

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*

Remember those in prison as if you were their fellow prisoners, and those who are mistreated as if you yourselves were suffering. Hebrews 13:3 (NIV)

INTRODUCTION

“What could instill more confusion and disrespect than finding out that you will be sentenced to an extra ten years in prison for the alleged crimes of which you were acquitted?”¹ Currently, courts may calculate a sentence based on conduct that underlies charges from which a jury has formally acquitted the defendant.² In the aftermath of *United States v. Booker*,³ eight federal district courts have questioned the wisdom and constitutionality of this practice.⁴ One district court aptly described “[s]entencing a defendant to time in prison for a crime that the jury found he did not commit” as a “Kafka-esque result.”⁵

In *United States v. Watts*, the Supreme Court held that courts may consider acquitted conduct to determine a sentence because Congress through 18 U.S.C. § 3661 barred any limitation on conduct considered at sentencing.⁶ The Court also noted that provisions in the United States Sentencing Guidelines (“Guidelines”) permit courts to consider acquitted conduct.⁷ When the Court decided that considering acquitted conduct is constitutional, federal district courts were required to impose a sentence

¹ *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006).

² See *infra* text accompanying notes 69–72. This Note adopts Professor Barry L. Johnson’s definition of “acquitted conduct” as “acts for which the offender was criminally charged and formally adjudicated not guilty, typically by the finder of fact after trial.” 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, 157 (1996).

³ 543 U.S. 220 (2005).

⁴ See *infra* note 67 and accompanying text.

⁵ *Ibanga*, 454 F. Supp. 2d at 536. Franz Kafka’s description of acquittals in a totalitarian state resembles today’s jury acquittals: “non-final ‘acquittals.’ . . . ‘That is to say, when [the accused] is acquitted in this fashion the charge is lifted from [his] shoulders for the time being, but it continues to hover above [him] and can, as soon as an order comes from on high, be laid upon [him] again.’” *Id.* at n.2 (alteration in original) (quoting FRANZ KAFKA, *THE TRIAL* 173 (Willa Muir & Edwin Muir trans., rev. ed., Alfred A. Knopf, Inc. 1992)).

⁶ 519 U.S. 148, 151 (1997).

⁷ *Id.* at 152.

in accordance with the Guidelines.⁸ Almost ten years later in *United States v. Booker*, the Court decided that the Guidelines are advisory and not mandatory because the Guidelines may result in unconstitutional sentences.⁹ The Court has not revisited the specific practice of using acquitted conduct at sentencing since *Booker*. Thus, courts of appeal have continued to allow its use because *Watts* remains good law and Congress has not amended 18 U.S.C. § 3661.¹⁰

This Note argues that Congress should amend 18 U.S.C. § 3661 to prohibit the use of acquitted conduct at sentencing. Part I considers the United States Sentencing Commission's philosophy and explains how the Guidelines permit the use of acquitted conduct. Part II discusses the Supreme Court's holding in *United States v. Watts*, its revamped sentencing jurisprudence in *United States v. Booker*, and the lower federal courts' approach to acquitted conduct post-*Booker*. Part III analyzes Fifth and Fourteenth Amendment procedural due process and Sixth Amendment trial by jury arguments against the use of acquitted conduct. Part IV examines policy arguments against using acquitted conduct. Part V proposes that Congress should enact legislation abolishing the use of acquitted conduct and presents model legislation. Part V also discusses how federal district courts may avoid using acquitted conduct at sentencing post-*Booker* with reduced risk of reversal on appeal.

I. THE HISTORY AND MECHANICS OF USING ACQUITTED CONDUCT AT SENTENCING

A. *The United States Sentencing Commission's Philosophy*

To cure the unpredictability of the federal sentencing system, Congress enacted the Sentencing Reform Act of 1984 ("SRA").¹¹ Before the SRA, federal judges were afforded unfettered discretion in

⁸ 18 U.S.C. § 3553(b) (2000).

⁹ 543 U.S. at 226–27.

¹⁰ See *infra* text accompanying notes 62–66.

¹¹ Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586 (2000), and 28 U.S.C. §§ 991–998 (2000)); see also U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, 1–2 (2006), http://www.ussc.gov/booker_report/Booker_Report.pdf [hereinafter FINAL REPORT]. Both the House of Representatives and Senate recognized the injustices of a federal sentencing system in which similarly situated defendants often received different sentences. *Id.* at 2. “[G]laring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence.” *Id.* at 2 n.16 (quoting S. REP. NO. 97-307, at 956 (1981)). “The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.” *Id.* (quoting H.R. REP. NO. 98-1017, at 34 (1984)).

determining a sentence within a broad statutory range.¹² The SRA created the United States Sentencing Commission (“Commission”), an independent agency within the judicial branch¹³ and gave it the authority to promulgate the United States Sentencing Guidelines.¹⁴

Through the Guidelines, the Commission sought to tailor punishment to each individual defendant and achieve greater uniformity in sentences among similarly situated defendants.¹⁵ The Commission rejected a system in which every defendant convicted of the same offense receives the same sentence.¹⁶ While the offense of conviction largely determines the sentence, the final sentence also reflects a particular defendant’s culpability through consideration of “relevant conduct.”¹⁷ Relevant conduct allows the sentencing court to consider the “totality of [the offender’s] conduct from the planning stages of the offense to post-offense behavior.”¹⁸ Examples of relevant conduct include “use of a firearm in commission of the underlying offense, infliction of extreme psychological injury, [or] selection of an especially vulnerable victim.”¹⁹

The Guidelines describe the scope of “relevant conduct” broadly enough to encompass using acquitted conduct.²⁰ For instance, in *United*

¹² *Id.* at 2 (“Because each judge was ‘left to apply his own notions of the purposes of sentencing,’ the federal sentencing system exhibited ‘an unjustifiably wide range of sentences to offenders convicted of similar crimes.’” (quoting S. REP. NO. 97-307, at 5 (1981))).

¹³ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 2017 (1984) (codified as amended at 28 U.S.C. §§ 991 (2000 & Supp. IV 2004), 992–93 (2000), 994 (2000 & Supp. IV 2004), 995–98 (2000)).

¹⁴ FINAL REPORT, *supra* note 11, at 3 nn.23–24 (citing 28 U.S.C. §§ 991 (2000 & Supp. IV 2004), 994 (2000 & Supp. IV 2004), 995(a)(1) (2000)).

¹⁵ William W. Wilkins, Jr., & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 495 (1990).

¹⁶ Johnson, *supra* note 2, at 160–61. The Commission rejected a pure “charge of offense” system that bases the offender’s sentence only “on the offense for which the offender was charged and convicted.” *Id.* at 160.

¹⁷ *Id.* at 162. See U.S. SENTENCING COMM’N GUIDELINES MANUAL §§ 1B1.3–1B1.4 (2006) [hereinafter GUIDELINES MANUAL].

¹⁸ Wilkins & Steer, *supra* note 15, at 520; see generally *id.* at 504–06. Through relevant conduct, the judge at sentencing may accordingly adjust a sentence for an offender’s acceptance of responsibility or for obstruction of justice. *Id.* at 520–21. Relevant conduct also allows a defendant to be held accountable for an accomplice’s conduct. *Id.* at 521. For “offenses involving fungible items” such as “drugs or monetary value offenses,” relevant conduct permits the sentencing court to consider “the entire range of a defendant’s similar offense behavior.” *Id.* at 514–15, 520–21.

¹⁹ Johnson, *supra* note 2, at 160 (citing GUIDELINES MANUAL, *supra* note 17, §§ 2B3.1(b)(2), 3A1.1, 5K2.3).

