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THE SIXTH AMENDMENT RIGHT TO FAIR SENTENCING: AN ANALYSIS OF ACQUITTED, DISMISSED, AND UNCHARGED CONDUCT UNDER THE FEDERAL SENTENCING GUIDELINES

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Daniel Scapicchio*

INTRODUCTION

On January 12, 2023, the United States Sentencing Commission proposed an amendment to the Federal Sentencing Guidelines that would limit judicial consideration of acquitted conduct.[1] Since the Supreme Court's decision in *United States v. Watts*, sentencing judges have been permitted to consider the underlying conduct from a charge in the defendant's indictment, even if the defendant is found not guilty of that charge at trial.[2] Relying on acquitted conduct, a judge has the authority to decide that a defendant who was found guilty of one charge and acquitted of another must serve a sentence as if he had been convicted of both.[3]

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[1] *See* U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 211–24 (Feb. 2, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf [hereinafter PROPOSED AMENDMENTS]; *see also U.S. Sentencing Commission Seeks Comment on Proposed Revisions to Compassionate Release, Increase in Firearms Penalties*, U.S. SENT'G COMM'N (Jan. 12, 2023), https://www.ussc.gov/about/news/press-releases/january-12-2023 (establishing January 12 as the date on which the Commission voted "to publish for comment proposed guideline amendments").

[2] 519 U.S. 148, 157 (1997) (per curiam).

[3] *See id.* at 168 (Stevens, J., dissenting) (decrying the fact that one of the defendants "was charged with several offenses and received a sentence that was based on the judge's conclusion that she was guilty of each of these multiple offenses even though she had in fact been found guilty of only one offense").

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This practice was upheld on a broad interpretation of the Federal Sentencing Guidelines' relevant conduct provision.[4] Now,[5] the Commission seeks to amend the definition of relevant conduct by carving out an exception for acquitted conduct.[6] Under the new definition, a criminal defendant retains the presumption of innocence for acquitted conduct unless he admits to the conduct through a guilty plea, or until the fact finder decides that the government failed to prove the charges in the indictment beyond a reasonable doubt.[7] If adopted, this amendment could bring about a watershed change in sentencing procedures that has been urged by scholars and defense attorneys for decades.[8]

In cases where a judge imposes an enhanced sentence based on facts that were not pleaded and proven to a jury beyond a reasonable doubt, the defendant's Sixth Amendment right to a jury trial is implicated.[9] At the same time, federal judges must retain some level of discretion when evaluating the defendant's conduct in order for the Federal Sentencing Guidelines (hereafter, "Guidelines") to work.[10] Naturally,

[4] *See Watts*, 519 U.S. at 152–54 (citing U.S. SENT'G GUIDELINES MANUAL § 1B1.3(a) (U.S. SENT'G COMM'N 2023)).

[5] On December 14, 2023, the U.S. Sentencing Commission published a news release explaining their decision to postpone the adoption of this amendment to provide more time for notice and comment. The notice and comment period ran through February 22, 2024, with a "public hearing on the proposed amendments" to be scheduled "at a later date." *U.S. Sentencing Commission Seeks Comment on Proposals Addressing the Impact of Acquitted Conduct, Youthful Convictions, and Other Issues*, U.S. SENT'G COMM'N (Dec. 14, 2023), https://www.ussc.gov/about/news/press-releases/december-14-2023.

[6] *See* PROPOSED AMENDMENTS, *supra* note 1, at 213–14. *See* discussion *infra* Part II for a conversation on the text of this proposed amendment.

[7] *Id.* at 212.

[8] For criticism of the *Watts* decision, *see, e.g.*, Elizabeth E. Joh, *"If It Suffices to Accuse":* United States v. Watts *and the Reassessment of Acquittals, Comment*, 74 N.Y.U. L. REV. 887 (1999); Sandra K. Wolkov, Case Note, *Reasonable Doubt in Doubt: Sentencing and the Supreme Court in* United States v. Watts, 52 U. MIA. L. REV. 661 (1998); Brief for the Nat'l Ass'n of Fed. Defs. and FAMM as Amici Curiae Supporting Petitioner at 4, McClinton v. United States, 143 S. Ct. 2400 (2023) (No. 21-1557).

[9] *See* Apprendi v. New Jersey, 530 U.S. 466, 476, 490 (2000).

[10] *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2023); *see also* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 500 (1990) (explaining that a powerful judicial system is important to stop prosecutors, defense, and government lawyers from teaming up to unfairly control how long someone goes to jail); *see generally* 18 U.S.C. § 3553(a)(2); U.S. SENT'G GUIDELINES MANUAL § 5K2.0 (commentary) (U.S. SENT'G COMM'N 2023) (Acknowledging that judge's ability to depart from the Guidelines when necessary serves an "integral function in the sentencing guideline system.").

