, at 551 (comparing the stricter requirements of a judgment notwithstanding the verdict, which in most cases the judge would be prohibited from entering, to this procedure of disregarding the jury’s acquittal at sentencing, which essentially achieves the same result).

196. *United States v. Boney*, 977 F.2d 624 (D.C. Cir. 1992).

doubt, not that they believed that the defendant was in fact innocent.¹⁹⁷ This interpretation, however, neglects the real possibility that the jury did indeed believe that the defendant was wholly innocent, as well as any other reason for a jury's decision to acquit, besides the assumption of a slight finding of reasonable doubt.¹⁹⁸ For example, the jury's doubt may not have been minimal. Although they may not have found that the defendant was wholly uninvolved, they may have actually believed that the prosecutor failed to establish nearly all of the elements of the offense. Nevertheless, the sentencing judge is permitted to increase the defendant's sentence based on the same conduct for which the jury previously determined should not result in punishment, by making his own findings under the lower evidentiary standard and procedural protections. Once a jury has exonerated a defendant of the charged criminal wrongdoing, the subsequent evaluation of such conduct with lower procedural standards for the purpose of enhanced sentencing offends not only the traditional notions of the criminal justice system, but also the constitutional requirement of due process.

The Supreme Court decisions of *Williams*¹⁹⁹ and *McMillan*²⁰⁰ provide the justification on which proponents of the relaxed procedural protections at sentencing commonly rely.²⁰¹ Specifically, both cases distinguished the defendant's interests at trial from those at sentencing based on the fact that once the sentencing phase is reached, the defendant has been found guilty in a court of law and can therefore be constitutionally deprived of his liberty.²⁰² Accordingly, as long as the sentence remains within the statutory maximum for the underlying conviction, a defendant has suffered no additional deprivation of liberty which would require the heightened safeguards available at trial.²⁰³

However, under the current sentencing scheme, the defendant indeed faces additional and substantial deprivations of liberty at the sentencing phase because judges are permitted to use unproven criminal conduct as the basis of an increased punishment, regardless of whether the ultimate sentence remains within the statutorily prescribed range. Theoretically, judges can impose the statutory maximum for the underlying offense. But,

197. *Id.* at 636.

198. Reitz, *supra* note 29, at 551-52. Reitz also suggests the possibility that the jury may have ignored the law, using the power of jury nullification to issue an acquittal though no doubt existed as to the defendant's guilt. Reitz, *supra* note 29, at 552 n.188 (citing *United States v. Dougherty*, 473 F.2d 1113, 1130-36 (D.C. Cir. 1972)).

199. *Williams v. New York*, 337 U.S. 241 (1949).

200. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

201. *See Berman, supra* note 184, at 667.

202. *McMillan*, 477 U.S. at 92; *Williams*, 337 U.S. at 247.

203. *McMillan*, 477 U.S. at 92; *Williams*, 337 U.S. at 247.

in reality, due to the characteristically broad sentencing ranges of criminal statutes, this rarely occurs. The duty of courts to calculate the Guidelines range further underscores the actual method of sentencing, as judges determine the applicable range of incarceration for the underlying offense and then increase the defendant's sentence based on additional facts evaluated by a preponderance of the evidence.

This process highlights the effect that the use of uncharged and acquitted conduct has on defendants' liberty interests. Defendants currently face significantly longer periods of incarceration based on unproven conduct that has never been tested (or has been explicitly rejected if tested) against the adversarial safeguards that attend the trial process to protect individuals against arbitrary deprivations of liberty. As a result, the current criminal sentencing system denies individuals the fundamental right to due process of law and must be reformed to comport with this constitutional guarantee.