²⁰ *Id.* at 162; see GUIDELINES MANUAL, *supra* note 17, §§ 1B1.3 to .4 (2006). While the Guidelines Manual does not directly comment on the use of acquitted conduct, the Commission has most likely allowed this practice to continue because judges considered acquitted conduct to determine a defendant’s sentence before the Guidelines were issued. Johnson, *supra* note 2, at 153–54.

States v. Poyato, the jury acquitted the defendant of possessing a firearm.²¹ Despite the jury acquittal, the Eleventh Circuit held that the district court erred because it did not increase the defendant's sentence by five years for possessing a firearm.²² The appellate court reasoned that the Guidelines require sentencing courts to consider whether the defendant possessed a firearm because possession constitutes "relevant conduct."²³

B. Sentencing Mechanics

Based on the sentencing court's considerations and the jury's verdict, the United States Sentencing Commission Guidelines Manual ("Guidelines Manual" or "Manual") provides formulaic procedures to calculate the sentence. The Manual provides a Sentencing Table²⁴ to determine the Guidelines sentencing range ("GSR"), a smaller range of months within the prescribed statutory range. This range sets the upper and lower limits of the range from which the judge selects the exact sentence.²⁵ The intersection of the vertical axis with the horizontal axis on the Sentencing Table determines the exact GSR.²⁶ The vertical axis represents the defendant's total "Offense Level" based on the offense for which the defendant was convicted;²⁷ the horizontal axis represents the defendant's "Criminal History Category" based on the "number and seriousness of the defendant's sentences for prior convictions."²⁸ A portion of this Sentencing Table is reproduced below:²⁹

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A 5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B 9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30

²¹ 454 F.3d 1295, 1296 (11th Cir. 2006).

²² *Id.* at 1299–1300.

²³ *Id.* at 1299.

²⁴ GUIDELINES MANUAL, *supra* note 17, at 380–82.

²⁵ Johnson, *supra* note 2, at 159.

²⁶ *Id.* at 158–59.

²⁷ *Id.* at 158. The judge may adjust the offense level based on "aggravating and mitigating facts or circumstances." *Id.*

²⁸ *Id.* at 159.

²⁹ GUIDELINES MANUAL, *supra* note 17, at 381.

For instance, a Criminal History Category of V and Offense Level of eight derives a GSR of fifteen to twenty-one months.

C. Uses of Acquitted Conduct at Sentencing

Generally, the procedural safeguards present at trial are not required at sentencing.³⁰ In considering acquitted conduct at sentencing, the court may base its findings upon evidence, such as hearsay, that is inadmissible at trial.³¹ Moreover, the court need only find by a preponderance of the evidence that the wrongful acts occurred.³² Using these relaxed procedural standards, courts often consider acquitted conduct at sentencing either as relevant conduct or as a basis for imposing a sentence higher than the one prescribed in the GSR.³³

Acquitted conduct is commonly used at sentencing as relevant conduct to determine a defendant's GSR.³⁴ For example, courts may use acquitted conduct as relevant conduct to calculate drug quantities.³⁵ In *United States v. Ibanga*, the jury convicted Ibanga of conspiracy to launder money but acquitted him of actual money laundering, conspiracy to distribute methamphetamine, and distributing methamphetamine.³⁶ The Guidelines required the court to consider relevant conduct or "the offense level for the underlying offense from which the laundered funds were derived."³⁷ The court found by a preponderance of the evidence that the defendant was responsible for distributing 124.03 grams of methamphetamine, the very charge of which the jury had acquitted the defendant.³⁸ As a result, the offense level was 33 instead of 23, resulting in a GSR of 151 to 188 months instead of 51 to 63 months—a difference of about 10 years.³⁹

Courts often use acquitted conduct to depart upward from the GSR, imposing a sentence higher than one within the GSR.⁴⁰ For example, courts may use "acquitted conduct contemporaneous with the charged

³⁰ *Id.* § 6A1.3(a). To calculate a sentence, the court may consider "relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." *Id.*; see also *infra* text accompanying notes 96–101.

³¹ GUIDELINES MANUAL, *supra* note 17, § 6A1.3(a).

³² *Id.* § 6A1.3 cmt.

³³ Johnson, *supra* note 2, at 164.

³⁴ *Id.*

³⁵ *Id.* at 164–65.

³⁶ 454 F. Supp. 2d 532, 532–33 (E.D. Va. 2006).

³⁷ GUIDELINES MANUAL, *supra* note 17, § 2S1.1(a).

³⁸ *Ibanga*, 454 F. Supp. 2d at 535.

³⁹ *Id.* at 532, 535.

⁴⁰ GUIDELINES MANUAL, *supra* note 17, § 5K2.0(a); see also Johnson, *supra* note 2, at 165.

offense” to justify departure.⁴¹ In *United States v. Carroll*, the jury acquitted Carroll of conspiracy to distribute methamphetamine and possession with intent to distribute methamphetamine.⁴² The jury convicted him only of possessing and attempting to possess methamphetamine.⁴³ Despite the jury acquittal, the Eleventh Circuit approved the district court’s decision to “depart[] upward from the Guideline[s] range based on a finding that Carroll had distributed the drugs.”⁴⁴ The district court doubled his sentence from twelve months to twenty-four months, adding six months to each conviction based on the acquitted conduct.⁴⁵

II. THE SUPREME COURT’S SENTENCING JURISPRUDENCE AND LOWER COURT DECISIONS AFTER *BOOKER*

A. *The Supreme Court’s Assessment of Acquitted Conduct*

In *United States v. Watts*, the Supreme Court held that use of acquitted conduct by a preponderance of the evidence standard at sentencing did not violate the Double Jeopardy Clause.⁴⁶ The Court reasoned that 18 U.S.C. § 3661 afforded broad discretion to the judge at sentencing because it forbids any limitation on information used to sentence a defendant.⁴⁷ Further, different evidentiary standards govern at trial than at sentencing, and the preponderance of the evidence standard satisfies the Due Process Clause of the Fifth Amendment.⁴⁸ An acquittal serves not to clear the defendant of guilt but as an “acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt.”⁴⁹

B. *Booker and Its Predecessors*

Before *United States v. Booker*,⁵⁰ a sentence within the larger statutory range, yet outside the jury-authorized range, was considered constitutional because “there [was] no Sixth Amendment right to jury

⁴¹ Johnson, *supra* note 2, at 166–68 (discussing *United States v. Fonner*, 920 F.2d 1330 (7th Cir. 1990) and *United States v. Ryan*, 866 F.2d 604, 608–09 (3d Cir. 1989) as examples of upward departures based on acquitted conduct).

⁴² 140 F. App’x 168, 169 (11th Cir. 2005).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 519 U.S. 148, 156–57 (1997).

⁴⁷ *Id.* at 151.

⁴⁸ *Id.* at 156.

⁴⁹ *Id.* at 155 (quoting *United States v. Putra*, 78 F.3d 1386, 1394 (9th Cir. 1996) (Wallace, C.J., dissenting)).

⁵⁰ 543 U.S. 220 (2005).

sentencing, even where the sentence turns on specific findings of fact.”⁵¹ The Court changed its course in *Apprendi v. New Jersey* and held that the Due Process Clause of the Fourteenth Amendment requires that any fact, other than a prior conviction, authorizing an increase in the statutory maximum “must be submitted to a jury[] and proved beyond a reasonable doubt.”⁵² Four years later, the Court in *Blakely v. Washington* held that a judicial determination increasing the sentence beyond the jury-authorized sentencing range violates the Sixth Amendment right to trial by jury, even when the final sentence is within the larger statutory range.⁵³

Booker extended *Apprendi* and *Blakely* to the United States Sentencing Guidelines.⁵⁴ After *Booker*, a judicial determination that results in a sentence higher than one within the range authorized by the jury verdict alone violates the Sixth Amendment’s guarantee of trial by jury.⁵⁵ In *Booker*, the Court sought to cure the growing trend that “the judge, not the jury, . . . determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance.”⁵⁶ Thus, the Court clarified that a sentence must exceed only the maximum Guidelines range authorized by the jury verdict, not the statutory maximum, to pose a Sixth Amendment violation.⁵⁷

The Court in *Booker* remedied the Sixth Amendment violation by excising the statutory provisions that made the Guidelines mandatory in the second half of its opinion.⁵⁸ It also severed those provisions requiring a de novo standard of review on appeal for departures from the

⁵¹ *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986).

