Uncharged Conduct and Disproportionate Impact: Amending the Guidelines to Protect Due Process Interests at Sentencing

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I. INTRODUCTION

Since the creation of the Federal Sentencing Guidelines, the Guidelines have required district courts to calculate a sentence's guideline range based not only on the conduct comprising the crime of

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conviction but also on what the Guidelines call "relevant conduct." Relevant conduct includes acquitted conduct, uncharged conduct, and other conduct that a sentencing court finds actually occurred in connection with the crime of conviction.

It is a longstanding view that judges should employ all relevant information, including the use of uncharged conduct, to decide where to sentence a defendant within the broad range of sentences typically fixed by statute.[1] This relevant information ordinarily only needs to be proven by a preponderance of the evidence.[2] Even before the Guidelines, judges often considered uncharged conduct as part of their highly discretionary decision in sentencing.[3] The Guidelines changed sentencing by *requiring* the sentencing judge to make findings regarding relevant uncharged conduct.[4]

At its inception, the Guidelines were mandatory. When Congress creates a criminal law, it includes the punishment for that crime. Congress sets the punishment ceiling and floor: the statutory maximum and, sometimes, the mandatory minimum. The Guidelines operate to fill the space between this floor and ceiling. When the Guidelines were mandatory, sentencing courts were required to sentence within the applicable guideline range unless there was a finding of an aggravating or mitigating circumstance that was not taken into consideration by the United States Sentencing Commission when formulating the Guidelines.[5]

However, in *United States v. Booker*, the Supreme Court rendered the guidelines "effectively advisory."[6] The Guidelines becoming advisory was intended to allow sentencing courts to consider the Guidelines and tailor sentences in light of other statutory concerns or to avoid the need for a jury trial on those facts.[7] Despite the Guidelines

1 United States v. Tucker, 404 U.S. 443, 446 (1972); *see also* 18 U.S.C. § 3661 (codifying the principle that sentencing courts have broad discretion in considering various kinds of information).

2 *See* McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (noting that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all").

3 *Id.*

4 18 U.S.C. § 3553(b); U.S. SENT'G GUIDELINES MANUAL §§1B1.1, 1B1.2, 5C1.1 (U.S. SENT'G COMM'N 2023) [hereinafter USSG].

5 18 U.S.C. § 3553(b), *excised by* United States v. Booker, 543 U.S. 220, 259 (2005); *see also* Mistretta v. United States, 488 U.S. 361, 367 (1989) (pointing out that Congress explicitly chose a "mandatory-guideline system" rather than an advisory system such that "the Sentencing Commission's guidelines [are] binding on the courts").

6 *Booker*, 543 U.S. at 245.

7 *Id.*

now being advisory, under the relevant conduct provision, judges have increased sentences by considering acquitted and uncharged conduct. Judges must calculate the guideline range based on the crime of conviction, different crimes, and crimes the defendant was acquitted of, never charged with, or dismissed.[8]

Both acquitted conduct and uncharged conduct sentencing are pernicious. The Supreme Court explicitly authorized using uncharged offenses in sentencing in *McMillan v. Pennsylvania*.[9] However, in doing so, the Court expressed concern about the "sentencing tail" wagging the substantive offense "dog."[10] Even so, most courts are not troubled by the use of uncharged conduct when it has a minimal effect on the sentence or is the same crime as the offense of conviction.

This Comment argues that, as warned in *McMillan*, there are outer limits to fact-finding at sentencing where due process demands proof burdens greater than a preponderance of the evidence. The preponderance of the evidence test provides the lowest standard of proof for fact-finding. As such, it should only be the threshold basis for adjustments and departures. Sentencing provides a spectrum of severity. At the farthest end of the spectrum, facts that increase the sentence beyond the otherwise applicable statutory maximum or increase the mandatory minimum sentence for an offense must be found beyond a reasonable doubt.[11] In the remaining continuum, a heightened proof standard of clear and convincing evidence should be required where a sentencing enhancement based on uncharged conduct disproportionately impacts the defendant's sentence.

Part II provides background on the current federal sentencing regime and its cornerstone, the relevant conduct provision. Part III details the journey of heightened proof burdens and sentencing jurisprudence to paint the current sentencing landscape. Finally, Part IV analyzes case law that suggests due process interests at sentencing demand a higher proof standard than a preponderance of the evidence, even under the current advisory Guidelines.

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8 USSG §§1B1.3(a)(1)–(2), cmt. n.3, cmt. background.

9 McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986).

10 *Id.* (expressing this concern in regard to the threat of a state legislature tailoring its substantive crime to transmute a traditional element of a crime into a sentencing factor).

11 Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("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."); Alleyne v. United States, 570 U.S. 99, 103 (2013) ("[A]ny fact that increases the mandatory minimum is an 'element' that must be submitted to the jury.").

II. THE FEDERAL SENTENCING LANDSCAPE AND RELEVANT CONDUCT

This section explains how the Sentencing Guidelines came to be, and in particular, the importance of the relevant conduct provision. To understand how uncharged conduct sentencing became a problem under our current sentencing regime, one must have an idea of our sentencing systems over time. Part A will provide an overview of federal sentencing before the Guidelines, the initial mandatory Guidelines, and the current advisory Guidelines. Part B will provide an overview of the relevant conduct provision and its effects in determining a guidelines sentence.

A. The Sentencing Guidelines: How Did We Get Here?

Before the Guidelines, federal judges had virtually unlimited discretion and imposed "indeterminate" sentences within broad statutory ranges.[12] As each judge was left to their own notions of the purposes of sentencing, there was an unjustifiably wide range of sentences for seemingly similar crimes.[13] In response to concerns over sentencing disparities and a desire to promote transparency and proportionality in sentencing, Congress created the United States Sentencing Commission.[14] Further, the Sentencing Reform Act of 1984 ("SRA") required sentencing courts to sentence defendants within the applicable guidelines range unless there was a permissible basis for a departure from the range or "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence" outside the applicable range.[15] This section starts with detailing sentencing before the Guidelines, follows with the operation and effect of the mandatory Guidelines, and closes with the current advisory Guidelines.

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12 *See* United States v. Mistretta, 488 U.S. 361, 366 (1989) (describing the federal sentencing system before the SRA).

13 *See* S. REP. NO. 98-225, *infra* note 42, at 38.

14 *See* Dorsey v. United States, 567 U.S. 260, 265 (2012) ("[T]he Sentencing Reform Act of 1984 . . . sought to increase transparency, uniformity, and proportionality in sentencing."); *see also Mistretta*, 488 U.S. at 379 ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.").

15 18 U.S.C. § 3553(b)(1); *see also Mistretta*, 488 U.S. at 367 (noting that the SRA "ma[de] the Sentencing Commission's guidelines binding on the courts").