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these competing doctrines give rise to constitutional challenges.[11] The Supreme Court has held that any question of fact that could increase a defendant's sentence beyond the statutory maximum must be supported by a jury verdict in order to be consistent with the Sixth Amendment.[12] The Guidelines, however, give judges broad discretion to consider conduct beyond what was presented to the jury, provided that they remain within the confines of the Guidelines.[13] This disconnect raises questions about where the jury's authority ends and where the judge's authority begins under the Sixth Amendment.[14]

By excepting acquitted conduct from consideration, the Commission seeks to resolve just one of a host of constitutional issues that arise between the jury's return of a verdict and the judge's imposition of a sentence.[15] Unfortunately, the relevant conduct provision still allows multiple avenues around the underlying constitutional concerns that the Commission seeks to address in the new amendment.[16] While acquitted conduct is the most glaring example of the issue, the Guidelines still allow judges to impose sentence enhancements based on conduct that is functionally equivalent to acquitted conduct.[17] Dismissed conduct (the underlying conduct of a charge that was once levied against a defendant but was later dismissed) and uncharged conduct (never formally brought as a charge) are not directly affected by the amendment and therefore can still be considered by a sentencing judge under relevant conduct.[18] Both are permissible when imposing enhanced sentences, despite

[11] *See, e.g.*, United States v. Watts, 519 U.S. 148 (1997); United States v. Booker, 543 U.S. 220, 226 (2005) (discussing whether "an application of the Federal Sentencing Guidelines violated the Sixth Amendment"); Witte v. United States, 515 U.S. 389 (1995) (analyzing the Federal Sentencing Guidelines in light of the Double Jeopardy Clause).

[12] *Booker*, 543 U.S. at 245.

[13] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.3, cmt. background (U.S. SENT'G COMM'N 2023).

[14] *See* Wolkov, *supra* note 8, at 679.

[15] *See* discussion *infra* Part III.

[16] *See* Wilkins, Jr. & Steer, *supra* note 10, at 503–17 (explaining the manner of conduct that falls within the relevant conduct provision).

[17] *See* PROPOSED AMENDMENTS, *supra* note 1, at 211; *see also* U.S. SENT'G GUIDELINES MANUAL § 1B1.3(a)(1)–(4) (U.S. SENT'G COMM'N 2023). The proposed amendment makes clear that only conduct that falls under the Commission's definition of acquitted conduct is affected by the amendment. As such, § 1B1.3(a)(1)–(4), which defines relevant conduct generally, must include dismissed and uncharged conduct. *See* discussion *infra* Part III, for a conversation on why those categories of relevant conduct are functionally equivalent to acquitted conduct.

[18] U.S. SENT'G GUIDELINES MANUAL § 5K2.21 (U.S. SENT'G COMM'N 2023).

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neither having the support of a jury verdict or an admission on the part of the defendant.[19] While the infringement on the Sixth Amendment is easier to identify when the judge's sentence directly contradicts the conclusion of the jury, the result is no different for a defendant sentenced based on conduct that is never presented to a jury in the first place.

The underlying theory reflected in both the language of the new rule and the attached policy statement is that the presumption of innocence attaches to all but admitted or convicted conduct.[20] If the Commission supports that argument for acquitted conduct, then the theory should be extended to all relevant conduct for which the issue arises. Otherwise, the constitutional issue that the Commission seeks to address will remain unresolved. In this Note, I argue that the functional equivalence of acquitted conduct, dismissed conduct, and uncharged conduct requires further action from the Federal Sentencing Commission and the Supreme Court. If the Sixth Amendment exempts all but admitted and convicted conduct from judicial fact-finding at sentencing, then any deprivation of that right should be deemed unconstitutional, not merely those deprivations which fit into the Guidelines' strict definitions.

This Note proceeds in three parts. Part I provides an overview of the United States Sentencing Commission and how the Guidelines have changed in response to constitutional challenges. Part II analyzes the language of the new amendment and the Commission's rationale. Part III compares the use of acquitted, dismissed, and uncharged conduct to show how the issue presents itself in situations outside of what the Commission defines in the new amendment.

I. THE COMMISSION AND THE GUIDELINES

The Sentencing Reform Act of 1984 established the United States Sentencing Commission to resolve the issue of undefined judicial discretion at sentencing.[21] The era of intermediate sentencing that preceded the Guidelines gave judges the authority to impose sentences with little to no appellate review.[22] With no unifying principles

[19] *Id.*; *see also* Witte v. United States, 515 U.S. 389, 399 (1995) (supporting the consideration of uncharged conduct in sentencing).

[20] *See* PROPOSED AMENDMENTS, *supra* note 1, at 211–12.

[21] *Overview of the United States Sentencing Commission*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/about/overview/2023_About-Us-Trifold.pdf (last visited Aug. 16, 2024); *see also* 28 U.S.C. § 991 (explaining the purpose of the United States Sentencing Commission).

[22] Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695–696 (2010) (stating that, before the Guidelines, "only a few

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in place, defendants who were charged with the same crime could face disparate sentences depending on which judge was assigned to their case.[23] Calls for reform grew and many sought to replace the old system of discretionary punishment with uniformity and consistency.[24] The Sentencing Reform Act was an attempt by Congress to set a national standard on sentencing procedures in a way that would reflect modern sentiment and policy.[25]

The result was the Federal Sentencing Guidelines, which prescribed a complicated series of fact-determined sentencing ranges that limited the set of possible outcomes for a given input of facts.[26] From an institutional standpoint, the Sentencing Reform Act was a success because it set up a functional system that uniformly governed sentencing procedures throughout the federal judiciary.[27] Despite this success, the Act was not without controversy, as questions remained about the reallocation of power from judges to the Federal Sentencing Commission.[28] Several challenges, including the very existence of the United States Sentencing Commission, arose soon after the enactment of the Sentencing Reform Act.[29]

After Congress established the Commission, the federal circuits were split on whether the delegation of power to the Commission was permissible on separation of powers grounds.[30] Since the Commission's primary purpose was to prescribe rules

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states had appellate review of sentencing . . . . A trial judge's authority to sentence was virtually unquestioned.").

[23] *See id.* at 697; U.S. SENT'G GUIDELINES MANUAL § 5K1.1 (U.S. Sent'g Comm'n 2023) (commentary) (background commentary) ("Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.").