⁵² 530 U.S. 466, 490 (2000).

⁵³ 542 U.S. 296, 308 (2004). In *Blakely*, the state statutory maximum penalty was 10 years imprisonment. *Id.* at 303. The jury verdict authorized a sentencing range of forty-nine to fifty-three months. *Id.* at 299–300. The judge imposed a sentence of ninety months, which was within the statutory range but exceeded the jury-authorized maximum sentence of fifty-three months. *Id.*

⁵⁴ The Court in *Booker* ended the first part of its opinion by repeating its holding in *Apprendi* in different terms: “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *Booker*, 543 U.S. at 244.

⁵⁵ *Id.* at 245.

⁵⁶ *Id.* at 236.

⁵⁷ The jury verdict in *Booker* authorized a sentence of 210 to 262 months in prison, but the judge found additional facts at a post-trial sentencing that authorized a sentence of 360 months to life imprisonment. *Id.* at 227. Both sentencing ranges were within the maximum statutory punishment. *Id.*

⁵⁸ *Id.* at 259 (invalidating 18 U.S.C. § 3553(b) (2000)); see 18 U.S.C. § 3553(b)(1) (Supp. IV 2004).

applicable Guidelines range.⁵⁹ While the Guidelines are only advisory, *Booker* held that the Sentencing Reform Act “requires judges to take account of the Guidelines together with other sentencing goals” listed in 18 U.S.C. § 3553(a).⁶⁰ Also, after *Booker*, appellate courts review a sentence only for reasonableness when considering factors in 18 U.S.C. § 3553(a).⁶¹

C. Lower Court Consideration of Acquitted Conduct Post-Booker

1. Appellate Court Consideration of Acquitted Conduct

After *Booker*, lower federal appellate courts still allow sentencing courts to use acquitted conduct found by a preponderance of the evidence to increase a defendant’s offense level.⁶² This increase in offense level

⁵⁹ *Id.* (invalidating 18 U.S.C. § 3742(e) (2000)); see 18 U.S.C. § 3742(e) (2000 & Supp. IV 2004).

⁶⁰ *Booker*, 543 U.S. at 259. 18 U.S.C. § 3553(a) outlines the factors considered at sentencing:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

....

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code . . . ;

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code . . . ;

....

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2000 & Supp. IV 2004).

⁶¹ *Booker*, 543 U.S. at 261.

⁶² The United States Courts of Appeal for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits have all permitted consideration of acquitted conduct at sentencing to increase a defendant’s offense level. See *United States v. Castillo*, 186 F. App’x 25, 27 (2d Cir. 2006); *United States v. Samet*, 200 F. App’x 15, 22 (2d Cir. 2006); *United States v. Wu*, 183 F. App’x 34, 35 (2d Cir. 2006); *United States v. Hayward*, 177 F. App’x 214, 215 (3d Cir. 2006) (“[A] jury’s verdict of acquittal does not

alters the Guidelines range and increases the sentence length.⁶³ Appellate courts have reasoned that considering acquitted conduct at sentencing does not violate a defendant's Sixth Amendment right to trial by jury or Fifth Amendment right to due process because the Supreme Court did not overrule *United States v. Watts*⁶⁴ and did not excise 18

prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.” (quoting *United States v. Watts*, 519 U.S. 148, 157 (1997)); *United States v. Cooper*, 201 F. App'x 155, 155–56 (4th Cir. 2006); *United States v. Jones*, 194 F. App'x 196, 197–98 (5th Cir. 2006); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006) (“Even post-*Booker*, for purposes of calculating the advisory guidelines range, the district court may find by a preponderance of the evidence facts regarding conduct for which the defendant was acquitted.” (citing *United States v. Radtke*, 415 F.3d 826, 844 (8th Cir. 2005))); *United States v. Armstrong*, 165 F. App'x 768, 772 (11th Cir. 2006); *United States v. Coleman*, 184 F. App'x 848, 849–50 (11th Cir. 2006); *United States v. Gilart*, 162 F. App'x 880, 883 (11th Cir. 2006); *United States v. Faust*, 456 F.3d 1342, 1347 (11th Cir. 2006) (“[W]e held nothing in *Booker* prohibits courts from considering relevant acquitted conduct when the Sentencing Guidelines are applied as advisory.” (citing *United States v. Duncan*, 400 F.3d 1297, 1304–05 (11th Cir. 2005))); *United States v. Hamaker*, 455 F.3d 1316, 1336 (11th Cir. 2006); *United States v. Motes*, 196 F. App'x 877, 881 (11th Cir. 2006) (“[R]elevant conduct of which a defendant was acquitted nonetheless may be taken into account in sentencing for the offenses of conviction, as long as the government proves the acquitted conduct relied upon by a preponderance of the evidence, and the judge does not impose a sentence that exceeds what is authorized by the jury verdict.” (quoting *Duncan*, 400 F.3d at 1304–05)); *United States v. Phillips*, 177 F. App'x 942, 961–62 (11th Cir. 2006); *United States v. Poyato*, 454 F.3d 1295, 1297 (11th Cir. 2006); *United States v. Dorcelly*, 454 F.3d 366, 372 (D.C. Cir. 2006) (“While the Court did not expressly address the sentencing court's consideration of acquitted conduct, we believe its language is broad enough to allow consideration of acquitted conduct so long as the court ‘deems [it] relevant.’” (alteration in original) (quoting *Booker*, 543 U.S. at 233)); *United States v. Vaughn*, 430 F.3d 518, 521 (2d Cir. 2005) (“[A]fter *Booker*, district courts may also continue to take into account acquitted conduct when sentencing defendants without violating the Due Process Clause”); *United States v. Williams*, 399 F.3d 450, 453–54 (2d Cir. 2005); *United States v. Ashworth*, 139 F. App'x 525, 527 (4th Cir. 2005); *United States v. Williams*, 150 F. App'x 221, 224–25 (4th Cir. 2005); *United States v. Price*, 418 F.3d 771, 787 (7th Cir. 2005) (“[A] court is permitted to consider a broad range of information for sentencing purposes, including conduct related to charges of which the defendant was acquitted.”); *United States v. Manning*, 147 F. App'x 24, 29 (10th Cir. 2005) (“We have held that *Booker* does not alter the ability of sentencing courts to increase a defendant's sentence on the basis of acquitted conduct as long as the government demonstrates responsibility for the acquitted conduct by a preponderance of the evidence.” (citing *United States v. Magallanez*, 408 F.3d 672, 683–85 (10th Cir. 2005))); *United States v. Bragg*, 148 F. App'x 855, 860 (11th Cir. 2005); *United States v. Carroll*, 140 F. App'x 168, 170 (11th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297, 1304–05 (11th Cir. 2005); *United States v. McKeever*, 149 F. App'x 921, 925 (11th Cir. 2005); *United States v. Paz*, No. 04-13385, slip op. 2005 WL 1540136, at *6 (11th Cir. July 1, 2005); *United States v. Small*, 149 F. App'x 841, 842–43 (11th Cir. 2005); *United States v. Tynes*, 160 F. App'x 938, 940 (11th Cir. 2005).

⁶³ See *supra* text accompanying notes 42–45.