1. Sentencing Before the Guidelines

Until the 19th century, criminal laws generally provided for fixed statutory sentences.[16] For the most part, a single punishment was doled out by a jury who did not need to know punishment standards or rules.[17] Over time, labor was divided between judges and juries.[18] Juries decided facts and liability, and judges determined the applicable law and sentenced.[19] Legislatures cast aside fixed-term sentences in favor of statutory schemes that gave judges discretion to sentence within a permissible range.[20]

Before the Commission and the Guidelines, the United States had an indeterminate sentencing regime.[21] The dominant approach to sentencing was a highly discretionary, rehabilitative "medical" model.[22] The trial stage was the stage of constitutional rights, formal evidentiary rules, and high standards of proof.[23] Rules of evidence did not apply at sentencing, and the proof burden was the lowest: a measly preponderance of the evidence.[24] Broad judicial discretion was warranted so that sentences could be tailored to the rehabilitative prospects of each individual offender.[25] Offenders were considered "sick," and punishments should aspire to "cure" the offender.[26] Even after the judge sentenced a defendant to imprisonment, parole was available depending on the defendant's conduct.[27] Just as a medical doctor would use all the information at their disposal to determine a diagnosis, a judge was not limited in their "clinical" role at sentencing.[28]

16 Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L. REV. 715, 715 (1942) [https://doi.org/10.2307/1597340].

17 Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right?*, 100 J. CRIM. L. & CRIMINOLOGY 691, 694 (2010) [hereinafter Gertner, *A Short History*].

18 *Id.*

19 *Id.*

20 Apprendi v. New Jersey, 530 U.S. 466, 481 (2000).

21 Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Maine L. Rev. 569, 571 (2005) [hereinafter Gertner, *Sentencing Reform*]; Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 654 (2005).

22 Berman, *supra* note 21; Gertner, *A Short History*, *supra* note 17, at 695.

23 Gertner, *A Short History*, *supra* note 17, at 695.

24 Gertner, *A Short History*, *supra* note 17, at 695.

25 Berman, *supra* note 21, at 654.

26 Berman, *supra* note 21, at 654; Nancy Gertner, *What Has Harris Wrought*, 15 FED. SENT'G REP. 83, 84 (2002) (describing vision of "judge as the sentencing expert" in a rehabilitative sentencing system) [https://doi.org/10.1525/fsr.2002.15.2.83].

27 Gertner, *A Short History*, *supra* note 17, at 696.

28 Gertner, *A Short History*, *supra* note 17, at 695.

A sentencing judge's authority largely went unquestioned until the creation of the Guidelines.[29] The combination of Congress prescribing a broad range of punishments for each offense and judges having substantial discretion to sentence within the statutory range led to disparity.[30] Congress's and the public's role in sentencing was necessarily limited by the view that judges are sentencing experts and by rehabilitative penal philosophy.[31] In the decades leading up to the Guidelines, Congress's efforts to rationalize punishments failed.[32]

There was a lack of standards for sentencing. This period of indeterminate sentencing was described as "the unruliness, the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory."[33] Judges did not write sentencing opinions, and common law of sentencing could not develop without appellate review of sentences.[34] Information considered at sentencing was not "exposed to adversary scrutiny, to rechecking at sources, to cross-examination"[35] and courts at sentencing often made "grave decisions of law upon untested hearsay and rumor."[36] The chaos-caused disparities made federal sentencing seem lawless.[37]

2. The Initial "Mandatory" Guidelines

Concerned by the lack of uniformity in judicial sentencing, Congress passed the SRA, creating the Commission and abolishing parole.[38] An "expert" Commission was created to rationalize sentencing rules that would reflect a more advanced understanding of human

29 Gertner, *A Short History*, *supra* note 17, at 695–96; *see also* Ian Weinstein, *The Revenge of Mullaney v. Wilbur: United States v. Booker and the Reassertion of Judicial Limits on Legislative Powers to Define Crimes*, 84 OR. L. REV. 393, 398 (2005) (detailing how judges employed unique approaches in rehabilitating particular defendants in the indeterminate sentencing era).

30 Gertner, *Sentencing Reform*, *supra* note 21, at 572; Gertner, *A Short History supra* note 17, at 697.

31 Gertner, *A Short History*, *supra* note 17, at 696.

32 Gertner, *Sentencing Reform supra* note 21, at 573 n.10.

33 Gertner, *A Short History*, *supra* note 17, at 697 (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1972)).

34 Gertner, *A Short History supra* note 17, at 697.

35 MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 29 (1972) [https://doi.org/10.2307/1227773].

36 *Id.* at 32.

37 Gertner, *A Short History*, *supra* note 17, at 697.

38 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 2017–26 (1984) (creating the U.S. Sentencing Commission to develop guidelines for federal sentencing).

behavior in relation to the criminal justice process.[39] Simultaneously, the penal philosophy shifted: rehabilitation was exchanged for "limited retribution."[40] The change in philosophy took sentencing expertise away from judges and parole authorities and gave it to the Commission.[41]

The Commission was tasked with promulgating guidelines that would give judges a structure for "evaluating the fairness and appropriateness of the sentence for an individual offender" while allowing for "thoughtful imposition of individualized sentences."[42] Unfortunately, this task was not given to sentencing experts as the first Commission lacked any commissioner with day-to-day experience of sentencing offenders.[43] The first Commission rejected factors judges had traditionally taken into account, minimized judicial discretion by keying to "objective" facts of the offense and offender, and relied on Congress's newly implemented mandatory minimums as the base levels for the Guidelines.[44]

The result was severe. The Guidelines resulted in the average prison time for federal defendants doubling.[45] Prosecutors wielded the threat of substantial sentences to procure guilty pleas.[46] And despite being stripped of their pre-Guidelines discretion, federal judges enforced the Guidelines rigorously.[47] The federal judiciary decided to

39 Gertner, *A Short History*, *supra* note 17, at 698 n.39 (noting that the "limited retribution" approach "emphasi[zed] punishment proportionate to the seriousness of the crime and, within the broad parameters of [] retributivism, lengthier incarceration for offenders who are most likely to recidivate").

40 Gertner, *Sentencing Reform*, *supra* note 21, at 574.

41 Gertner, *A Short History*, *supra* note 17, at 698.

42 S. REP. NO. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

43 Gertner, *A Short History*, *supra* note 17, at 700 n.50–51.

44 Gertner, *A Short History*, *supra* note 17, at 700–01; Breyer, *infra* note 68, at 19–20 ("Eventually, in light of the arguments based in part on the uncertainty as to how a sentencing judge would actually account for the aggravating and/or mitigating factors, the Commission decided to write its offender characteristics rules with an eye towards the parole Commission's previous work in the area.").

45 U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 46 (2004).

46 Gertner, *A Short History*, *supra* note 17, at 701–02; *see also* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 763–64 (2005) (describing how the Commission has been "stacked" in favor of prosecution interests).