B. JUDICIAL RECOGNITION OF THE UNCONSTITUTIONALITY OF CONSIDERING UNPROVEN CONDUCT AT SENTENCING

Importantly, several federal courts in the aftermath of *Booker*²⁰⁴ have already supported the proposition that enhancing a defendant's sentence based on conduct that has not been the subject of a conviction should not be allowed, at least not when it is considered by a preponderance of the evidence standard.²⁰⁵ Specifically, in *United States v. Pimental*,²⁰⁶ the United States District Court for the District of Massachusetts stated that, even though the Guidelines have been rendered advisory, the Fifth Amendment's due process requirement is still implicated in criminal sentencing.²⁰⁷ Accordingly, such fundamental protection requires a judge to find all facts deemed relevant to a defendant's punishment beyond a reasonable doubt.²⁰⁸ Additionally, in *United States v. Huerta-Rodriguez*,²⁰⁹ the United States District Court for the District of Nebraska found that it is never "reasonable" to increase a defendant's sentence on the basis of

204. *United States v. Booker*, 543 U.S. 220 (2005).

205. *See United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 935 (N.D. Iowa 2006); *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006), *vacated and remanded by* 271 F. App'x 298 (4th Cir. 2008); *United States v. Baldwin*, 389 F. Supp. 2d 1, 2 (D.D.C. 2005); *United States v. Pimental*, 367 F. Supp. 2d 143, 154 (D. Mass. 2005); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028 (D. Neb. 2005); *United States v. Coleman*, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005).

206. *United States v. Pimental*, 367 F. Supp. 2d 143 (D. Mass. 2005).

207. *Id.* at 153-54.

208. *Id.* at 154.

209. *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005).

conduct that has not been proven beyond a reasonable doubt.²¹⁰ These decisions indicate that certain federal courts have already recognized that using a preponderance of the evidence standard to evaluate uncharged and acquitted conduct for the purpose of sentencing enhancement violates a defendant's fundamental right to due process and should not persist.

C. PROPOSED CHANGES TO THE CURRENT FEDERAL SENTENCING SCHEME

As indicated above, a number of federal courts have already acknowledged that the current federal sentencing system does not comport with the constitutional requirement of due process. The following are recommendations to be implemented by the courts to relieve the federal criminal sentencing procedure of constitutional infirmity.

1. UNCHARGED CONDUCT AND ACQUITTED CONDUCT

Allowing judges to consider conduct for which a defendant has never been charged when determining an appropriate sentence essentially provides prosecutors with the incentive to withhold formal charges against a defendant for certain criminal conduct. In so doing, prosecutors escape the burden of proving such conduct beyond a reasonable doubt, yet still obtain the benefit of a conviction for such acts in the form of a defendant's enhanced sentence.²¹¹ Prosecutors must be required to charge such conduct separately to prevent this manipulation of the criminal justice system. Accordingly, a judge should not be permitted to consider uncharged conduct that would constitute an independent element of an offense under a separate statute to enhance a defendant's sentence. Only if a defendant is charged with the separate offense and all of its elements proven beyond a reasonable doubt should a judge be allowed to consider any underlying conduct of that offense.²¹²

Some commentators argue, however, that eliminating uncharged conduct from consideration will decrease the judge's discretion at

210. *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028 (D. Neb. 2005).

211. *See United States v. Ebbole*, 917 F.2d 1495, 1501 (7th Cir. 1990) ("In Ebbole's case, the United States Attorney's office appears to have accepted this dubious invitation."); *United States v. Fischer*, 905 F.2d 140, 142 (7th Cir. 1990) (urging prosecutors "not to indict defendants on relatively minor offenses and then seek enhanced sentences later by asserting that the defendant has committed other more serious crimes for which, for whatever reason, the defendant was not prosecuted . . . [or] convicted").

212. *See Yellen*, *supra* note 194, at 275 (suggesting that the federal system should follow the lead of several states which have already prohibited consideration of such conduct and revise the Federal Guidelines accordingly).

sentencing and instead advance the prosecutor's power.²¹³ Since the conviction by itself will determine the applicable sentencing range, these critics contend that the prosecutor's choice of which offense to charge will directly determine the defendant's punishment, thereby increasing the risk of sentence disparity between two similarly situated defendants.²¹⁴ While it is true that the main consideration at sentencing will be the conduct for which the defendant is convicted, the recommended procedure is the most appropriate constitutional option to be employed within the process of criminal sentencing. Restricting the sentencing judge from considering uncharged conduct that constitutes an independent element of a separate offense requires the prosecution to either produce enough evidence to charge and convict the defendant of that offense or forego the potential sentence enhancement on the basis of such conduct. As a result, defendants will only be subject to punishment based on the specific criminal conduct for which they were convicted by a jury beyond a reasonable doubt.