[24] *Id.* at 698.

[25] *Id.*; 28 U.S.C. § 991(b)(1)(C) (stating that one of the purposes of the U.S. Sentencing Commission is to "reflect, to the extent practicable, advancement in knowledge of human behavior as it related to the criminal justice process").

[26] *See generally* U.S. SENT'G COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (1987), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf. *See* discussion *infra* Part III for a brief overview of the Guidelines in operation.

[27] MICHAEL TONRY, SENTENCING MATTERS 72–73 (1998) (arguing that despite being a policy failure, the Guidelines have been a narrow institutional success).

[28] *Id.* at 72–76.

[29] *Id.* at 74; Mistretta v. United States, 488 U.S. 361, 370 (1989).

[30] TONRY, *supra* note 27, at 74; Charles R. Eskridge III, *The Constitutionality of the Federal Sentencing Reform Act After* Mistretta v. United States, 17 PEPP. L. REV. 683, 685 (1990).

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with the force of law to the federal courts,[31] the Commission's placement in the judiciary and the requirement that federal judges serve on the committee appeared to conflict with core separation of powers principles.[32] Under the nondelegation doctrine, the Supreme Court has held that Congress may exercise limited discretion when establishing a separate rule-making commission, provided that the scope of the power they delegate is sufficiently narrow.[33]

It was on these grounds that the Supreme Court upheld the constitutionality of the Federal Sentencing Commission in *Mistretta v. United States*.[34] In an 8–1 decision, the majority held that Congress, in establishing the Commission, had provided "intelligible principles" that could be applied by the judiciary without offending the Constitution or nondelegation doctrine.[35] After *Mistretta*, the issues with the Guidelines fell into two categories. The first concerned the operation of the Guidelines and whether adherence to their rules could compel an unconstitutional result;[36] the second came from the general development of the Sixth Amendment, which raised broader questions about whether the Guidelines struck the correct balance between judicial discretion and the jury trial right.[37] In interpreting the Guidelines after *Mistretta*, the Supreme Court has consistently erred on the side of caution by framing constitutional challenges in a manner that allowed the Guidelines to remain in force, despite apparent inconsistencies that arose in the time between *Mistretta* and *Watts*.[38] In 2000, the Supreme Court's decision in *Apprendi v. New Jersey* laid the foundation for these challenges.

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[31] 28 U.S.C. § 991(b)(1)–(2) (explaining the purpose of the United States Sentencing Commission).

[32] *Id.* § 991(a) ("At least 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States."); U.S. CONST. art. I, § 1.

[33] *See Mistretta*, 488 U.S. at 371–72.

[34] *Id.* at 361.

[35] *Id.* at 372, 374–75.

[36] Maureen Juran, Note, *The Tenth Circuit's Approach to the Constitutionality of the Federal Sentencing Guidelines*, 67 DENV. U. L. REV. 545, 554 (1990).

[37] Apprendi v. New Jersey, 530 U.S. 466, 549 (2000) (O'Connor, J., dissenting) ("If this is an accurate description of the constitutional principle underlying the Court's opinion, its decision will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades.").

[38] United States v. Booker, 543 U.S. 220, 251–52 (2005) (salvaging the Guidelines despite the constitutional violation they compelled). *See also* United States v. Watts, 519 U.S. 148, 170 (1997)

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In *Apprendi*, the Supreme Court considered the imposition of an enhanced sentence based on New Jersey's hate crime statute.[39] The defendant in *Apprendi* was convicted of violating several state firearm statutes.[40] Those violations carried a maximum sentence of ten years' imprisonment.[41] Apprendi was sentenced to twelve years pursuant to New Jersey's hate crime statute, which allowed a trial judge to extend a defendant's sentence if, on a preponderance of the evidence, the judge found that the crime was racially motivated.[42] Under the New Jersey statute, the question of whether the offense qualified as a hate crime was left entirely up to the judge.[43] Two years of the defendant's sentence, therefore, were based on judicial fact-finding that was subject to the lower preponderance of the evidence standard.[44] This, the defendant argued, was a violation of his Sixth Amendment right to a jury trial.[45] Both the New Jersey Superior Court and the New Jersey Supreme Court affirmed the conviction and sentence.[46] The Supreme Court granted certiorari and reversed, holding that the judge's authority in imposing enhanced sentences does not extend to factual findings that depart from the maximum sentencing range of the crime for which the defendant was found guilty.[47] As Justice Stevens, writing for the majority, explained: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[48]

The *Apprendi* decision distinguishes between what is and what is not an element of a crime and assigns the responsibility of ruling on those issues to the appropriate decision maker—elements of an offense for the jury and sentencing

(Kennedy, J., dissenting) (criticizing the majority's decision's "hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted").

[39] *Apprendi*, 530 U.S. at 466, 468–69.

[40] *Id.* at 469–70.

[41] *Id.* at 468–70.

[42] *Id.* at 468–69.

[43] *See id.* at 470–71.

[44] *See id.* at 471.

[45] *See id.* at 475–76.

[46] *Id.* at 471–72.

[47] *Id.* at 474, 490.

[48] *Id.* at 490.