47 Gertner, *A Short History*, *supra* note 17, at 702–03 (attributing the rigorous application of the Guidelines to judges having a lack of training on sentencing, a lack of criminal justice backgrounds, and the assumption that the Guidelines were promulgated by an expert Commission).

mechanically follow the Guidelines they opposed instead of creating a robust law of departures or critically evaluating them in opinions.[48]

Even after the Commission came under constitutional attack, the Supreme Court held that the Guidelines were mandatory and had the force and effect of laws.[49] In *Mistretta v. United States*, the petitioner argued that Congress's creation of the Sentencing Commission violated separation of powers and delegated excessive authority to the Commission to promulgate the Guidelines thereby.[50] The Court reasoned that Congress did not violate nondelegation doctrine as the SRA outlined policies that called for establishing the Commission, explained what the Commission should do and how to do it, and set out "specific directives to govern particular situations."[51]

Separately, the Court determined the Commission's creation and promulgation of Guidelines did not violate separation of powers principles for three reasons: (1) "substantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch, and the methodology of rulemaking has been and remains appropriate to that Branch[;]"[52] (2) "the mixed nature of the Commission [does not] violate[] the Constitution by requiring Article III judges to share judicial power with nonjudges [because] the Commission is not a court and exercises no judicial power[;]"[53] and (3) there is "no risk that the President's limited removal power will compromise the impartiality of Article III judges serving on the Commission and . . . no risk that the [Sentencing Reform] Act's removal provision will prevent the Judicial Branch from performing its constitutionally assigned function[.]"[54]

3. *Booker*'s "Advisory" Guidelines

After twenty years of mandatory Guidelines, in *United States v. Booker*, the Supreme Court ended the mandatory Guidelines by holding

48 Gertner, *A Short History*, *supra* note 17, at 703.

49 *See, e.g.*, United States v. Mistretta, 488 U.S. 361, 391 (1989) ("[T]he Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases."); Stinson v. United States, 508 U.S. 36, 42 (1993) (affirming the pre-*Booker* Guidelines as mandatory).

50 *Mistretta*, 488 U.S. at 653–54.

51 *Id.* at 379 (quoting United States v. Chambless, 680 F. Supp. 793, 796 (E.D. La. 1988)).

52 *Id.* at 396–97.

53 *Id.* at 408.

54 *Id.* at 411.

them unconstitutional.[55] The Court issued two opinions: a "merits" opinion by Justice Stevens holding that the Guidelines are subject to the Sixth Amendment's jury trial requirements,[56] and a separate, "remedial" opinion by Justice Breyer holding that the provisions mandating district judges to sentence within the applicable Guidelines range are incompatible with the Sixth Amendment and must be severed.[57] Notably, the Justices forming the "merits" and "remedial" opinions were not the same.

The five Justices of the "merits" opinion were Justices Stevens, Scalia, Souter, Thomas, and Ginsburg. In the "merits" opinion, it was determined that the Guidelines violated Sixth Amendment rights because they required judges to find facts that could increase a defendant's sentence beyond the sentencing range required by a guilty plea or a jury's verdict.[58] The five Justices of the "remedial" opinion were Justices Rehnquist, O'Connor, Kennedy, Ginsburg, and Breyer. In the "remedial" opinion, it was determined that two provisions of the SRA were incompatible with the Sixth Amendment and must be invalidated.[59] Recognizing that the "merits" opinion's constitutional requirements would "destroy the [intended sentencing] system"[60] the "remedial" opinion invalidated §§ 3553(b)(1) and 3742(e) to retain the "portions of the [SRA] that are (1) constitutionally valid, capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the [SRA.]"[61] Thus, *Booker* held that the Sixth Amendment applied to the Guidelines and concluded they were advisory.[62] This means that the "advisory" Guidelines would allow judges to "consider" Guideline ranges but were permitted to tailor sentences in light of other statutory concerns.[63]

Post-*Booker*, courts follow a three-step process in which they calculate and consider the Guidelines, the five statutory factors in 18 U.S.C. § 3553(a), to decide what sentence to impose within the broad

55 United States v. Booker, 543 U.S. 220, 245 (2005) (finding 18 U.S.C. § 3553(b)(1), the provision that makes the Guidelines mandatory, is incompatible with the Sixth Amendment and must be severed and excised).

56 *Id.* at 226–27.

57 *Id.* at 259.

58 *Id.* at 236–37.

59 *Id.* at 259.

60 *Id.* at 259.

61 United States v. Booker, 543 U.S. 220, 258–59 (internal citations omitted).

62 *Id.* at 245 (finding 18 U.S.C. § 3553(b)(1), the provision that makes the Guidelines mandatory, is incompatible with the "merits" opinion's Sixth Amendment requirements and must be severed and excised).

63 *See id.* at 266 (leaving 18 U.S.C. § 3553(a) intact).

statutory range of punishment.[64] *Booker's* practical effect was the addition of the third step: whether, after considering all of the factors in 18 U.S.C. § 3553(a), a sentence outside of the applicable guideline range should be imposed as a "variance."[65] The *Booker* three-step process requires "respectful consideration"[66] of the Guidelines Manual at each step. The three steps are: (1) the initial calculation of the sentencing range; (2) consideration of policy statements or commentary in the Guidelines Manual about departures; and (3) considering the § 3553(a) factors in deciding what sentence to impose, whether within the applicable range, or whether as a departure, a variance, or as both.[67] In calculating a defendant's sentencing guideline range, the defendant's "relevant conduct" is considered.

B. The Cornerstone of the Guidelines: Relevant Conduct

In promulgating the Guidelines, the Commission tried to find a happy compromise between a "charge offense" and a "real offense" system.[68] "Real offense" sentencing is an approach to sentencing that accounts for all of a defendant's conduct in relation to the offense of conviction, not just the specific conduct of which the defendant has been convicted.[69] A different sentencing approach is the "charge offense" approach. The "charge offense" approach considers only the specific conduct of which the defendant has been convicted.[70]

To illustrate the differences between these approaches, a bank robber provides an example. Under a pure "charge offense" system, one would look to the relevant criminal statute and read off the punishment provided in the sentencing guidelines to sentence a bank robber.[71] Here,

64 *Id.* at 264–65.

65 USSG §1B1.1, cmt. (background).

66 Kimbrough v. United States, 552 U.S. 85, 101 (2007).

67 *See* Gall v. United States, 552 U.S. 38, 50 n.6 (2007) ("The fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.").

68 Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 12 (1988) ("A sentencing guideline system must have some real elements, but not so many that it becomes unwieldy or procedurally unfair. The Commission's system makes such a compromise [by looking] to the offense charged to secure the 'base offense level[,]' [and] then modifies that level in light of several 'real' aggravating or mitigating factors, . . . several 'real' general adjustments . . . and several 'real' characteristics of the offenders, related to past record.").

69 U.S. SENT'G COMM'N, *Guidelines Manual*, ch. 1, pt.A.4 [https://doi.org/10.1525/fsr.2023.35.3.186].

70 *Id.*

71 Breyer, *supra* note 68, at 9.

the guidelines punishment should reflect the severity of the statutory crime.[72] While judges may be able to deviate from the guideline punishment, the "charge offense" system may overlook the actual conduct in how the robbery was committed.[73] Because criminal statutes tend not to consider the nuances of how a crime is committed, sentencing courts are asked to consider what *really* happened.[74] Under a "real offense" system, the punishment is based on the case's specific circumstances.[75] Here, the vulnerability of the victim, whether the robber acted under duress, the amount of money taken, and whether a teller was injured or not are taken into account.[76]

The Guidelines do not take a pure "real offense" approach; it takes a modified "real offense" approach that generally accounts for some but not all of the defendant's real offense conduct.[77] Concerned that a "charge offense" system would give prosecutors too much influence over sentencing by adjusting the number and content of counts in an indictment, the Commission initially sought a pure "real offense" system.[78]

Including the concept of relevant conduct was intended as a balance between "charge offense" and "real offense" sentencing.[79] Relevant conduct is an integral part of the federal sentencing system.[80] The relevant conduct provision, USSG §1B1.3, specifies the conduct for which a defendant may be held accountable in determining the offense-severity level.[81] The relevant conduct analysis begins with the offense of conviction and then considers real offense characteristics.[82] The

72 Breyer, *supra* note 68, at 9.

73 Breyer, *supra* note 68, at 9–10 (providing examples of how different robbers may perform the crime).

74 Breyer, *supra* note 68, at 10 (emphasis in original).

75 Breyer, *supra* note 68, at 10.

76 Breyer, *supra* note 68, at 9–10.

77 USSG ch. 1, pt.A.4.

78 U.S. SENT'G COMM'N, RELEVANT CONDUCT AND REAL OFFENSE SENTENCING (Nov. 1996) https://www.ussc.gov/research/research-and-publications/simplification-draft-paper-3.