⁶⁴ In *United States v. Booker*, the Court confined the application of *Watts* to cases where there is “[no] contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment.” 543 U.S. at 240. The Court in *Booker* further noted that “*Watts* . . . presented a very narrow question

U.S.C. § 3661, the statute construed by the *Watts* Court to permit sentencing courts to consider acquitted conduct.⁶⁵ The Tenth and Eleventh Circuits have expressed concern regarding the use of acquitted conduct, but nonetheless continue to allow its use.⁶⁶

2. District Court Consideration of Acquitted Conduct

After *Booker*, eight district courts have declined to consider acquitted conduct at sentencing or have required proof of that conduct by a higher standard than a preponderance of the evidence.⁶⁷ Because the Guidelines Manual requires consideration of acquitted conduct for

regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument.” *Id.* at 240 n.4.

⁶⁵ See *Dorcely*, 454 F.3d at 371–72; *Ashworth*, 139 F. App’x at 527; *Duncan*, 400 F.3d at 1304–05; *Magallanez*, 408 F.3d at 684–85; *Price*, 418 F.3d at 787–88; *Vaughn*, 430 F.3d at 525–27.

⁶⁶ Judge Barkett on the Eleventh Circuit wrote a concurrence in *United States v. Faust*, expressing discontent with the continued use of acquitted conduct:

I join the majority in affirming Faust’s conviction, but concur in its sentencing decision only because I am bound by Circuit precedent. Although *United States v. Duncan*, 400 F.3d 1297 [(11th Cir. 2005)], expressly authorized the district court to enhance Faust’s sentence for conduct of which a jury found him innocent, I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.

Faust, 456 F.3d at 1349 (Barkett, J., concurring).

The Tenth Circuit has also acknowledged that a defendant “might well be excused for thinking that there is something amiss” with using acquitted conduct “to sentence him to an additional 43 months in prison in the face of a jury verdict finding facts under which he could be required to serve no more than 78 months.” *Magallanez*, 408 F.3d at 683.

⁶⁷ 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); *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. Carvajal*, No. 04 Cr. 222(AKH), 2005 WL 476125, at *4–6 (S.D.N.Y. Feb. 17, 2005); *United States v. Coleman*, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005); *United States v. Gray*, 362 F. Supp. 2d 714, 720 (S.D. W. Va. 2005). *But see* *United States v. Brown*, 439 F. Supp. 2d 134, 137 (D.D.C. 2006) (“[E]nhancement of [a] sentence for [a] convicted offense based on relevant acquitted conduct proven only by a preponderance of the evidence does not present a Sixth Amendment violation.” (quoting *United States v. Edwards*, 427 F. Supp. 2d 17, 20 (D.D.C. 2006) (“*Booker* leaves intact the longstanding authority of the sentencing judge to consider acquitted conduct proven by a preponderance of the evidence, without violating the Sixth Amendment.”))); *United States v. Santiago*, 413 F. Supp. 2d 307, 318 (S.D.N.Y. 2006) (noting that district courts may find facts relevant to sentencing by a preponderance of the evidence “where the jury acquitted the defendant of that conduct.” (quoting *Vaughn*, 430 F.3d at 527)); *United States v. Agostini*, 365 F. Supp. 2d 530, 534 (S.D.N.Y. 2005) (“The Supreme Court’s decision in *Booker* did not alter the court’s ability to enhance a defendant’s sentence on the basis of acquitted conduct.”).

certain offenses,⁶⁸ a court must account for its refusal to consider it. These district courts have employed the following legal rationales (complete with literary references):⁶⁹

- *Watts* permits, but does not require, courts to consider acquitted conduct at sentencing;⁷⁰
- acquitted conduct should be considered by a reasonable doubt or by a clear-and-convincing standard at sentencing;⁷¹
- considering acquitted conduct is incongruent with the sentencing factors of promoting respect for the law and providing just punishment for the offense.⁷²

The last section of this Note discusses the logic of these rationales.

III. CONSTITUTIONAL ARGUMENTS AGAINST THE USE OF ACQUITTED CONDUCT AFTER *BOOKER*

A. Use of Acquitted Conduct May Violate the Sixth Amendment Right to a Jury Trial

1. Appellate Courts May Presume That a Sentence Within the Guidelines Range is Reasonable

The Supreme Court in *Rita v. United States* recently determined that the law permits courts of appeal to “presume that a sentence imposed within a properly calculated . . . Guidelines range is a reasonable sentence.”⁷³ A sentence outside of the Guidelines range, however, will not be presumed unreasonable.⁷⁴ The Court allows this presumption of reasonableness because both the sentencing judge and

⁶⁸ See *supra* text accompanying notes 25–29.

⁶⁹ The court in *Ibanga* ended its opinion with an observation from Mr. Bumble, a character in *Oliver Twist*: “If the law supposes that, . . . the law is an ass—an idiot.” *Ibanga*, 454 F. Supp. 2d at 543 (quoting CHARLES DICKENS, *OLIVER TWIST* 463 (Signet Classics 3d ed. 1961) (1838)). Likewise the court in *United States v. Wendelsdorf* admitted that its reading of *Watts*—holding acquitted conduct as an optional consideration—is much like Balthasar in his “creative reading” to literally avoid exacting a “pound of flesh.” *Wendelsdorf*, 423 F. Supp. 2d at 929 n.1 (citing WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1).

⁷⁰ *Id.* at 935.

⁷¹ *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. Coleman*, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005).

⁷² *Ibanga*, 454 F. Supp. 2d at 539; see 18 U.S.C. § 3553(a)(2)(A) (2000).

⁷³ 127 S. Ct. 2456, 2459 (2007).

⁷⁴ *Id.* at 2459, 2462.

the Commission are charged with carrying out the goals in 18 U.S.C. § 3553(a).⁷⁵ Thus, a sentence within the Guidelines range reflects that both the sentencing judge and the Sentencing Commission have reached the same conclusion.⁷⁶ The Court emphasizes that only appellate courts may apply this presumption⁷⁷ and admits that such a presumption may “encourage sentencing judges to impose Guidelines sentences.”⁷⁸

Concurring in *Rita*, Justice Scalia argued that the majority’s endorsement of substantive review for reasonableness signifies an inevitable return to pre-*Booker* sentencing practices.⁷⁹ In conducting a substantive review, an appellate court examines the sentencing court’s consideration of the Section 3553(a) factors with respect to the defendant’s unique circumstances. For example, in *Rita* the Court reviewed the sentencing court’s consideration of the defendant’s “physical ailments”⁸⁰ and “lengthy military service”⁸¹ and agreed that these circumstances are “insufficient to warrant a sentence lower than the Guidelines range of 33 to 45 months.”⁸² The Court in *Rita* acknowledged that a substantive review may “increase[] the likelihood that the judge, not the jury, will find ‘sentencing facts’”⁸³ To meaningfully guard against Sixth Amendment violations, Justice Scalia proposed a procedural review for reasonableness.⁸⁴ He explained that the Guidelines range is typically calculated using judge-found facts.⁸⁵ Reviewing the procedures used to calculate the Guidelines range would reveal whether the judge’s, rather than the jury’s, fact-finding determined the upper limits of a sentence.⁸⁶ Thus, he concluded a procedural, rather than substantive, review for reasonableness more

⁷⁵ *Id.* at 2462–63.

⁷⁶ *Id.* at 2463.

⁷⁷ *Id.* at 2465.

⁷⁸ *Id.* at 2467. One district court has acknowledged that “[t]here is no question that a district judge sitting within the Fourth Circuit varies from a Guidelines sentence at his or her peril.” *United States v. Ibanga*, 454 F. Supp. 2d 532, 538 (E.D. Va. 2006).

⁷⁹ *Rita*, 127 S. Ct. at 2476–79 (Scalia, J., concurring in part).