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factors for the judge.[49] This classification calls into question the relevant conduct provision of the Federal Sentencing Guidelines.[50] If a judge is not permitted to extend a sentence beyond the statutory maximum, then a large part of Section 3 of the Guidelines, which lists the appropriate sentencing enhancements for a judge to consider, appears to go against this new interpretation of the Sixth Amendment.[51] The specific language in *Apprendi*, however, allowed the Guidelines to remain in force because, arguably, judges are merely determining the proper sentencing range, not extending it.[52] Further, the majority in *Apprendi* carved out a number of exceptions to the general rule, including the controversial "fact of a prior conviction" exception.[53]

The friction between the Guidelines and the Sixth Amendment after *Apprendi* proved to be an existential one. In the 1990s and early 2000s, it was unclear whether federal judges were required to follow the Guidelines even when doing so could result in a violation of the Court's new interpretation of the Sixth Amendment.[54] The Supreme Court took a narrow approach to the resolution of this problem: if the Guidelines could compel an unconstitutional result, then the specific provisions that allowed this to happen should be struck down, not the entire system.[55] The issue for the Court, then, was whether the Guidelines were mandatory or discretionary.[56]

The early Guidelines permitted sentencing judges to depart from the system only if it found "an aggravating or mitigating circumstance . . . that was not adequately taken into consideration by the Sentencing Commission."[57] The language

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[49] *See id.* at 477, 485–90.

[50] *See* Freya Russell, Note, *Limiting the Use of Acquitted and Uncharged Conduct at Sentencing:* Apprendi v. New Jersey *and Its Effect on the Relevant Conduct Provision of the United States Sentencing Guidelines*, 89 CALIF. L. REV. 1199, 1229 (2001).

[51] *Id.* at 1200–01; U.S. SENT'G GUIDELINES MANUAL § 3 (U.S. SENT'G COMM'N 2023).

[52] *See* Andrew J. Fuchs, Note, *The Effect of* Apprendi v. New Jersey *on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, FORDHAM L. REV. 1399, 1431 (2001).

[53] *Apprendi*, 530 U.S. at 488–90 (citing Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

[54] Bobby Scott, United States v. Booker*: System Failure or System Fix?*, 160 U. PA. L. REV. PENNUMBRA 195, 197 (2011).

[55] United States v. Booker, 543 U.S. 220, 245–49 (2005).

[56] *See id.* at 245.

[57] U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, at 1.6 (U.S. SENT'G COMM'N 1987) (quoting 18 U.S.C. § 3553(b)).

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in the governing statute did not provide adequate guidance, which caused some judges to impose harsh sentences on the grounds that the Guidelines required them to do so.[58] That idea was challenged on state grounds in *Blakely v. Washington*, where the defendant challenged his sentence based on Washington state's version of the Federal Sentencing Guidelines.[59] In *Blakely*, the Supreme Court considered whether a state statute, which allowed the judge to extend the defendant's sentence beyond the fifty-three month maximum up to ninety months, was consistent with the Sixth Amendment.[60] The Court held that the existence of a sentencing guideline system could not, in itself, allow a judge to violate *Apprendi*.[61] In doing so, the majority emphasized that their decision did not invalidate Washington's sentencing guidelines, but rather required the state legislature to reform its system to be consistent with *Apprendi*.[62] If the Constitution required this compliance for state sentencing procedures, then the same question with respect to the Federal Sentencing Guidelines had to be resolved.

In the 2005 case *United States v. Booker*, the Supreme Court reviewed the constitutionality of the mandatory Federal Sentencing Guidelines, which allowed a judge to consider aggravating factors not presented to the jury when imposing a sentence and required a certain sentence if those factors were present.[63] The case had the potential to do away with the Guidelines entirely because, if the Guidelines required judges to violate the Sixth Amendment, the system could not remain in force.[64] As such, the Court considered two major issues: first, the Court reviewed whether a Sixth Amendment violation occurred via the proper application of the Guidelines.[65] Second, if the Guidelines constituted a violation, the Court decided whether the unconstitutional portion of the Guidelines could be removed without

[58] TONRY, *supra* note 27, at 54 (relating how one "California judge in tears imposed a lengthy sentence because the guidelines required it and then resigned").

[59] 542 U.S. 299–301 (2004).

[60] *Id.* at 298.

[61] *Id.* at 310–11, 313 ("As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.").

[62] *See id.* at 308.

[63] 543 U.S. 220, 233–35 (2005).

[64] *See id.* at 245.

[65] *Id.*

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invalidating the Guidelines as a whole.[66] In a split opinion, two separate five-Justice majorities answered yes to both questions.[67] The Court held that the provision of the Guidelines that compelled the mandatory sentence was unconstitutional, and it also held that the provision could be severed from the governing statute in a way that would keep the Guidelines in place.[68] With *Booker*, the Supreme Court solved one of the most pressing issues that the Guidelines presented; the impetus was on federal judges to ensure a constitutional application of the Guidelines.[69]

Mistretta, *Apprendi*, and *Booker* remain the structural precedent of the Federal Sentencing Guidelines.[70] At times, the principles espoused in those decisions seem to be at odds with one another. The exceptions to *Apprendi*, or rather the questionable classifications of "sentencing factors" and "elements of a crime," are the root of much of the controversy around the Guidelines today.[71] The Supreme Court's decision in *United States v. Watts* provides the most glaring example of the Court's inconsistent messaging and is the decision that would be effectively overturned if the Commission's new amendment becomes law. In *Watts*, the Supreme Court held that a sentencing court may consider conduct underlying a criminal charge, even if the defendant was found "not guilty" for that conduct at trial.[72] The per curiam opinion references the language of the governing statute that established the Sentencing Commission to justify a broad reading of Section 1B1.3 of the Guidelines—the relevant conduct provision.[73] The majority held that this section, which is construed to allow judges to consider—among other factors—acquitted conduct, embodied the same reasoning from the governing statute which enabled judges to consider the

[66] *Id.*

[67] *Id.* at 226–27. Justices Stevens, Scalia, Souter, Thomas and Ginsburg held that Booker's sentence violated the Sixth Amendment, while Chief Justice Rehnquist and Justices Breyer, O'Connor, Kennedy, and Ginsburg held that the Guidelines were salvageable. *Id.* at 226 n.***, 244 n.*.