79 USSG §1B1.3, cmt. (background); *see also* Witte v. United States, 515 U.S. 389, 403 (1995) (relevant conduct is a "sentencing enhancement regime[] evincing the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity").

80 U.S. SENT'G COMM'N, RELEVANT CONDUCT PRIMER (Sept. 2022) [hereinafter Primer] https://www.ussc.gov/sites/default/files/pdf/training/primers/2022_Primer_Relevant_Conduct.pdf.

81 *Id.*

82 *See* USSG §1B1.2(a)–(b) (instructing courts to determine the offense guideline in Chapter Two based on the offense of conviction or stipulated offense and then to

sentencing court may find facts constituting relevant conduct by a preponderance of the evidence standard; neither a jury trial nor a beyond-a-reasonable-doubt standard is required.[83]

The Guidelines define relevant conduct to include "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant,"[84] and "in the case of a jointly undertaken criminal activity," all acts and omissions of others that were within the scope of, in furtherance of, and reasonably foreseeable in connection with that jointly undertaken criminal activity.[85] Relevant conduct may include conduct the defendant has been acquitted of, conduct the defendant was not charged with, and even conduct of other participants in a jointly undertaken criminal activity.[86]

Section 1 highlights the practice of acquitted conduct sentencing, which is highly criticized. Section 2 explains how the problem of uncharged conduct sentencing will continue even if acquitted conduct sentencing is deemed unconstitutional.

1. The Controversy of Acquitted Conduct Sentencing

Even though the Supreme Court has approved acquitted conduct sentencing, the practice is met with disdain by many. Under the mandatory Guidelines, the Supreme Court approved acquitted conduct sentencing.[87] When *Booker* rendered the Guidelines advisory, the Court implicitly upheld acquitted conduct sentencing.[88] Supreme Court Justices, federal appellate judges, practitioners, and scholars have questioned the fairness and constitutionality of allowing courts to include acquitted conduct in sentencing calculations.[89] Outside the

determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct)).

83 *Id.*

84 USSG §1B1.3(a)(1)(A).

85 *Id.* §1B1.3(a)(1)(B) (cleaned up).

86 *See* Primer, *supra* note 80, at 15; *see also* U.S. SENT'G COMM'N RELEVANT CONDUCT PRIMER, at 14 (Mar. 2018) https://www.ussc.gov/sites/default/files/pdf/training/primers/2018_Primer_Relevant_Conduct.pdf.

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

88 *Booker*, 543 U.S. at 240 (2005).

89 *See, e.g.*, Jones v. United States, 574 U.S. 948, 950 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of cert.) (noting that it violates the Sixth Amendment when the conduct used to increase a defendant's penalty is found by a judge rather than by a jury beyond a reasonable doubt, and highlighting that this is particularly so when the facts leading to a substantively unreasonable sentence are ones for which a jury has acquitted the defendant); Watts, 519 U.S. at 170 (Kennedy, J., dissenting)

federal sentencing regime, states have held that sentencing a defendant based on acquitted conduct violates a defendant's due process rights.[90]

The Sixth Amendment guarantees criminal defendants the right to a jury trial, and due process requires that the prosecution "prove each element of a charged crime beyond a reasonable doubt."[91] The reasonable doubt burden is underscored by the "special weight" granted to a jury's acquittal.[92] Defendants are not only protected from being tried again for an offense for which they have been acquitted,[93] but an acquitted defendant retains the presumption of innocence.[94] Even if a jury's verdict of acquittal is "based upon an egregiously erroneous foundation,"[95] it presents the community's collective judgment, and "its finality is unassailable."[96] Still, in *United States v. Watts*, the Supreme Court held that courts are not barred from acquitted conduct sentencing.[97]

The most recent case that presented an opportunity for the Supreme Court to address acquitted conduct sentencing was *McClinton v. United States*.[98] After waiting for just over a year for a grant or denial of certiorari, the Court decided to deny certiorari.[99] Its denial of certiorari was not silent. In fact, the Court seems to have issued a warning to the Commission:

(allowing district judges "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"); United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of the r'hrg en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences that they other-wise would impose seems a dubious infringement of the rights to due process and to a jury trial."); Enag Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 258–60 & nn. 142–52 (2009) (noting that federal courts have broadly held that United States v. Watts survived United States v. Booker and allows reliance on acquitted conduct sentencing).

90 *See* Berman, *infra* note 170.

91 *In re* Winship, 397 U.S. 358, 364 (1970).

92 United States v. DiFrancesco, 449 U.S. 117, 129 (1980).

93 *See* U.S. CONST. amend. V.

94 *DiFrancesco*, *supra* note 91, at 129.

95 Fong Foo v. United States, 369 U.S. 141, 143 (1962).

96 Yeager v. United States, 557 U.S. 110, 122 (2009).

97 United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam) ("[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 evidence.").

98 McClinton v. United States, 23 F.4th 732 (2022), *cert. denied*, 143 S. Ct. 2400 (2023).

99 *McClinton*, 143 S. Ct. 2400 (Sotomayor, J., statement respecting denial of cert.).

> The Court's denial of certiorari today should not be misinterpreted. The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year. If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented [by acquitted conduct sentencing].[100]

During the year in which the Court considered granting or denying certiorari, the Commission attempted to address acquitted conduct sentencing. On January 12, 2023, the Commission published its 2023 Preliminary Proposed Amendments to the Sentencing Guidelines.[101] One proposal explicitly addressed acquitted conduct sentencing. The Preliminary Proposed Amendment provided that acquitted conduct "*generally* shall not be considered relevant conduct for purposes of determining the guideline range."[102] However, the proposal was subject to public comment, hearings, debate, and revision, in a year-long process[103] that ultimately resulted in the proposed amendment not being adopted.[104]

While the proposed amendment seems like a step in the right direction, a similar amendment would still allow judges to increase a defendant's punishment by considering acquitted conduct when "determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted . . . ."[105] Proposed amendments like this would not address the unconstitutionality of acquitted conduct sentencing. In other words, it would not stop a judge from "gut[ting] the role of the jury in preserving individual liberty and preventing oppression by the government."[106] Further, proposals like this would have only prospective effect, providing no relief to the criminal defendants who will be or have been sentenced before the Commission acts.

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100 *Id.* at 2403.