Another point of criticism is that consideration of uncharged conduct at sentencing assists the judge in determining a defendant's culpability and thereby reduces unwarranted sentence uniformity.²¹⁵ For example, in a drug trafficking operation, some offenders carry the additional responsibility as leaders or organizers, some operate with large quantities, and some engage in violence, while others do not exhibit any of the above characteristics.²¹⁶ According to this argument, these factors could not be considered at sentencing because they are generally not included as underlying elements in the applicable statutes.²¹⁷ However, by only excluding conduct that constitutes an independent element of a separate offense, no limitation is therefore placed on a judge's consideration of those distinguishing factors that are not defined by separate criminal statutes. Instead, the uncharged conduct prohibited from consideration under this proposal is limited to that which would allow the prosecution to circumvent fundamental due process protections by increasing a defendant's sentence based on conduct for which he or she should have been previously charged and convicted. Consequently, if such factors do constitute independent elements of separate statutory offenses, then each must be charged and proven to a jury beyond a reasonable doubt before it can be considered to

213. See Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 194-95 (1996) (distinguishing between the use of acquitted conduct and uncharged conduct in that abolishing only acquitted conduct does not present the problem of prosecutorial charging discretion).

214. Johnson, *supra* note 213, at 194.

215. See *id.* at 195.

216. *Id.*

217. *Id.*

enhance a defendant's sentence.

Alternatively, if judges continue to take into account uncharged conduct that constitutes an independent element of a separate statutory offense, the following procedure is suggested to ensure that the criminal sentencing system satisfies the constitutional requirement of due process. If the defendant challenges the conduct at issue, the judge must hold a mandatory post-trial hearing, at which the defendant is given the opportunity to present any and all evidence relevant to the conduct in question. Additionally, the defendant will have available all procedural safeguards provided by the Constitution and at trial, specifically the Sixth Amendment right to confront all adverse witnesses,²¹⁸ the Fourth Amendment protection against unlawfully obtained evidence,²¹⁹ and the general prohibition within the Federal Rules of Evidence against hearsay evidence.²²⁰

Importantly, the prosecutor will be required to prove beyond a reasonable doubt that the defendant in fact engaged in the alleged conduct. Heightening both the standard of proof and available safeguards at sentencing ensures that defendants are not subjected to increased punishment post-trial without the same guarantees they would receive had the prosecutor actually put them on trial for such conduct. Additionally, for each determination that the judge makes beyond a reasonable doubt, he must issue an explanatory opinion for purposes of appellate review. Specifically, this opinion must detail the judge's finding of each fact that serves as the basis for an enhanced sentence regardless of whether the punishment falls within the applicable range under the Guidelines or constitutes a departure therefrom.

Finally, the standard of review for such findings of fact should be *de novo*. An increased standard of appellate review is particularly important to ensure that the trial court is properly administering the new procedural mechanisms so that the criminal sentencing system in fact vindicates the right to due process. Implementing a *de novo* standard allows the reviewing court to make sure that all facts used as sentencing enhancements were indeed proven beyond a reasonable doubt after the defendant had an opportunity to present any and all information concerning such conduct. Additionally, a heightened standard of appellate review will provide the incentive for sentencing judges to comport with the new process, thereby assuring that defendants are guaranteed the constitutional protection of due

218. U.S. CONST. amend. VI.

219. U.S. CONST. amend. IV.

220. FED. R. EVID. 802.

process throughout the entire trial, including during the sentencing phase.

Accordingly, uncharged conduct that constitutes an independent element of an offense under a separate statute will be prohibited from consideration unless the defendant has been given a full opportunity to contest such allegations and the conduct has been proven beyond a reasonable doubt. As a result, prosecutors will be prohibited from obtaining increased sentences at the expense of fundamental constitutional protections, and defendants will no longer be deprived of their right to life and liberty based on uncharged conduct without adequate due process of law.