[68] *See id.* at 245–46.

[69] *See* Scott, *supra* note 54, at 199 ("[T]he Supreme Court's decision in *Booker* fundamentally changed 18 U.S.C. § 3553, the primary statute governing sentencing decisions. After *Booker*, the sentencing judge must consider the Commission's Guidelines and policy statements, but it need not follow them.").

[70] Mark S. Hurwitz, Note, *Much Ado About Sentencing: The Influence of* Apprendi*,* Blakely*, and* Booker *in the U.S. Courts of Appeals*, 27 JUST. SYS. J. 81, 81–82 (2006).

[71] *See, e.g.*, Douglas Ankney, *Acquitted Conduct Sentencing*, CRIM. LEGAL NEWS (Feb. 15, 2022), https://www.criminallegalnews.org/news/2022/feb/15/acquitted-conduct-sentencing.

[72] United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam).

[73] *See id.* at 152–54; U.S. SENT'G GUIDELINES MANUAL § 1B1.3 (U.S. SENT'G COMM'N 2023).

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context of both the offense and the offender.[74] As such, the judge would not be required to ignore the nature of the person who committed the crime when imposing a sentence.[75]

While some level of discretion at sentencing is necessary to ensure the proper functioning of the Guidelines system, the *Watts* opinion extended the breadth of the relevant conduct provision beyond what many thought was constitutional.[76] In *Watts*, the Court relied on the 1949 case of *Williams v. New York*.[77] Long before the advent of the Guidelines, the Supreme Court held in *Williams* that judges are permitted to consider evidence outside the confines of the conviction to determine a criminal sentence.[78] The holding is grounded in history and tradition; judges have been permitted to consider the relevant conduct of a criminal defendant since the Constitution was ratified, and they have retained that discretion ever since.[79] In other words, *Williams* stands for the proposition that judges should be able to consider conduct outside of what is included in the indictment when imposing a sentence, because they "have always done so."[80] Based on the reasoning in *Williams*, the Supreme Court upheld the use of acquitted conduct at sentencing, placing it in the "sentencing factor" category despite its effect of extending a criminal sentence beyond the statutory maximum without the support of a jury verdict or a guilty plea.[81]

The development of the Guidelines through these constitutional challenges suggests that the Supreme Court views them as a practical necessity.[82] In order to keep the Guidelines operational, the Supreme Court has repeatedly chosen to take a

[74] *Watts*, 519 U.S. at 151–52 (quoting 18 U.S.C. § 3661).

[75] *See id.*

[76] *See* Joh, *supra* note 8, at 897–98; *see also* Wolkov, *supra* note 8, at 683–84.

[77] *Watts*, 519 U.S. at 151–52 (citing *Williams*, 337 U.S. 241 (1949)).

[78] *Williams*, 337 U.S. at 247–48 (arguing that "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial").

[79] *Id.* at 246.

[80] TONRY, *supra* note 27, at 94.

[81] *See Watts*, 519 U.S. at 156–57.

[82] *See* United States v. Booker, 543 U.S. 220, 259 (2005) (upholding the Guidelines despite the constitutional violation they compelled in the case); *see also Watts*, 519 U.S. at 170 (Kennedy, J., dissenting) (criticizing the majority's decision to leave the broader Sixth Amendment issue unanswered).

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narrow approach to the issues,[83] leaving a host of unanswered questions between the lines of precedent. In proposing the new amendment on relevant conduct,[84] the Commission takes a similarly narrow approach by focusing on a very specific issue without addressing the broader ones. Practitioners and judges need further guidance on the outer bounds of the jury trial right, and, while the Commission is persistent in its narrow approach, its decision to amend the Guidelines is a step toward a new era of sentencing that may soon take hold in federal courts.[85]

II. RELEVANT CONDUCT AND THE PROPOSED AMENDMENT

The Guidelines changed significantly from their first iteration, through *Booker* and to the present day. Among those changes, the *Watts* decision stands out as inconsistent with the surrounding precedent.[86] By focusing more on judicial discretion than the underlying constitutional issues that *Watts* presented, the Supreme Court paved the way for an overly broad interpretation of the relevant conduct provision.[87] The proposed amendment would place a meaningful limit on judicial discretion, but the Commission's current approach is likely to lead to further challenges to the relevant conduct provision.[88] To better explain the scope of the issue, a brief overview of the operation of the Guidelines is warranted.

In applying the Guidelines at sentencing, a judge must cross-reference the crime of conviction from the indictment with the appropriate offense conduct in Chapter 2 of the Guidelines.[89] This starting point provides the advisory sentencing range.[90] The judge then considers potential adjustments to the sentencing range under Chapter 3.[91] The adjustments from Chapter 3 permit the judge to consider the defendant's conduct more generally, with no requirement that the conduct be

[83] *See Booker*, 543 U.S. at 259; *see also Watts*, 519 U.S. at 170 (Kennedy, J., dissenting).

[84] *See* PROPOSED AMENDMENTS, *supra* note 1, at 213–14.

[85] For a discussion of the effort to overturn *Watts* and its progeny, see Ankney, *supra* note 71.

[86] *See Watts*, 519 U.S. at 148; Apprendi v. New Jersey, 530 U.S. 466 (2000); *Booker*, 543 U.S. at 220.