⁸⁰ *Id.* at 2469 (majority opinion).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 2465. Despite this increased likelihood, the Court concluded that the presumption of reasonableness does not violate the Sixth Amendment. *Id.* The Court reasoned that the Sixth Amendment does not “automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence.” *Id.* at 2465–66. It only “forbids a judge to increase a defendant’s sentence [when] the judge finds facts that the jury did not find (and the offender did not concede).” *Id.* at 2466 (emphasis omitted).

⁸⁴ *Id.* at 2476 (Scalia, J., concurring in part).

⁸⁵ *Id.* at 2477.

⁸⁶ *Id.* at 2482–83.

effectively guards against the Sixth Amendment violations found in *Booker*.⁸⁷

Rita's effect on using acquitted conduct at sentencing may depend on whether appellate courts review a sentencing court's determinations substantively or procedurally. When the Guidelines require sentencing courts to use acquitted conduct in calculating the Guidelines range,⁸⁸ *Rita* allows an appellate court to presume that a sentence within that range is reasonable.⁸⁹ A substantive review may allow an appellate court to overlook the constitutionality of using acquitted conduct because the procedures used to calculate the range will not be scrutinized and the Guidelines range will be presumed reasonable. The appellate court only reviews the trial court's consideration of Section 3553(a) sentencing factors. In conducting a procedural review, however, the appellate court examines whether the trial judge has unconstitutionally "increase[d] a defendant's sentence . . . [based on] facts that the jury did not find (and the offender did not concede)."⁹⁰ A procedural review requires an appellate court to examine whether the sentencing court used acquitted conduct to increase the defendant's offense level, thereby increasing the Guidelines range. Thus, the appellate court will be directly confronted with using acquitted conduct at sentencing post-*Booker* to increase the sentence.

A substantive reasonableness review, however, does not necessarily preclude a procedural reasonableness review. The majority opinion in *Rita* does not forbid a procedural reasonableness review and indirectly implies such a review; the presumption of reasonableness only applies to a sentence "imposed within a *properly calculated* . . . Guidelines range . . ."⁹¹ Thus, an appellate court may still examine whether the Guidelines range was improperly calculated using facts that a jury did not find and the defendant did not admit. The *Rita* Court's emphasis on a substantive—not procedural—reasonableness review may simply reflect that the issue in *Rita* concerned the substantive not procedural components of Rita's sentence.⁹² Only future cases will demonstrate *Rita*'s effects on using acquitted conduct at sentencing.

⁸⁷ *Id.* at 2482–84.

⁸⁸ *See supra* text accompanying note 52.

⁸⁹ *Rita*, 127 S. Ct. at 2459.

⁹⁰ *Id.* at 2466.

⁹¹ *Id.* at 2459 (emphasis added).

⁹² Rita's counsel had argued that his "[p]hysical condition, vulnerability in prison and the military service," justified a sentence lower than one within the Guidelines range in light of the sentencing factors in 18 U.S.C. § 3553(a). *Id.* at 2461. The Court reviewed the sentence substantively by considering the effect Rita's special circumstances had on the final sentence. *Id.* at 2469–70.

2. The Tail of Acquitted Conduct Wags the Dog of Sentencing

Using acquitted conduct may also violate the Sixth Amendment right to trial by jury if the acquitted conduct alone disproportionately increases the sentence. In *Apprendi v. New Jersey*, the Court held that “due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence.’”⁹³ The length of the sentence reflects the degree of “criminal culpability” because a “heightened stigma [is] associated with an offense the legislature has selected as worthy of greater punishment”⁹⁴ The *Apprendi* Court found that a judicial determination that doubled a sentence from ten to twenty years is “a tail which wags the dog of the substantive offense.”⁹⁵ Similarly, in *Jones v. United States*, the Court considered a federal carjacking statute as containing three separate offenses rather than one crime with three possible maximum penalties because the potential penalty might increase by two-thirds through a judicial determination.⁹⁶ In *Ibanga*, a post-*Booker* case, the Guidelines range calculated with the acquitted conduct would have increased the sentence by two-thirds, yet the court was obliged to explain its decision not to use acquitted conduct at sentencing.⁹⁷

The reasoning in *Apprendi* and *Jones*, together with *Booker*, strengthens the argument that using acquitted conduct violates the Sixth Amendment when the acquitted conduct disproportionately increases the sentence.⁹⁸ The first half of *Booker* emphasizes that any fact increasing the maximum sentence, unauthorized by a jury verdict, “must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”⁹⁹ A jury acquittal leaves no doubt that the jury has rejected the sentence-enhancing fact by a reasonable doubt.

B. Using Acquitted Conduct Does Not Violate Procedural Due Process

Because a criminal trial and sentencing hearing are viewed as separate proceedings, procedural Due Process does not require courts to

⁹³ 530 U.S. 466, 484 (2000) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).

⁹⁴ *Id.* at 495 (citation omitted).

⁹⁵ *Id.* (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

⁹⁶ 526 U.S. 227, 243–44, 251–52 (1999).

⁹⁷ *United States v. Ibanga*, 454 F. Supp. 2d 532, 538–42 (E.D. Va. 2006).

⁹⁸ The Court in *Watts* commented that the use of acquitted conduct by a preponderance of the evidence standard to substantially increase a sentence might be unconstitutional. 519 U.S. 148, 156–57 (1997). The Court ultimately declined to decide the issue because “[t]he cases before [it] . . . [did] not present such exceptional circumstances” *Id.*

⁹⁹ *Booker*, 543 U.S. at 244.

use the Federal Rules of Evidence or a specific standard of proof at sentencing, even with respect to acquitted conduct.¹⁰⁰ The Fourteenth Amendment requires proof beyond a reasonable doubt at a criminal trial but not at the sentencing proceeding.¹⁰¹ The Court in *McMillan v. Pennsylvania* held that a judicial determination by a preponderance of the evidence did not violate the Due Process Clause, even though the judicial determination resulted in a mandatory minimum sentence of five years.¹⁰² The *McMillan* Court, relying on *Williams v. New York*, noted that “[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all.”¹⁰³ In *Williams*, the jury returned a guilty verdict and recommended a life sentence, but the judge imposed the death penalty based on “additional information” that could not be presented to the jury.¹⁰⁴ The *Williams* Court explained that “[h]ighly relevant—if not essential—to [a judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.”¹⁰⁵

C. Assessment of Constitutional Arguments

The constitutional arguments against using acquitted conduct at sentencing are stronger after *Booker*, but still weak considering the Court’s comprehensive sentencing jurisprudence. The exact point at which the use of acquitted conduct disproportionately controls the length of the sentence is arbitrary. This disproportional-length argument seeks to curtail the more flagrant results of an already questionable practice. It does not answer why a jury acquittal fails to protect a defendant from punishment for conduct underlying the acquitted charge. Moreover, the “tail wags the dog” and presumption arguments are not unique to the use of acquitted conduct. These arguments apply equally to any factual determination made by a judge at sentencing. The Supreme Court’s denial of certiorari to appeals from circuit courts that approve using acquitted conduct at sentencing also indicates these constitutional arguments are, at this time, likely futile.¹⁰⁶

¹⁰⁰ See *supra* text accompanying note 47.

¹⁰¹ See *In re Winship*, 397 U.S. 358, 364 (1970). While *Winship* was decided in the pre-Guidelines era, post-Guidelines cases have clarified that the reasonable doubt standard is not required at sentencing proceedings. See *Watts*, 519 U.S. at 151; *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

¹⁰² 477 U.S. at 81, 91–92.

¹⁰³ *Id.* at 91 (citing *Williams*, 337 U.S. at 246–47).

¹⁰⁴ *Williams*, 337 U.S. at 242–43.

¹⁰⁵ *Id.* at 247.