Nevertheless, critics are likely to respond that this procedure is simply too burdensome on both prosecutors and courts to be implemented, particularly since judges are currently allowed discretion to impose sentences anywhere within the prescribed statutory range for the convicted offense, including the statutory maximum. As set forth above, however, due to the broad range of criminal statutes and the often excessively high maximum sentence, judges rarely impose the maximum sentence permitted based solely on the offense of conviction. Moreover, this proposal requires a judge to issue an explanatory opinion detailing the specific facts on which he based his determination. Coupled with the heightened standard of appellate review, these procedures set forth significant safeguards to prevent manipulation of the system.

Although this process may require additional judicial resources, preserving the fundamental constitutional right of due process of law justifies any further strain imposed on the judiciary. This proposal merely advocates that the same constitutional safeguards provided at the guilt/innocence phase of the underlying trial govern the subsequent sentencing phase, as defendants remain susceptible to further deprivation of liberty by way of an enhanced period of incarceration. Accordingly, by implementing this suggested procedure, the consideration of uncharged conduct at sentencing will be performed in a manner that is consonant with traditional notions of fairness, justice, and due process of law—a concern for which judicial resources are certainly warranted.

With regard to conduct for which a defendant has been previously acquitted, judges should not be allowed to consider the underlying facts of the offense for the purpose of increasing a defendant's sentence. Only a complete prohibition of such conduct will reinstate the "legal force" of an acquittal at sentencing.²²¹ An acquittal represents a determination of a defendant's "legal innocence" of the criminal wrongdoing charged against

221. See Reitz, *supra* note 29, at 552.

him.²²² Indeed, the finality of a jury's verdict of not guilty has been recognized as being in the interest of the fundamental principle of fairness.²²³

Allowing conduct that served as the basis of an acquittal to be subsequently used by a sentencing court to enhance a defendant's sentence undermines both the meaning of the jury's verdict as an exoneration of the defendant's culpability for the charged offense and its distinctive quality of finality. Instead, it permits a sentencing judge to overturn a jury's determination of not guilty and penalize a defendant based on acts that a jury previously decided should not result in that defendant's punishment. Although certain instances may arise in which this blanket prohibition seems to promote unfairness (for example, if the defendant is acquitted on the basis of a technicality), the legal implications of a jury's acquittal are too significant to allow the underlying conduct to be subsequently used to enhance a defendant's sentence. Additionally, as discussed below, the procedural mechanism of a special verdict may serve to alleviate concerns about this limited inequity. Ultimately, the use of acquitted conduct for the purpose of increasing a defendant's sentence results in an individual's deprivation of liberty based on conduct for which he was explicitly found not culpable; therefore, the consideration of such conduct offends the fundamental guarantee of due process of law and should not persist in the federal criminal sentencing system.

2. CONSIDERATIONS BEYOND UNCHARGED AND ACQUITTED CONDUCT

Notably, much of the conduct that judges consider when enhancing a sentence does not neatly fit into the category of either uncharged or acquitted conduct. The following suggestions address related conduct that currently may be taken into account by a judge at sentencing.

a. Mistrials and Voluntarily Dismissed Charges

First, if the prosecutor does charge a defendant with criminal conduct, yet the result is a mistrial, the situation is tantamount to the conduct having never been charged. Therefore, such facts should not be considered by a sentencing judge without implementing the proposed new procedures. Similarly, if the charges against a defendant are dismissed either before or during trial, the underlying conduct should not be used to increase a defendant's sentence at a subsequent hearing. Although in these

222. See Johnson, *supra* note 213, at 193.

223. See *id.* (citing State v. Wakefield, 278 N.W.2d 307, 308 (Minn. 1979) (“[T]he acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime.”)).

instances the conduct has in fact been charged, it still has not been proven beyond a reasonable doubt; thus, allowing such to be used as a sentencing enhancement promotes the current sentencing system's paradigm and its associated constitutional infirmity.

b. Plea Bargains and Nolo Contendere Pleas

However, conduct that has been the subject of a plea bargain or to which a defendant pleaded nolo contendere²²⁴ must be treated differently. In these situations, the defendant is admitting guilt; therefore, the consideration of such conduct in determining an appropriate punishment does not implicate the same due process concerns. While it may be argued that some defendants select these options only as strategic moves to merely reduce their punishments, it is both impossible and impractical to determine the subjective intent of each defendant in choosing whichever route he ultimately pursues. Indeed, facts admitted by the defendant have always been allowed to serve as the basis for an increased sentence, even if they were used to enhance a defendant's period of incarceration beyond the allowable maximum.²²⁵