[87] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2023).

[88] *See* Holly Barker, *Sentencing Commission to Vote on Handling of Acquitted Conduct*, BLOOMBERG L.: U.S. L. WK. (Apr. 4, 2023, 5:00 AM), https://news.bloomberglaw.com/us-law-week/sentencing-commission-to-vote-on-handling-of-acquitted-conduct.

[89] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(1) (U.S. SENT'G COMM'N 2023).

[90] *Id.* § 1B1.2(b).

[91] *Id.* § 1B1.1(a)(3)–(4).

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included in the indictment or proven to a jury beyond a reasonable doubt.[92] It is at this stage that relevant conduct comes into consideration.[93] The relevant conduct provision in its current form provides that judges shall consider "all acts and omissions . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[94] The current interpretation of this provision allows judges to consider conduct for which the defendant was found not guilty at trial and the underlying conduct from a charge that was dismissed.[95] Due to the breadth of the relevant conduct provision, a judge can impose the same sentence they would have imposed if the defendant had been found guilty of their relevant conduct at trial.[96]

To illustrate the issue of an overly broad interpretation of relevant conduct, consider *United States v. Fitch*, where a defendant was only charged with fraud offenses but faced a sentence that suggested actual guilt for murder.[97] The relevant conduct in *Fitch* suggested, quite convincingly, that the defendant had killed his wife.[98] Fitch, however, had not been tried for murder.[99] Even though the jury only convicted Fitch of the fraud charges, the district judge relied on relevant conduct to conclude that Fitch's sentence should reflect the apparent murder.[100] While the sentencing range for the fraud offense was forty-one to fifty-one months, the district court sentenced Fitch to 262 months.[101] The Ninth Circuit held that the district court's sentence enhancement "certainly was not unreasonable."[102] Because such conduct falls within the scope of Section 1B1.4 (the relevant conduct provision) the judge

[92] *Id.* § 1B1.3 cmt. background ("Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.").

[93] *Id.* § 1B1.3.

[94] *Id.* § 1B1.3(a)(1). The definition of relevant conduct changes slightly depending on the category of offense, but the quoted language is the default definition.

[95] *See* United States v. Watts, 519 U.S. 148, 156–57 (1997) (per curiam).

[96] *See id.* at 163 (Stevens, J., dissenting) ("As the District Court applied the Guidelines, precisely the same range resulted from the acquittal as would have been dictated by a conviction.").

[97] 659 F.3d 788, 790 (9th Cir. 2011).

[98] *See id.* at 791–92.

[99] *Id.* at 790.

[100] *Id.* at 794.

[101] *Id.* at 790.

[102] *Id.* at 798.

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was only required to find that the defendant committed the murder by a preponderance of the evidence.[103] This is the current breadth of the relevant conduct provision.[104]

On its face, the proposed amendment is directed only at acquitted conduct.[105] In proposing this change, the Commission aims to carve out an exception from Section 1B1.3(a)(1) while keeping the rest of the provision functional.[106] The proposed amendment reads as follows:

> Acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless such conduct—
> (A) was admitted by the defendant during a guilty plea colloquy; or
> (B) was found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction.[107]

In a brief commentary section, published in the report that contains the amendment, the Commission references *Watts* and the Supreme Court's decision to uphold the use of acquitted conduct.[108] The amendment is an attempt to clarify the proper usage of acquitted conduct,[109] which calls back to the reasoning found in the dissenting opinions in *Watts* from Justices Stevens and Kennedy. In his dissent, Justice Stevens took a step back from the intricacies of the Guidelines to note the absurdity of forcing a defendant who was found not guilty of a charge to serve a sentence as if he had

[103] *Id.*; United States v. Watts, 519 U.S. 148, 149, 156 (1997) (per curiam) (explaining that preponderance of the evidence is the appropriate standard when reviewing facts relevant to sentencing); U.S. SENT'G GUIDELINES MANUAL § 1B1.4 (U.S. SENT'G COMM'N 2023).

[104] U.S. SENT'G GUIDELINES MANUAL § 1B1.3 (U.S. SENT'G COMM'N 2023).

[105] PROPOSED AMENDMENTS, *supra* note 1, at 213.

[106] *See id.* at 211. The Commission defines acquitted conduct as conduct "underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction." *Id.* at 214.

[107] *Id.* at 213.

[108] *Id.* at 211.

[109] *See id.* at 212.

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been found guilty of that charge.[110] Justice Stevens argued that the broad discretion granted by the Commission's governing statute should be read as a guiding principle and that it did not justify an interpretation of the relevant conduct provision that could compel such a result.[111] Justice Kennedy, also in dissent, criticized the narrow approach of the majority:

> At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal . . . . If there is no clear answer but to acknowledge a theoretical contradiction from which we cannot escape because of overriding practical considerations, at least we ought to say so.[112]

As Justices Stevens and Kennedy point out, the Sixth Amendment issue here cannot be easily squared with the strict categorization of the Guidelines.[113] While keeping the Guidelines intact is understandably important as a "practical consideration," it should not override the Sixth Amendment violation that occurs when a judge exercises authority that should be reserved for the jury.[114] Though the Commission uses narrow wording in its explanation of the amendment, it cannot avoid endorsing the broader idea that the Sixth Amendment requires all relevant conduct that increases the statutory maximum to be supported by a guilty verdict or admission from the defendant.[115]

III. ACQUITTED, UNCHARGED, AND DISMISSED CONDUCT

Of the potential Sixth Amendment issues with the relevant conduct provision, acquitted conduct is the easiest to identify: by allowing a judge to consider conduct

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[110] United States v. Watts, 519 U.S. 148, 170 (1997) (Stevens, J., dissenting) ("The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.").