¹⁰⁶ *United States v. Wu*, 183 F. App’x 34, 35 (2d Cir.), *cert. denied*, 127 S.Ct. 320 (2006); *United States v. Hayward*, 177 F. App’x 214, 215 (3d Cir.) (“[A] jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the

IV. PUBLIC POLICY ARGUMENTS AGAINST THE USE OF ACQUITTED CONDUCT

A. Restoring the Jury Trial's Power

While constitutional arguments are relatively weak, public policy arguments against acquitted conduct center on preserving a meaningful jury trial. Using acquitted conduct jeopardizes the jury trial's role in legitimizing punishment. It also denies the jury meaningful participation in the administration of government.

1. The Jury Trial's Significance

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."¹⁰⁷ This presumption of innocence alongside the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free" define the foundation of American criminal law.¹⁰⁸ A judge's consideration of acquitted conduct nullifies these principles and usurps the jury's historic role as fact finder.¹⁰⁹

Traditionally, "it was the duty of the court to expound the law and that of the jury to apply the law."¹¹⁰ Trial courts in early America had "minimal flexibility in the imposition of a sentence" because punishments were "legislatively fixed."¹¹¹ Courts were not confronted with today's expansive statutory ranges.¹¹² The judge's role during colonial times was confined to the "ministerial task" of

evidence." (quoting *United States v. Watts*, 519 U.S. 148, 157 (1997)), *cert. denied*, 127 S. Ct. 270 (2006)); *United States v. Armstrong*, 165 F. App'x 768, 772 (11th Cir.), *cert. denied*, 127 S. Ct. 109 (2006); *United States v. Gilart*, 162 F. App'x 880, 883 (11th Cir.), *cert. denied*, 126 S. Ct. 2055 (2006); *United States v. Vaughn*, 430 F.3d 518, 521 (2d Cir.) ("[A]fter *Booker*, district courts may also continue to take into account acquitted conduct when sentencing defendants without violating the Due Process Clause . . ."), *cert. denied*, 547 U.S. 1060 (2006); *United States v. Ashworth*, 139 F. App'x 525, 527 (4th Cir.), *cert. denied*, 546 U.S. 1045 (2005); *United States v. McKeever*, 149 F. App'x 921, 925 (11th Cir. 2005), *cert. denied*, 546 U.S. 1129 (2006); *United States v. Tynes*, 160 F. App'x 938, 940 (11th Cir. 2005), *cert. denied*, 547 U.S. 1085 (2006).

¹⁰⁷ *Coffin v. United States*, 156 U.S. 432, 453 (1895). "Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens." *Id.* at 454 (citation omitted).

¹⁰⁸ *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

¹⁰⁹ See *infra* text accompanying notes 110–15.

¹¹⁰ *Sparf v. United States*, 156 U.S. 51, 106 (1895).

¹¹¹ Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1210 (1993).

¹¹² For instance, the statutory sentencing range for laundering money is "a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both." 18 U.S.C. § 1956(a)(1) (2000).

“[p]ronounc[ing] . . . the sentence” because the judge “[had] limited discretion once a jury convicted”¹¹³ The Supreme Court in the nineteenth century realized that the judge and jury functions “cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.”¹¹⁴ Confounding the functions of judge and jury resulted in the dilemma in *Booker*: “[H]ow 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”¹¹⁵

The remedial *Booker* opinion implies that juries cannot be entrusted with complex decisions;¹¹⁶ but the jury’s power of nullification and review refutes this implication. Jury nullification refers to the jury’s power to disregard a law altogether, whereas jury review refers to the jury’s power to refuse to enforce laws the jury finds unconstitutional.¹¹⁷ Jury nullification occurs when the jury finds that a defendant committed the charged offense yet “refuses . . . convict[ion] for equitable, prejudicial, or arbitrary reasons.”¹¹⁸ While jury nullification violates the juror oath, “courts may not wage direct war against jury independence.”¹¹⁹ With respect to jury review, Justice Samuel Chase was almost impeached because he refused “to instruct the jury regarding its power to review [the law] for unconstitutionality”¹²⁰ and blocked counsel from arguing law to the jury in a criminal case.¹²¹ The jury’s authority has eroded with Supreme Court jurisprudence, and perhaps, the jury should not be entrusted with all legal matters.¹²² Nonetheless, the jury remains competent to serve as arbiter over complex factual matters.¹²³

¹¹³ Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 424 (1999).

¹¹⁴ *Sparf*, 156 U.S. at 106.

¹¹⁵ *Booker*, 543 U.S. at 237.

¹¹⁶ *Id.* at 254 (“How would courts and counsel work with an indictment and a jury trial that involved not just whether a defendant robbed a bank but also how?”).

¹¹⁷ *Lear*, *supra* note 111, at 1228.

¹¹⁸ Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 826 (1990); *see Lear*, *supra* note 111, at 1228.

¹¹⁹ Weinberg-Brodt, *supra* note 118; *see Lear*, *supra* note 111, at 1236–37.

¹²⁰ *Lear*, *supra* note 111, at 1228.

¹²¹ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183, 1191–92 (1991).

¹²² *Id.* at 1194–95.

¹²³ *See United States v. Kandirakis*, 441 F. Supp. 2d 282, 331 (W.D. Mass. 2006) (“As any trial judge will confirm, an American jury can skillfully and impartially handle all these matters with discernment and dispatch.”). The court in *Kandirakis* allowed the jury to make complex factual decisions regarding Guidelines sentencing enhancements; it then considered the jury’s determinations at sentencing. *Id.* Other courts have implemented this practice, as well, demonstrating that juries are capable of deciding complex factual issues.

2. Jury Duty as Meaningful Democratic Participation

“The jury as an institution not only guards against judicial despotism, but also provides an opportunity for lay citizens to become both pupils of and participants in our legal and political system.”¹²⁴ The jury experience was thought to “[teach] men to practice equity . . . to judge his neighbor as he would himself be judged”¹²⁵ In exercising such judgment, the jury functions as a “conduit for community conscience in culpability assessment.”¹²⁶ A sentence in opposition to the jury verdict teaches the juror as pupil and legal participant that her “efforts in assessing the evidence and weighing the different charges were of limited importance, overridden by the contrary opinion of one judge.”¹²⁷

Using acquitted conduct also denigrates the juror’s participation in the administration of government and “skews the power relationship between the federal prosecutor and the petit jury.”¹²⁸ The jury system, as Tocqueville noted, “invests the people, or that class of citizens, with the direction of society.”¹²⁹ The jury, through an acquittal, wielded influence over law-enforcement decisions.¹³⁰ Specifically, the federal petit jury, “through the Sixth Amendment ‘district’ requirement,” provided both “community oversight of the United States Attorney” and “a strong check to potential prosecutorial abuse.”¹³¹ An acquittal demonstrated to the executive the community’s tolerance for certain crimes and classes of offenders.¹³² When acquitted conduct is used at sentencing, the jury’s function as overseer of the United States Attorney becomes obsolete.¹³³ Diminishing the jury’s power resurrects the Founders’ pivotal concern that “lack of adequate provision for jury trial . . . would fatally weaken the role of the people in the administration of government.”¹³⁴

See id. at 331 app. (referencing and providing in the appendix jury verdicts from several recent federal district court cases).

¹²⁴ *United States v. Ibanga*, 454 F. Supp. 2d 532, 541 (E.D. Va. 2006) (citing Amar, *supra* note 121, at 1186).

¹²⁵ Amar, *supra* note 121, at 1186 (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295 (Phillips Bradley ed., Vintage Books 1961) (1831)).

¹²⁶ Johnson, *supra* note 2, at 185.

¹²⁷ *Id.*

¹²⁸ Lear, *supra* note 111, at 1233.