101 *See* U.S. SENT'G COMM'N, *Proposed Amendments to the Sentencing Guidelines (Preliminary), Proposed Amendment: Acquitted Conduct 13–14* (Jan. 12, 2023), https://bit.ly/3QOA35o.

102 *Id.* (emphasis added).

103 *See* U.S. SENT'G COMM'N, *Amendment Process*, http://bit.ly/3weG2Y4 (last visited Mar. 24, 2024).

104 *See generally* U.S. SENT'G COMM'N, *Amendments to the Sentencing Guidelines* (Apr. 27, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.

105 USSG §1B1.4.

106 United States v. Brown, 892 F.3d 385, 408 (D.C. Cir. 2018) (Millet, J., concurring).

The Commission, however, has not left the problem of acquitted conduct sentencing for another day but instead has taken another stab at addressing acquitted conduct. In a second set of proposed amendments, the Commission proposed three options that would address acquitted conduct.[107] The first option would amend §1B1.3, the relevant conduct provision, to include a definition of acquitted conduct and state that acquitted conduct is not considered in determining a defendant's guideline range unless an exception applies,[108] and amend §6A1.3, the relevant policy statement, to state that acquitted conduct is *not* relevant conduct for determining a defendant's guideline range.[109] The second option would only amend the commentary to §1B1.3 to note that a downward departure may be warranted if acquitted conduct "has a disproportionate impact in determining the guideline range relative to the offense of conviction."[110] It would also define "acquitted conduct," but not to the extent that option one did. The final and third option amends §6A1.3 to allow consideration of acquitted conduct only if it is established by clear and convincing evidence, and then adding commentary to §1B1.3 to be consistent with §6A1.3.[111]

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107 U.S. SENT'G COMM'N, *Proposed Amendments to the Sentencing Guidelines*, *Proposed Amendment: Acquitted Conduct 39–45* (Dec. 26, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf.

108 *Id.* at 40. The first option addressing acquitted conduct would include a new subsection (c) to §1B1.3 which in full is:

> (c) ACQUITTED CONDUCT.—
>
> (1) EXCLUSION.—Acquitted conduct is not relevant conduct for purposes of
> determining the guideline range.
>
> (2) DEFINITION OF ACQUITTED CONDUCT.—"Acquitted conduct" means conduct (i.e., any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.
>
> ["Acquitted conduct" does not include conduct that—
> (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 [, regardless of whether such conduct also underlies a charge of which the defendant has been acquitted].]

109 *Id.* at 43.

110 *Id.* at 40.

111 *Id.* at 40, 45–46. The new subsection (c) added to §6A1.3 would be:

While all of these potential options address acquitted conduct, the problem of uncharged conduct sentencing would be left intact and unaddressed. Any proposed amendment that recognizes the disproportionate impact acquitted conduct can have in determining a guidelines range leaves open the opportunity for uncharged conduct to have a disproportionate impact.

2. The Looming Problem of Uncharged Conduct Sentencing

Sentencing based on uncharged offenses implicates the presumption of innocence. Our criminal justice system gives prosecutors only one shot at convicting a defendant of charged conduct. However, sentencing courts have used actual offenses, of which a defendant was never convicted and is presumed innocent, as uncharged conduct. This use of relevant conduct leads to a disturbing trend in criminal prosecutions. Pre- and post-*Booker*, defendants are regularly punished for separate and greater crimes without notice, a jury trial, admissible evidence, or a heightened proof burden.[112]

Prosecutors charge relatively minor crimes with correspondingly short sentences but use USSG §1B1.3(a) to push for enhanced terms of

> (c) STANDARD OF PROOF.—The use of a preponderance of the evidence standard generally is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case. However, the court shall not consider acquitted conduct unless such conduct is established by clear and convincing evidence.
>
> For purposes of this guideline, ***"acquitted conduct"*** means conduct (i.e., any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

The additional commentary added to §1B1.3 would be:

10. Acquitted Conduct.—In accordance with §6A1.3 (Resolution of Disputed Factors (Policy Statement), a court may not consider acquitted conduct for purposes of determining the guideline range unless such conduct is established by clear and convincing evidence.

112 *See, e.g.*, United States v. Rashaw, 170 F. App'x. 986 (8th Cir. 2006) (per curiam) (affirming a statutory maximum sentence of 30 years based on an uncharged double homicide that was unrelated to the defendant's firearms-based conviction); United States v. Jardine, 364 F.3d 1200 (10th Cir. 2004) (affirming a 108-month sentence based on an uncharged drug trafficking offense that was unrelated to the defendant's initial guidelines sentence of 18–24 months based on firearms possession); United States v. Vernier, 335 F. Supp. 2d 1374 (S.D. Fla. 2004) (departing upward based on suspicion of uncharged murder from a sentence based on a fraudulent money withdrawal conviction), *aff'd in part, vacated in part on other grounds*, 152 F. App'x. 827 (11th Cir. 2005).

imprisonment.[113] The other crimes used as the basis for enhancement are either uncharged or acquitted and not proven beyond a reasonable doubt.[114] Using uncharged conduct, a potential imprisonment term of two to eight months can be increased to 84 to 105 months (about nine years).[115] In other words, a sentence of less than a year can be increased to seven, almost nine years, based on conduct a person was never arrested for, charged with, pleaded guilty to, or convicted of by a jury beyond a reasonable doubt, so long as the sentence does not exceed the otherwise applicable statutory maximum.[116] Worse yet, prosecutors could still charge someone for this uncharged conduct, and the Double Jeopardy Clause would not prohibit it.[117] If the government wishes to punish a defendant for certain alleged criminal conduct, then the alleged conduct should be charged in an indictment.[118]

Alleged uncharged conduct can only be found by a preponderance of the evidence, despite it being chargeable. The Commission believes that the preponderance of the evidence standard is enough of a burden to meet due process requirements.[119] However, the Sixth Amendment, in conjunction with the Due Process Clause, requires prosecutors to prove each element of a crime to a jury beyond a reasonable doubt.[120] While the Supreme Court has separately stated that the Sixth Amendment requires proof of each criminal element beyond a reasonable doubt, it has also held that the preponderance standard at sentencing *generally* satisfies due process.[121]

Even if the Supreme Court were to confirm that the Sixth Amendment right to a jury trial prohibits judges from basing sentences on charges that juries have acquitted criminal defendants, such a holding would not necessarily extend to uncharged conduct sentencing. In 2021 alone, 2.4% of all upward variances and 12.9% of upward departures from a defendant's guideline range relied on dismissed or

113 United States v. St. Hill, 768 F.3d 33, 39 (1st Cir. 2014) (Torruella, J., concurring).

114 *Id*.

115 *See, e.g*., *id.* at 40 (using three incidents of relevant conduct that were all alleged drug sales).

116 *Id.*

117 *Id*; *see also* Witte v. United States, 515 U.S. 389, 406 (1995) (stating that consideration of relevant conduct in determining a sentence does not constitute punishment for that conduct and prosecution of that conduct does not violate the Double Jeopardy Clause).

118 *St. Hill*, 768 F.3d at 41 (Torruella, J., concurring).