[111] *See id.* at 168–69.

[112] *Id.* at 170 (Kennedy, J., dissenting). Justice Kennedy further criticized the majority for failing to analyze the difference between uncharged conduct and acquitted conduct. *Id.*

[113] *Id.* at 168, 170 (Stevens, J., dissenting) (Kennedy, J., dissenting).

[114] *Id.* at 170 (Kennedy, J., dissenting); *see* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

[115] Ambiguity about whether the Commission has the authority to enact these changes is one factor that likely contributed to its narrow approach. *See* Barker, *supra* note 88. The Commission emphasizes that acquitted conduct sentencing is constitutional under current Supreme Court precedent, but the amendment would forbid the practice that *Watts* upholds. *See* PROPOSED AMENDMENTS, *supra* note 1, at 211–12.

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of which the jury found the defendant not guilty, Section 1B1.3 has been construed in a way that gives power to the judge when it should be reserved for the jury.[116] The conclusion by the jury that a defendant is not guilty beyond a reasonable doubt loses its effect when the same conduct is reintroduced at sentencing under a lower preponderance of the evidence standard.[117] In the proposed amendment, the Commission defines and excepts acquitted conduct from the broader relevant conduct provision.[118] In doing so, the Commission misses the broader Sixth Amendment issue, acknowledged by Justices Stevens and Kennedy in their dissents to *Watts*, while simultaneously endorsing the reasoning behind them.[119] If the defendant retains the presumption of innocence unless a jury finds them guilty or until they plead guilty, why should the defendant lose that presumption of innocence for conduct that was never considered by a jury in the first place? If the Commission contends that the presumption of innocence attaches to all but admitted or convicted conduct, then that should remain true regardless of what category the Guidelines assign to that conduct.

The Guidelines define dismissed conduct as conduct "underlying a charge dismissed as part of a plea agreement in the case."[120] If an initial charge is brought against a criminal defendant and is later dismissed, that charge is removed from jury consideration.[121] Currently, under Section 1B1.3, a judge may bring the conduct underlying that dismissed charge back into consideration at sentencing.[122] The sentencing judge uses the dismissed conduct to determine the appropriate guideline range in the same way he or she would use acquitted conduct.[123] Because such

[116] U.S. SENT'G GUIDELINES MANUAL § 1B1.3 (U.S. SENT'G COMM'N 2023); *see* United States v. Booker, 543 U.S. 220, 237 (2005) ("The new sentencing practice [brought about by the Guidelines] forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime.").

[117] *Watts*, 519 U.S. at 156 (noting that the "application of the preponderance standard at sentencing generally satisfies due process").

[118] PROPOSED AMENDMENTS, *supra* note 1, at 213–14.

[119] *Id.* The decision to forbid acquitted conduct implies an acknowledgement of the constitutional issue it raises. *See Watts*, 519 U.S. at 168–70 (Stevens, J., dissenting) (Kennedy, J., dissenting).

[120] U.S. SENT'G GUIDELINES MANUAL § 5K2.21 (U.S. SENT'G COMM'N 2023).

[121] *See id.*

[122] *See id.* § 1B1.3.

[123] *See id.* § 1B1.1(a)(3).

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conduct falls within the scope of Section 1B1.3, the judge may impose a higher sentence if he or she finds, by a preponderance of the evidence, that the defendant committed the underlying conduct for the dismissed charge.[124] While there is no "not guilty" verdict to contradict the judge's decision, the defendant's sentence may still be extended beyond what would otherwise have been the maximum.[125] Under the current precedent, this practice is constitutional because the judge is not increasing the maximum sentence as *Apprendi* explicitly forbids, but rather is applying the discretionary guidelines to arrive at the stricter sentencing range as a matter of law.[126] From the defendant's viewpoint, the enhanced sentence based on dismissed conduct is no less a violation of his or her Sixth Amendment rights than if the judge had considered acquitted conduct, because the ultimate sentence is determined by the judge's evaluation of conduct that the defendant never had the opportunity to explain in front of a jury.

The use of dismissed conduct was upheld by the Supreme Court's decision in *Witte v. United States*.[127] In *Witte*, the Court approved an enhanced sentence that had been based on dismissed conduct.[128] The Court was swayed by the history and tradition of judicial discretion at sentencing and the ability of the judge to view the defendant in the broadest context necessary to impose the proper punishment.[129] As such, according to the Supreme Court, sentencing enhancements based on dismissed conduct do not subject the defendant to punishment for crimes for which he was not convicted; they merely reflect the relevant circumstances of the defendant as well as the crime of conviction.[130]

Under the current Sentencing Guidelines, judges are permitted to consider dismissed and uncharged conduct when determining the Guideline range.[131] The practice entails a judge extending a sentence based on conduct that the defendant does not admit to and that the prosecution has not proven beyond a reasonable

[124] *See id.*; *Watts*, 519 U.S. at 156.

[125] *See* Witte v. United States, 515 U.S. 389, 399 (1995); Wilkins, Jr. & Steer, *supra* note 10, at 501–03.

[126] *See Witte*, 515 U.S. at 405–06; Apprendi v. New Jersey, 530 U.S. 466, 474–76 (2000).

[127] 515 U.S. 389.

[128] *Id.* at 393–94.

[129] *Id.* at 397–98, 405–06.

[130] *Id.* at 406.

[131] U.S. SENT'G GUIDELINES MANUAL § 5K2.21.