Additionally, the contention that defendants will be dissuaded from plea bargaining specifically because such conduct can be subsequently used as a sentencing enhancement has little merit. Criminal defendants have several incentives to choose this option, including avoiding the cost, time, and effort involved with a full criminal trial and, primarily, the likelihood of receiving a lesser sentence than if they were unsuccessful at trial.²²⁶ Defendants are unlikely to pass up these significant opportunities when serious charges are pending against them based on the possibility that this conduct may subsequently be used against them at sentencing for a future offense. Moreover, if such conduct were not allowed to be considered based on this assertion, the criminal justice system would be tailoring itself to individuals who are essentially anticipating that they will commit future crimes, thereby undermining the system's goals of rehabilitation and deterrence.

224. A plea of nolo contendere constitutes an admission of all the elements of the charged offense and allows the court to sentence the defendant for that crime. 21 AM. JUR. 2d *Criminal Law* § 675 (2008). Sometimes called a plea of "no contest," a plea of nolo contendere means that the defendant does not choose to defend himself against the particular charge. *Id.*

225. See generally *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

226. Christopher R. Mock, *Parole Suitability Determinations in California: Ambiguous, Arbitrary, and Illusory*, 17 S. CAL. REV. L. & SOC. JUST. 889, 913 (2008); see *Defendants' Incentives for Accepting Plea Bargains*, <http://www.nolo.com/legal-encyclopedia/article-29732.html> (last visited September 30, 2010).

Since the facts underlying a plea bargain or a plea of *nolo contendere* constitute an admission of guilt, these procedures remain unaltered by the proposed sentencing process.

c. Special and General Verdicts of Acquittal

Furthermore, in an acquittal for a crime with multiple elements, it may be argued that the jury found that some, or perhaps all, of these elements were proven beyond a reasonable doubt, yet for whatever reason failed to render a guilty verdict. In a civil case, the Federal Rules of Civil Procedure provide the option for a court to submit a special verdict form to the jury, under which the jury returns a written finding on each issue of fact involved.²²⁷ While special verdict forms are disfavored in criminal trials due to the fear that they may lead the jury “step-by-step” to a guilty verdict, neither the Federal Rules of Criminal Procedure nor the courts have established a *per se* rule against them.²²⁸ Judges are instead given discretion to determine whether a special verdict should be used based on the circumstances of each particular case.²²⁹ Indeed, federal courts have explicitly recognized that special verdict forms may be used when specific findings are necessary for sentencing purposes; however, some courts have limited the use of such questioning to only after the jury determines that the defendant is guilty of the charged crime.²³⁰

Nevertheless, federal courts have stated that it is better practice to submit the general verdict and special verdict forms to the jury separately²³¹ and have upheld the use of special verdict forms when “[t]here is no suggestion whatever that responding to the questions was ever meant by the judge to place any inhibitions upon the jury’s right to acquit.”²³² Accordingly, judges should not be hesitant to use special verdict forms when warranted by the circumstances, namely in criminal trials involving multiple elements. By submitting the general form to the jury first, and submitting the specific form only after the the general verdict is rendered, the defendant remains shielded from improper application of the special verdict form. Sentencing judges should therefore be allowed to increase a defendant’s sentence based on any conduct found proven beyond a reasonable doubt, as indicated by a properly submitted special verdict form, regardless of whether the jury rendered a general verdict of acquittal.

227. FED. R. CIV. P. 49(a)(1).

228. *United States v. Palmeri*, 630 F.2d 192, 202 (3d Cir. 1980). The United States Supreme Court has yet to deal with this issue.

229. *United States v. Udeozor*, 515 F.3d 260, 270-72 (4th Cir. 2008).

230. *Id.* at 271; *United States v. Desmond*, 670 F.2d 414, 418 (3d Cir 1982).

231. *Udeozor*, 515 F.3d at 271.

232. *Heald v. Mullaney*, 505 F.2d 1241, 1246 (1st Cir. 1974).