¹²⁹ Amar, *supra* note 121, at 1185 (quoting TOCQUEVILLE, *supra* note 125, at 293).

¹³⁰ Lear, *supra* note 111, at 1233.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Amar, *supra* note 121, at 1187 (quoting HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 19 (1981)).

B. Consequences of Abolishing the Use of Acquitted Conduct

Amendments to prohibit the use of acquitted conduct as relevant conduct in calculating the applicable Guidelines offense level were considered by the Commission in 1993 and 1994 and were ultimately rejected.¹³⁵ While the proposed amendments did not directly prohibit acquittal-based upward departures,¹³⁶ the Commission most likely rejected them for two related reasons. First, abolishing the use of acquitted conduct might lead to abolishing unadjudicated conduct at sentencing.¹³⁷ The question whether to “prohibit sentencing judges from enhancing sentences on the basis of acquitted conduct when they can enhance sentences on the basis of the same conduct if it is not charged by the prosecutor,”¹³⁸ seemed unanswerable. Second, abolishing the use of acquitted conduct (which might lead to abolishing uncharged conduct) might eventually result in abolishing the use of relevant conduct at sentencing.¹³⁹ Such a result would seem undesirable to the Commission because relevant conduct is the “cornerstone” of the Guidelines.¹⁴⁰

Abolishing acquitted conduct but not uncharged conduct is justifiable because fundamental, normative, and logical differences exist between the two.¹⁴¹ Acquitted conduct differs from unadjudicated conduct, which refers to “conduct potentially characterized as criminal for which the offender’s legal guilt has not been formally adjudicated, either through trial or guilty plea.”¹⁴² Because acquitted conduct is different in principle than uncharged conduct, abolishing acquitted conduct legitimizes and preserves the purpose of relevant conduct.

1. The Difference Between Use of Acquitted and Uncharged Conduct

Using acquitted conduct at sentencing gives the prosecutor a second opportunity to prove to the court what the jury rejected, while using uncharged conduct presents the first bite at the apple. In *United States v. Coleman*, the court acknowledged that eliminating acquitted conduct possibly “creat[es] a temptation for prosecutors to decline to bring charges that they fear could result in acquittal and wait to bring

¹³⁵ See Sentencing Guidelines for United States Courts, 57 Fed. Reg. 62,832, 62,832 (proposed Dec. 31, 1992); 58 Fed. Reg. 67,522, 67,541 (proposed Dec. 21, 1993); see also Johnson, *supra* note 2, at 155–56, nn.9–12.

¹³⁶ Johnson, *supra* note 2, at 191.

¹³⁷ *Id.*

¹³⁸ *Id.* at 192.

¹³⁹ *Id.*

¹⁴⁰ See Wilkins & Steer, *supra* note 15, at 495–96.

¹⁴¹ Johnson, *supra* note 2, at 192–93.

¹⁴² *Id.* at 157–58.

supporting facts to the court's attention at sentencing."¹⁴³ Nonetheless, the court concluded that calling additional witnesses to the stand during sentencing to provide evidence of an acquitted charge allows "the prosecutor to try the same facts in front of two different fact-finders."¹⁴⁴

Generally, prosecutors are unlikely to forego formal charging because they are interested primarily in increasing conviction rates and gaining greater leverage to plea bargain.¹⁴⁵ One study of prosecutors' actual behavior indicates that prosecutors are more focused on conviction than on sentencing.¹⁴⁶ While prosecutors theoretically could forego charging crimes and instead use uncharged conduct to increase a sentence, they tend to "reduce sentencing exposure to induce pleas."¹⁴⁷ During plea bargaining, the prosecutor gains leverage through dismissing counts. Undercharging diminishes the prosecutor's bargaining power. Thus, the mechanics of plea bargaining counteract a possible temptation to undercharge. Finally, "to the extent prosecutors focus on Guidelines sentencing, they generally act in concert with defense attorneys to minimize sentencing exposure."¹⁴⁸

2. The Effect of Abolishing Acquitted Conduct on Relevant Conduct

Continuing to use uncharged conduct, but not acquitted conduct, at sentencing allows a sentence to reflect a defendant's real conduct without ignoring the jury's verdict. "[A]cquittal carries a message about the defendant's legal innocence that mere absence of a conviction does not."¹⁴⁹ If acquitted conduct but not uncharged conduct is abolished, then the use of relevant conduct at sentencing remains relatively unaltered.¹⁵⁰ The sentencing judge is unable to use only one *species* of relevant conduct: acquitted conduct. The broader ban of uncharged conduct, however, threatens the *genus* of relevant conduct.

Abolishing uncharged conduct (a large category of relevant conduct) promotes a pure-conviction system in which the conviction alone determines the sentence.¹⁵¹ The judge's discretion at sentencing would

¹⁴³ 370 F. Supp. 2d 661, 673 (S.D. Ohio 2005) (quoting Johnson, *supra* note 2, at 200).

¹⁴⁴ *Id.* at 672–73.

¹⁴⁵ Johnson, *supra* note 2, at 200 n.263 (citing Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 535, 546–48 (1992)).

¹⁴⁶ Johnson, *supra* note 2, at 200.

¹⁴⁷ *Id.* at 200 n.263 (citing Nagel & Schulhofer, *supra* note 141).

¹⁴⁸ *Id.* at 200.

¹⁴⁹ *Id.* at 194.

¹⁵⁰ *Id.* at 194–95.

¹⁵¹ *Id.* at 195.

decrease, while the prosecutor's power to determine the sentence would increase.¹⁵² Uncharged conduct as relevant conduct often aids the judge in assessing a defendant's culpability. Convictions alone cannot determine culpability. For example, persons convicted of conspiracy to launder money may receive different sentences depending on whether they organized the conspiracy or served merely as couriers.¹⁵³ Sentencing judges forbidden to use uncharged conduct would often impose sentences based solely on conviction.¹⁵⁴ Thus, the prosecutor's charging decision would directly determine the sentence.¹⁵⁵ In designing the Guidelines, the Commission attempted to avoid this exact result.¹⁵⁶

V. PROPOSAL

A. Congress Should Abolish the Use of Acquitted Conduct at Sentencing

The Commission should recommend abolishing the use of acquitted conduct at sentencing, and Congress should authorize this change.¹⁵⁷ The Guidelines must conform to "all pertinent provisions of title 18."¹⁵⁸ Thus, the Guidelines must be consistent with 18 U.S.C. § 3661 that "[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."¹⁵⁹ This statute served partly as the basis for the Supreme Court's decision to permit consideration of acquitted conduct at sentencing.¹⁶⁰ This statute also serves as the basis for the appellate courts' continued approval of acquitted conduct after

¹⁵² *Id.* at 194–95.

¹⁵³ *See supra* text accompanying notes 34–39.

¹⁵⁴ Johnson, *supra* note 2, at 195.

¹⁵⁵ *Id.* at 194–95.

¹⁵⁶ *Id.* at 194; *see Lear, supra* note 111, at 1204–05.

¹⁵⁷ *Compare* United States v. Watts, 519 U.S. 148, 158 (1997) (Scalia, J., concurring) ("[N]either the Commission nor the courts have authority to decree that information which would otherwise justify enhancement of sentence or upward departure from the Guidelines may not be considered for that purpose (or may be considered only after passing some higher standard of probative worth than the Constitution and laws require) if it pertains to acquitted conduct."), *with id.* at 159 (Breyer, J., concurring) ("Given the role that juries and acquittals play in our system, the Commission could decide to revisit this matter in the future. For this reason, I think it important to specify that, as far as today's decision is concerned, the power to accept or reject such a proposal remains in the Commission's hands."), *and* Johnson, *supra* note 2, at 187 ("The Commission clearly has the power to bar consideration of acquitted conduct under the modified real-offense model as well.")