119 USSG §6A1.3 cmt.

120 Alleyne v. United States, 570 U.S. 99, 100 (2013).

121 *Compare id.*, *with* United States v. Watts, 519 U.S. 148, 156 (1997) (citing commentary to USSG §6A1.3).

uncharged conduct.[122] This data does not represent the impact of such departures or variances on a defendant's guideline sentence. And in the Guidelines' current form, there is no distinction between relevant conduct that is uncharged and relevant conduct of which the defendant has been acquitted. Absent a departure or variance, all relevant conduct, uncharged or acquitted, must be given the weight assigned by the Guidelines.[123]

III. THE RISE AND FALL OF HIGHER PROOF BURDENS AT SENTENCING

Determining a defendant's rights at sentencing has been elusive. In the twentieth century, the Supreme Court began to draw the silhouette of constitutional rights at sentencing. Jurisprudence concerning sentencing procedures started with an affirmation that the Due Process Clause should not deprive courts of out-of-court information and judges should have "the fullest information possible concerning the defendant's life and characteristics" to curate a punishment fit for the offender, not just the crime.[124] But this affirmation was before the criminal procedure revolution that provided criminal defendants with an array of constitutional procedural rights.[125] Though defendants were determined to have some rights at sentencing, it was not all of the protections due at trial.[126]

Part A discusses the state of proof burdens at sentencing prior to the Guidelines. Part B follows with how the federal courts of appeals grappled with proof burdens at sentencing under the mandatory Guidelines. Finally, Part C concludes with how the circuits have split post-*Booker* on what proof burdens are necessary to protect due process interests at sentencing.

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122 U.S. SENT'G COMM'N, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, 102–03 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf.

123 USSG §§1B1.1–1B1.4.

124 Williams v. New York, 337 U.S. 241, 247–51 (1949).

125 *See* Berman, *supra* note 21, at 663 n.52.

126 *See* Mempa v. Rhay, 389 U.S. 128, 137 (1967) (determining indigent defendants have a Sixth Amendment right to counsel at sentencing); Brady v. Maryland, 373 U.S. 83, 87 (1963) (discussing the right to discovery of evidence helpful to the defense); Specht v. Patterson, 386 U.S. 605, 610 (1967) (determining that due process requires that convicted defendants have counsel, the opportunity to be heard, to confront the witnesses against them, the right to cross-examine, and to offer evidence of their own); North Carolina v. Pearce, 395 U.S. 711, 725 (1969) (due process requires that "a defendant be free of apprehension of a retaliatory motivation on the part of the sentencing judge").

A. Proof Burdens at Sentencing Pre-Guidelines

In the years preceding the Guidelines, the Supreme Court began establishing substantive considerations that would render a sentence unconstitutional. The Supreme Court established that the Due Process Clause required "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged."[127] *McMillan* held that due process was not violated when a statute transmuted an element of the charged offense into a sentencing factor that could be found by proof less than beyond a reasonable doubt.[128] The Court in *McMillian* went so far as to reject the suggestion that due process required fact-finding by clear and convincing evidence at sentencing.[129] The suggestion of "constitutionalizing burdens of proof at sentencing" was found inappropriate.[130]

It was therefore constitutional for a judge to find sentencing factors by a preponderance of the evidence and not by a higher standard.[131] Following *McMillan*, lower federal courts regularly upheld a range of constitutional challenges where sentencing systems punished defendants without providing them the traditional procedural protections offered at trial.[132] While due process interests were recognized at sentencing, the process due to a convicted felon at sentencing is far from the process due to an accused at trial.[133]

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127 *In re* Winship, 397 U.S. 358, 364 (1970).

128 *See McMillan*, 477 U.S. at 84, 85–86 (concerning a state statute that treated possession of a firearm as a sentencing factor instead of an element of the charged offense).

129 *Id.* at 91–92.

130 *Id.* at 92.

131 *Id.* at 92; *see also* United States v. Grayson, 438 U.S. 41, 50 (1978) (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)) ("a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the course from which it may come.").

132 *See, e.g.*, United States v. Mergerson, 4 F.3d 337, 343 (5th Cir. 1993) ("as a general matter, the burden of proof at sentencing is by a preponderance of the evidence"); United States v. Restrepo, 946 F.2d 654, 656–57 (9th Cir. 1991) (en banc) (determining that the preponderance standard for fact-finding at sentencing adequately protects a defendant's due process interests).

133 *See* Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977) (quoting "The fact that due process applies does not . . . implicate the entire panoply of criminal trial procedural rights. 'Once it is determined that due process applies, the question remains what process is due. . . . D]ue process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.' Morrissey v. Brewer, 408 U.S. 471, 481").

B. Proof Burdens in the Circuits Pre-Booker

Neither the SRA nor the Guidelines specify a burden of proof to apply at sentencing. However, the preponderance standard has been the norm in sentencing because it treats errors in either direction equally.[134] The Guidelines mandated consideration of uncharged and acquitted conduct at sentencing, resulting in mandatory sentencing enhancements. Though judges had some discretion to "depart" from the Guidelines where "there exist[ed] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."[135]

Trailblazing in the use of a clear and convincing proof standard was the Third Circuit in *United States v. Kikumura*.[136] In *Kikumura*, the defendant was convicted of transporting explosives across state lines, earning a guideline range of twenty-seven to thirty-three months (about three years).[137] The district court judge found that the defendant planned to use the explosives to kill multitudes and therefore departed upward to the statutory maximum sentence of thirty years.[138] In departing upward by many years, the district court exercised discretion.[139] On appeal, the Third Circuit explained that while "less procedural protection is so clearly appropriate in the majority of sentencing cases," where the enhancement represents the overwhelming proportion of the punishment imposed, "a court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations."[140]

To accommodate these concerns, the Third Circuit created a new rule requiring the district courts to increase the procedural protections

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134 *Cf.* Grogan v. Garner, 498 U.S. 279, 286 (1991) ("Because the preponderance-of-the-evidence standard results in roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'") (citation omitted); Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983) ("A preponderance-of-the-evidence standard allows both parties to 'share the risk of error in roughly equal fashion.' Any other standard expresses a preference for one side's interests.") (citation omitted).

135 18 U.S.C. § 3553(b) (1994) (current version at 18 U.S.C. § 3553(b)(1) (2012)); *see also* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 46 (2000) (discussing the use of departures).

136 United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990).

137 *Id.* at 1089–02.

138 *Id.* at 1089.

139 *Id.* at 1097–98.

140 *Id.* at 1099–01.

afforded to defendants at sentencing to resemble those afforded at trial more closely.[141] By applying a clear and convincing proof standard to sentencing factors, the Third Circuit reasoned that the defendant would be afforded such procedural protection at sentencing.[142] Thus, the *Kikumura* court concluded that increasing a sentence from just over two years to thirty years required greater confidence than a mere preponderance of the evidence.[143]

The Third Circuit went on to flesh out when to apply a clear and convincing evidence proof standard in numerous cases, finding an increase of thirty-nine percent in guidelines range and twelve percent in actual sentences did not require relevant sentencing factors to be found by clear and convincing evidence.[144] A five-level departure did not "present the rare circumstance" that called for applying a clear and convincing standard.[145] Neither did an enhancement increasing a defendant's guidelines range from fifteen to twenty-one months (about two years) to twenty-one to twenty-seven months (about two and a half years) require clear and convincing evidence.[146] Under Third Circuit precedent, the Government conceded that a clear and convincing proof standard was proper for a nine-level departure.[147] However, clear and convincing evidence was required for a factual finding that dictated a fifty-fold upward departure from a criminal fine.[148]

After *Kikumura*, other circuits began to apply or support a clear and convincing standard at sentencing. The Ninth Circuit adopted *Kikumura* and required the application of clear and convincing evidence for a finding of an uncharged kidnapping that would result in a nine-level guidelines enhancement, increasing a sentencing range from twenty-seven to thirty-one months (about two and a half years) to fifty-seven to seventy-one months (about six years).[149] While approving *Kikumura*, the Seventh Circuit did not require a heightened proof standard for a

141 *Id.* at 1101–02.