Additionally, the use of this procedure may alleviate the concern about the possible injustice associated with the complete abolishment of acquitted conduct considerations at sentencing.

On the other hand, however, if the jury simply rendered a general acquittal without implicating which elements were found proven or unproven, allowing a sentencing judge to consider any underlying fact of the offense would be inconsistent with the proposed reform to the federal sentencing paradigm and should not be permitted.

d. Convictions Reversed on Appeal

Another type of conduct that warrants consideration under the proposed scheme is the underlying facts of a conviction that was subsequently reversed on appeal. This situation presents the significant distinction of whether the decision to reverse the conviction was based on the merits. A decision on the merits means that the judgment is based on the evidence rather than on technical or procedural grounds.²³³ Therefore, if the reversal is on the merits (for example due to insufficiency of the evidence, such that no reasonable juror could have reached that conclusion) judges should not be allowed to use the underlying conduct to increase a defendant's sentence since it was improperly found beyond a reasonable doubt. If the sentencing hearing for the subsequent offense occurs before the appeal is taken or judgment is rendered and the judge increased the defendant's sentence based on a conviction later reversed on the merits, the defendant must be entitled to petition the sentencing court to have his sentence reduced accordingly.

However, the opposite outcome results if the reversal was instead based on some error unrelated to the substantive conviction and thus was not a decision on the merits. In this situation, the jury properly found the underlying elements of the offense beyond a reasonable doubt; therefore, a sentencing judge should be entitled to consider the conduct that served as the basis for that conviction to determine an appropriate sentence.

e. Not Guilty By Reason of Insanity Verdicts

Finally, a prosecutor may charge a defendant with criminal conduct, yet the jury may find the individual not guilty by reason of insanity. While this verdict is not equivalent to an acquittal, it is also not a conviction. In determining whether or not this conduct should be allowed to serve as the basis for a sentencing enhancement, the primary purpose of punishment must be considered. The main objective for criminal punishment, which is

233. BLACK'S LAW DICTIONARY 389 (3d pocket ed. 2006).

also the rationale behind considering prior conduct at sentencing, is to hold people accountable for blameworthy behavior.²³⁴ When a jury returns a verdict of not guilty by reason of insanity, they are recognizing that the defendant engaged in wrongdoing, but do so while acknowledging that the key factor of culpability, or blameworthiness, is absent.²³⁵ As a result, a judge should not be allowed to consider such underlying conduct for the purpose of increasing a defendant's period of incarceration.

While several types of conduct exist that do not precisely fall under the heading of uncharged or acquitted, the recommended sentencing scheme provides a practical paradigm to be administered by the courts in any situation. Accordingly, only through the implementation of the proposed procedures will the federal sentencing system finally withstand due process scrutiny.

IV. CONCLUSION

An individual's right to due process, specifically the right to fundamentally fair procedures when the deprivation of one's life or liberty is at stake, is one of the core protections provided by the United States Constitution. Yet, this fundamental guarantee has been consistently overlooked within the federal system of criminal sentencing. Defendants are routinely deprived of life and liberty based on conduct for which they have not been convicted or in some instances, have never been charged.

Admittedly, the requirements of adequate due process must be flexible. However, this quality does not justify the inadequate procedures to which defendants are subjected at sentencing, and it certainly does not permit individuals to be deprived of life or liberty due to increased sentences based on unproven criminal conduct. It is time for the courts to declare these procedures an unconstitutional violation of a defendant's due process rights and implement a system that will allow the federal criminal sentencing scheme to satisfy the basic constitutional requirements of fairness, justice, and due process of law.

Kathryn M. Zainey

234. Sean E. Brotherson & Jeffrey B. Teichert, *Value of the Law in Shaping Social Perspectives on Marriage*, 3 J.L. & FAM. STUD. 23, 27 (2001) ("The reason that different degrees of mental culpability result in different sanctions is . . . because our tradition of justice demands that we attempt to achieve proportionality between the moral blameworthiness of the defendant and the sanction for his wrong.").

235. Randolph N. Jonakait, *Two Proposals for Abolishing the Insanity Defense*, 35 HASTINGS L.J. 403, 420 (1983).