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doubt.[132] The Commission's decision to further refine the definitions that create this problem raises questions about why the presumption of innocence for relevant conduct is not the default. The same issue arises regardless of whether the defendant was found not guilty of the conduct underlying the charge, or whether the charge was dismissed and never considered by the jury at all. In both scenarios, the judge has the authority to effectively find the defendant guilty of a crime which they were not found guilty of by a jury.

The decision to do away with sentencing that accounts for acquitted conduct calls into question any case that relies on *Watts* to uphold the broad interpretation of the relevant conduct provision.[133] For example, in the Seventh Circuit case *United States v. Holton*, the court upheld a sentence based on uncharged conduct.[134] In *Holton*, the defendant was found guilty of conspiracy to commit Hobbs Act robbery in Illinois.[135] The case against this defendant included allegations of several other store robberies in the area; the jury "found him guilty of conspiracy but acquitted him" of these charges.[136] The government had not, however, charged him with an earlier act of robbing drug dealers.[137] This uncharged conduct led the district judge to impose a sentence about four years above the initial Guidelines sentence.[138] The Seventh Circuit upheld the sentence, holding that *Watts* controlled in such circumstances.[139] Uncharged conduct is perhaps the most difficult category of relevant conduct to regulate, but in cases such as *Holton* where the defendant's sentence suggests guilt for a crime he was not charged with, the jury trial right is clearly implicated in the same way it would have been had the defendant been acquitted of that crime.[140] Essentially, uncharged conduct is any other relevant

[132] *See Apprendi*, 530 U.S. at 490.

[133] *See* Ankney, *supra* note 71.

[134] 873 F.3d 589 (7th Cir. 2017) (per curiam).

[135] *Id.* at 590. A "Hobbs Act robbery" is "a robbery affecting interstate commerce." *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 590–91.

[139] *Id.* at 592.

[140] *See* Robert Alan Semones, Note, *A Parade of Horribles: Uncharged Relevant Conduct, the Federal Prosecutorial Loophole, Tails Wagging Dogs in Federal Sentencing Law, and* United States v. Fitch, 46 U.C. DAVIS L. REV. 313, 315 (2012).

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conduct that is not acquitted conduct or dismissed conduct.[141] Uncharged conduct is often presented by a prosecutor in a pre-sentence report prior to the judge's application of the Guidelines.[142] If the pre-sentence report includes conduct underlying a charge that was not included in the indictment, the defendant could be sentenced based on that conduct without any opportunity to defend themselves in front of a jury. Currently, this practice is supported by the Supreme Court's reasoning in *Watts*, which is now called into question by the proposed amendment.[143] With the potential change to acquitted conduct sentencing, courts may need to revisit the question of whether uncharged conduct sentencing is consistent with the Sixth Amendment. In doing so, the courts will inevitably run into the same issue that underlies acquitted conduct.[144] Judges should not be able to effectively find a criminal defendant guilty of a crime that the jury did not find the defendant guilty of, regardless of which category their conduct falls into under the Guidelines. The basic principle that a defendant is innocent until proven guilty should not give way to "practical considerations" about the judicial task.[145]

IV. CONCLUSION

The Supreme Court's precedent involving the Federal Sentencing Guidelines has produced an unfortunate dichotomy. In theory, the Court has invalidated the provisions of the Guidelines that offend the constitutional guarantees of the Sixth Amendment. At the same time, the Guidelines allow for such a broad construction of relevant conduct that the same issues continue to resurface despite their apparent resolution. The Sentencing Commission takes a significant step in the right direction by proposing an amendment that excludes acquitted conduct from the relevant conduct provision, but the issue it seeks to address should not be resolved incrementally. In his dissent in *Watts*, Justice Stevens concluded that the Guidelines must adhere to the constitutional guarantee that criminal charges must be proven beyond a reasonable doubt:

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[141] U.S. SENT'G GUIDELINES MANUAL § 1B1.3(a) (U.S. SENT'G COMM'N 2023); *see id.* § 5K2.21 (defining dismissed and uncharged conduct).

[142] FED. R. CRIM. P. 32(d).

[143] *See* Barker, *supra* note 88.

[144] *See* Joh, *supra* note 8, at 909–11.

[145] *See* United States v. Watts, 519 U.S. 148, 170 (1997) (Kennedy, J., dissenting).

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> Whether an allegation of criminal conduct is the sole basis for punishment or merely one of several bases for punishment, we should presume that Congress intended the new sentencing Guidelines that it authorized in 1984 to adhere to longstanding procedural requirements enshrined in our constitutional jurisprudence. The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.[146]

A ban on acquitted conduct only eliminates one of several ways in which a defendant's Sixth Amendment rights may be deprived under the Guidelines. A defendant is equally deprived of their right to a jury trial if the issue for which they are being sentenced was never brought in front of a jury. This remains true regardless of the label that the Guidelines attach to that conduct. As such, the Sentencing Commission or the Supreme Court should adopt the policy of the new amendment, without limiting it to the narrow definition of acquitted conduct. As the text of the proposed amendment implies, the presumption of innocence attaches to all but admitted or convicted conduct.[147] That necessarily includes conduct that would fall outside of the current definition. Despite the convenience and practical necessity of the Guidelines, they must comport with the guarantee of the Sixth Amendment: no defendant should be made to serve a sentence that suggests guilt for a charge they were not found guilty of at trial.

[146] *Id.* at 169–70 (Stevens, J., dissenting).

[147] *See* PROPOSED AMENDMENTS, *supra* note 1, at 213–14.

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