142 United States v. Kikumura, 928 F.3d 1084, 1089 (1990).

143 *Id.* at 1098–02 (concluding that when fact-finding at sentencing transformed the offense of conviction into something more serious, with a more severe penalty, an enhanced burden of persuasion should be used).

144 United States v. Mack, 229 F.3d 226, 232–35 (3d Cir. 2000).

145 United States v. Baird, 109 F.3d 856, 865 n.8 (3d Cir. 1997).

146 *See* United States v. Mobley, 956 F.2d 450, 454–59 (3d Cir. 1992).

147 *See* United States v. Paster, 173 F.3d 206, 216–17 (3d Cir. 1999).

148 *See* United States v. Bertoli, 40 F.3d 1384, 1409–10 (3d Cir. 1994).

149 *See* United States v. Mezas de Jesus, 217 F.3d 638, 642–45 (9th Cir. 1991).

six-level increase in a defendant's base offense level.[150] The Tenth Circuit adopted the holding of *Kikumura*.[151] The Second Circuit viewed "the preponderance standard [as] no more than a *threshold* basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures."[152] Similarly, the First Circuit held it would violate due process not to consider a downward departure where a defendant had been acquitted of a state-law murder charge, even though the Guidelines required an enhancement based on a finding by a preponderance that the defendant had committed murder, increasing the guidelines range from 262–327 months (about twenty-seven and a half years) to mandatory life imprisonment.[153]

The Fifth Circuit, however, did not find a case requiring a heightened proof standard at sentencing but believed cases may arise where a sentencing fact is a "tail that wags the dog of the substantive offense" and could require a heightened proof burden.[154] The D.C. Circuit reserved the question of whether a clear and convincing proof standard may be necessary in "extraordinary circumstances."[155] The Eight Circuit recognized that the *Kikumura* clear and convincing standard could apply in exceptional cases.[156] Although recognizing that sentencing factors could disproportionately affect a defendant's sentence in relation to the offense of conviction, the Sixth Circuit rejected the possibility of applying heightened proof burdens at sentencing.[157]

150 United States v. Trujillo, 959 F.2d 1377, 1382 (7th Cir. 1992). *Contra* United States v. Reuter, 463 F.3d 792, 793 (7th Cir. 2006) (holding that *Kikumura*-style due process analysis did not survive *Booker*).

151 *See* United States v. St. Julian, 922 F.3d 563, 569 n.1 (10th Cir. 1991).

152 United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996) (emphasis in original).

153 *See* United States v. Lombard, 72 F.3d 170, 183–87 (1st Cir. 1995).

154 *See* United States v. Mergerson, 4 F.3d 337, 343–44 (5th Cir. 1993) (citations omitted) (reasoning that a sentencing fact could arguably require a finding beyond a reasonable doubt).

155 United States v. Lam Kwong-Wah, 966 F.2d 682, 688 (D.C. Cir. 1992).

156 United States v. Townley, 929 F.2d 365, 369–70 (8th Cir. 1991).

157 *See, e.g.*, United States v. Mayle, 334 F.3d 552, 557 (6th Cir. 2003) ("Although the case before us undeniably presents one of those exceptional situations where the sentencing factor has a disproportionate effect on the sentence relative to the offense of conviction, this Circuit has previously rejected the invitation to adopt a higher standard of proof[.]"); United States v. Graham, 275 F.3d 490, 517 n.19 (6th Cir. 2001) ("We do not believe that a higher standard of proof is required simply because the enhancement would significantly increase the defendant's sentence.").

During the era of mandatory Guidelines, the Supreme Court began addressing the constitutionally suspect aspects of the Guidelines concerning defendants' limited rights at sentencing. In *Witte v. United States*,[158] the Court heavily relied on pre-Guidelines precedent and also the fact that sentencing courts had traditionally considered a wide range of information without procedural protections, to hold that there was no Double Jeopardy violation when a defendant's prior conviction was used to increase punishment through the calculation of his guidelines sentence.[159]

The Court's pre-*Booker* sentencing jurisprudence reached its apex in *United States v. Watts* in 1997.[160] Relying on *McMillan*, the Court in *Watts* reiterated the need for the "fullest information possible concerning the defendant's life and characteristics" at sentencing.[161] The Guidelines did not alter sentencing courts' level of discretion under 18 U.S.C. § 3661. 18 U.S.C. § 3661 provides that limitations cannot be placed on the information concerning a defendant's (a) background, (b) character, and (c) conduct of such person convicted for an offense.[162] In addition, the Court noted that USSG §1B1.3 (Relevant Conduct) provides that conduct not formally charged, or not an element of the defendant's offense of conviction, may enter into the determination of their applicable guideline sentencing range.[163] Noticeably lacking was any reference to the need for such information concerning the previous rehabilitative model of sentencing. While ignoring the shift in sentencing models from rehabilitative to "limited retribution," the Court held that it is constitutionally permissible under the guidelines to increase a defendant's punishment based on acquitted conduct, so long as the conduct is proven by a preponderance of the evidence.[164]

C. The State of Proof Burdens Post-Booker

At the turn of the century, tides shifted in Supreme Court jurisprudence concerning defendants' due process and Sixth

158 515 U.S. 389 (1995).

159 *Id.* at 399–401; *see also* Nicholson v. United States, 511 U.S. 738, 747 (1994) (holding that a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction when sentencing them for a subsequent offense).

160 519 U.S. 148 (1997).

161 *Id.* at 151–52.

162 18 U.S.C. § 3661.

163 *Watts*, 519 U.S. at 153–54 ("[A]s we have noted, [§1B1.3] directs sentencing courts to consider all other related conduct, whether or not it resulted in a conviction.").

164 *Id.* at 155–57.

Amendment rights. *Jones v. United States*[165] and *Apprendi v. New Jersey*[166] established a constitutional rule: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[167] The *Apprendi* rule was grounded in the "Due Process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment."[168] *Apprendi's* holding and reasoning questioned the constitutionality of sentencing decision-making that relied on judicial fact-finding.[169]

And then came the *Blakely* earthquake and the *Booker* aftershock.[170] In *Blakely v. Washington*, Justice Scalia concluded that a defendant's Sixth Amendment right to a jury trial was violated when a sentencing court enhanced their guideline sentence based on a judge's factual finding that the defendant's kidnapping offense involved "deliberate cruelty."[171] Writing for the majority, Justice Scalia explained that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[172] The *Blakely* opinion went further and asserted that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment."[173]

The five Justices that made up the majorities in *Jones*, *Apprendi*, and *Blakely* ruled in *Booker's* "merits" opinion that the Guidelines, when instructing judges to make factual findings to calculate increases in applicable sentencing ranges, violated the Sixth Amendment's jury trial right.[174] *Booker's* "remedial" opinion, formed by a different majority for

165 526 U.S. 227 (1999).