¹⁵⁸ *See* 28 U.S.C. § 994(b)(1) (2000).

¹⁵⁹ 18 U.S.C. § 3661 (2000). Justice Scalia's concurrence in *Watts* outlines why Congress and not the Commission has the authority to abolish acquitted conduct. *Watts*, 519 U.S. at 158 (Scalia, J., concurring). *But see id.* at 159 (Breyer, J., concurring); Johnson, *supra* note 2, at 186–88.

¹⁶⁰ *See Watts*, 519 U.S. at 151–52.

Booker.¹⁶¹ The Commission may risk violating this statute if it abolishes acquitted conduct at sentencing without Congressional approval.¹⁶² Thus, the Commission should recommend amending this statute to Congress.¹⁶³ After all, the *Booker* Court placed “[t]he ball . . . in Congress’ court . . . to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.”¹⁶⁴

B. Model Legislation

Congress should amend 18 U.S.C. § 3661 to eliminate the use of acquitted conduct as relevant conduct and its use as a basis for departing upward from the Guidelines range.¹⁶⁵ The following suggested statutory language achieves these two objectives:

§ 3661—Use of Information for Sentencing.

No limitation shall be placed on the information concerning the background, the character, and the conduct of a person convicted of an offense which a court of the United States may receive and consider for purpose of imposing an appropriate sentence, except:

(a) conduct for which a defendant is formally charged and adjudicated not guilty by the finder of fact shall not be considered relevant conduct under the United States Sentencing Guidelines Manual § 1B1.3 (2006);

(b) conduct for which a defendant is formally charged and adjudicated not guilty by the finder of fact shall not constitute grounds for departure under the United States Sentencing Guidelines Manual § 5K2.0 (2006);

¹⁶¹ See *supra* text accompanying note 70.

¹⁶² Violating 18 U.S.C. § 3661 is irrelevant, though, if 18 U.S.C. § 3661, as construed, violates the Sixth Amendment. “It makes no difference whether it is a legislature, a Sentencing Commission, or an appellate court that usurps the jury’s prerogative.” *United States v. Rita*, 127 S. Ct. 2456, 2479 (2007) (Scalia, J., concurring).

¹⁶³ 28 U.S.C. § 994(w)(3) requires the Commission to “submit to Congress at least annually . . . any recommendations for legislation that the Commission concludes is warranted . . .” 28 U.S.C. § 994(w)(3) (2000). While scholars note that Congress might not pursue such legislation because of the “need to appear tough on crime [and] the press of other legislative matters,” Congress may present the legislation as essential to restoring jurors’ authority in trials. Johnson, *supra* note 2, at 187 (citing Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993)).

¹⁶⁴ 543 U.S. 220, 265 (2005).

¹⁶⁵ See Johnson, *supra* note 2, at 189–91 (proposing two amendments to the Guidelines to eliminate consideration of acquitted conduct in the sentencing process).

(c) the court shall determine the scope of conduct for which a defendant is formally charged and adjudicated not guilty by the finder of fact under Section 3661 (a) & (b); and

(d) when a dispute arises as to which conduct should be excluded for purposes of sentencing, the defendant bears the burden of persuasion for any conduct to be excluded under Section 3661 (a) & (b).¹⁶⁶

C. How Federal District Courts Should Treat Acquitted Conduct Until Congress Acts

Sentencing courts may decide case by case that using acquitted conduct contravenes 18 U.S.C. § 3553(a) considerations “to promote respect for the law, and to provide just punishment for the offense.”¹⁶⁷ Through this approach, the court in *United States v. Ibanga* avoided using acquitted conduct when it would have increased the maximum possible sentence from five to fifteen years.¹⁶⁸ These factors may be used to avoid acquitted conduct just as they may be used to avoid any other type of conduct that results in unjust punishment. Courts cannot use these factors to automatically ban the use of acquitted conduct in every case. Such a holding would violate 18 U.S.C. § 3661, which bars any limitations on information used at sentencing. No magic number indicates when acquitted conduct becomes the “tail that wags the dog,”¹⁶⁹ but district courts, like the *Ibanga* court, should know it when they see it.¹⁷⁰

This approach is more consistent with *United States v. Booker*, *United States v. Watts*, and 18 U.S.C. § 3661 than other approaches adopted by district courts since *Booker*. Choosing not to consider acquitted conduct because *Watts* permits, but does not mandate, its consideration at sentencing¹⁷¹ undermines unanimous circuit-court

¹⁶⁶ This proposal addresses similar objectives as Professor Barry L. Johnson’s proposal, but it uses the vehicle of a statutory amendment through Congress instead of an amendment to the Guidelines through the Commission. *See id.*

¹⁶⁷ 18 U.S.C. § 3553(a)(1)(A) (2000). *See United States v. Ibanga*, 454 F. Supp. 2d 532, 538–43 (2006).

¹⁶⁸ *Id.*

¹⁶⁹ *See supra* text accompanying notes 91–94.

¹⁷⁰ Using different rationales, courts after *Booker* have declined to use acquitted conduct when it disproportionately affects sentence length. *United States v. Pimental*, 367 F. Supp. 2d 143, 156–57 (D. Mass. 2005) (declining the use of acquitted conduct when it resulted in a sentence anywhere from twenty-seven to thirty-three months and instead imposing a sentence of probation); *United States v. Coleman*, 370 F. Supp. 2d 661, 665, 670, 681 (S.D. Ohio 2005) (declining the use of acquitted conduct when it resulted in a sentence anywhere from thirty to thirty-seven months and instead imposing a sentence of one year).

¹⁷¹ *United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 935 (N.D. Iowa 2006).

opinions allowing the use of acquitted conduct when required by the Guidelines Manual.¹⁷² Applying a reasonable doubt standard at sentencing¹⁷³ may seem to provide a viable solution, but its application may directly undermine a jury's verdict. Suppose a jury acquits a defendant due to reasonable doubt, but the court finds the defendant guilty of the acquitted conduct beyond a reasonable doubt. That court's finding effectively reverses the jury's acquittal. At least under current sentencing practices, the court deviates from the jury verdict through factual findings made by a lower evidentiary standard.¹⁷⁴

All these discussed approaches present the danger (although to different degrees) of decreasing uniformity in sentences among similarly situated defendants. While all courts must take into account 18 U.S.C. § 3553(a),¹⁷⁵ courts will inevitably differ about when the use of acquitted conduct does not promote respect for the law nor provide just punishment for the offense. If *Watts* permits but does not mandate using acquitted conduct, then each court must decide for itself when to permit its use. Requiring the reasonable doubt standard allows the court to directly defy the jury verdict when it disagrees with it. Thus, none of these approaches presents a lasting solution to a continuing problem.

CONCLUSION

Conduct underlying a jury acquittal should not serve as the basis for increasing a sentence. Currently, district courts must justify any refusal to use acquitted conduct at sentencing. District courts may do so on the basis that acquitted conduct contravenes 18 U.S.C. § 3553(a).¹⁷⁶ However, Congress has the authority to, and should, provide a lasting solution by amending 18 U.S.C. § 3661 to prevent the use of acquitted conduct at sentencing.

Farnaz Farkish

¹⁷² See *supra* text accompanying note 62.

¹⁷³ *United States v. Baldwin*, 389 F. Supp. 2d 1, 2 (D.D.C. 2005); *Pimental*, 367 F. Supp. 2d at 154; *Coleman*, 370 F. Supp. 2d at 670.

¹⁷⁴ *United States v. Watts*, 519 U.S. 148, 156 (1997).

¹⁷⁵ *Booker*, 543 U.S. at 259.

¹⁷⁶ See 18 U.S.C. § 3553(a)(1)(A) (2000). See, e.g., *United States v. Ibanga*, 454 F. Supp. 2d 532, 538–43 (2006).