166 530 U.S. 466 (2000).

167 *Id.* at 490.

168 *Id.* at 476 (noting that the Fourteenth Amendment commanded the same rule involving state statutes).

169 Berman, *supra* note 21, at 673.

170 *See* Douglas A. Berman, *Examining the Blakely Earthquake and Its Aftershocks*, 16 FED. SENTENCING REP. 307 (2004) [https://doi.org/10.1525/fsr.2004.16.5.307].

171 542 U.S. 296, 298 (2004).

172 *Id.* at 303–04 (emphasis added).

173 *Id.* at 313; *see also id.* at 305–06 ("[*Apprendi*] reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of a jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.").

174 United States v. Booker, 543 U.S. 220, 226–27 (2005).

the Sixth Amendment problem,[175] made the Guidelines simply advisory considerations for judges,[176] rather than allowing juries to have a more significant role in the federal sentencing system. The result of *Booker* was a federal sentencing system that granted judges more power at sentencing than they previously had and left in place the lack of protections for due process interests.[177]

Despite *Booker* not discussing proof standards at sentencing or the Due Process clause, several circuits reversed course on the disproportionate impact exception. Following *Booker*, circuit after circuit retreated on the disproportionate impact exception.[178] Even the pioneer of the exception overruled *United States v. Kikumura*.[179] The Fifth and Tenth Circuits have left the "door open" regarding whether a heightened burden of proof may be required for relevant conduct determinations in certain cases.[180] Standing alone, the Ninth Circuit continues to allow for a disproportionate impact exception even under the advisory Guidelines.[181]

The circuits that have abandoned the exception have done so for legal and policy reasons. Under the advisory Guidelines, it is reasoned that defendants no longer have an expectation interest in being

175 Justice Ginsburg was the only Justice to join both *Booker's* "merits" and "remedial" opinion. *See supra* Part II.A.3.

176 *Booker*, 542 U.S. at 756–71 (Breyer J., announcing opinion of the Court, with Rehnquist, C.J. & O'Connor, Kennedy & Ginsburg, JJ., joining).

177 Berman, *supra* note 21, at 676.

178 *See, e.g.*, United States v. Grubbs, 585 F.3d 793, 802 (4th Cir. 2009) ("We are thus persuaded that after Booker, the due process clause does not require the district court to find uncharged conduct by a heightened standard of proof"); United States v. Reuter, 463 F.3d 792, 793 (7th Cir. 2006) (expressing sympathy for the disproportionate impact exception, but deeming "there is no need for courts of appeals to add epicycles to an already complex set of (merely) advisory guidelines by multiplying standards of proof"); United States v. Villareal-Amarillas, 562 F.3d 892, 895 (8th Cir. 2009) ("We now join three other circuits in concluding that, even if valid when the Guidelines were mandatory, [the disproportionate impact exception] did not survive the Supreme Court's recent decision[] in United States v. Booker").

179 United States v. Fisher, 502 F.3d 293, 306 (3d Cir. 2007) (clarifying that, under advisory Guidelines, a preponderance of the evidence standard does not infringe upon a defendant's rights). Note that *Fisher*, is a three-judge panel, not the court sitting en banc. However, the Third Circuit has never formally overruled *Kikumura* by the court sitting en banc. Rather, *Kikumura* was left on "life-support" and its status post-*Booker* was not reached in *United States v. Grier*, 475 F.3d 556, 568 n.8 (2007) (en banc).

180 *See* United States v. Simpson, 741 F.3d 539, 559 (5th Cir. 2014) ("Though we have continued to leave this door open, we have never actually required a heightened burden for factual determinations at sentencing.").

181 United States v. Hymas, 780 F.3d 1285, 1293 (9th Cir. 2015) (vacating part of a sentence and remanding for use of a heightened standard of proof at sentencing).

sentenced within a given guidelines range.[182] Further, under advisory Guidelines, it is reasoned that sentencing enhancements cannot cause "disproportionate" increases.[183] The range for a "proportionality" inquiry is provided by the statutory maximum and minimums in the United States Code, not the Guidelines.[184] Thus, regardless of how much a sentence is increased at sentencing, if it does not surpass the statutory maximum, it can be found reasonable and not "disproportionate to the offense of conviction."[185] Another reason circuits abandoned the exception is because post-*Booker*, judges have discretion to depart or vary downward where enhancements would increase unreasonably.[186]

Still, the Ninth Circuit upheld the application of the disproportionate exception in *United States v. Staten*.[187] The Ninth Circuit reasoned that defendants continue to have protectable due process interests at sentencing.[188] Further, the Ninth Circuit does not focus on whether the district court is required to find facts but instead focuses on the *actual* effect a fact has on the defendant's sentence.[189] Since a district court may find facts that "have an *actual* disproportionate impact on the sentence ultimately imposed, the due process concerns which animated [the Ninth Circuit's] adoption of the clear and convincing standard in such limited instances have not evaporated."[190]

In *United States v. Staten*, the Ninth Circuit addressed whether its precedent requiring the application of a clear and convincing standard in certain circumstances was irreconcilable with *Booker*.[191] Because *Booker*, like its predecessor *Blakely*, did not turn on proof standards in sentencing satisfying due process concerns, the Ninth Circuit

182 United States v. Brika, 487 F.3d 450, 461 (6th Cir. 2007) (stating that any due process rationale under *Kikumura* is now irrelevant).

183 *See Fisher*, 502 F.3d at 308 (opining that the advisory nature of the Guidelines makes it "a logical impossibility for 'the tail to wag the dog'"); *see also Grubbs*, 585 F.3d at 802 (same).

184 *Fisher*, 502 F.3d at 307 ("After *Booker*, 'the offense of conviction' is defined by the United States Code . . . .").

185 *Id.*

186 *See* Reuter, 463 F.3d at 793 (7th Cir. 2006) (noting that sentencing judges were now "liberated" by the post-*Booker* sentencing regime).

187 466 F.3d 708, 720 (9th Cir. 2006).

188 *See id.* at 720 ("[O]ur prior clear and convincing evidence sentencing case law . . . focused on the actual effect a given fact had on the sentence . . . not on whether the district court was required to give a fact it found the effect it did.").

189 *Id.* at 719–20 (highlighting that the mandatory nature of the Guidelines was not a factor in *Kikumura* because the increase was based on a discretionary departure).

190 *Id.* at 720.

191 466 F.3d 708, 718 (9th Cir. 2006).

determined neither opinion was at odds with requiring heightened proof standards.[192] To date, in the Ninth Circuit, if the basis of a severe sentencing enhancement is uncharged (or acquitted conduct), due process may require that such conduct is found by clear and convincing evidence.[193] A sentencing judge may still conduct a broad inquiry, without regard to the rules of evidence applicable at trial,[194] to resolve such a sentencing dispute.[195]

IV. UNCHARGED CONDUCT DEMANDS HIGHER PROOF BURDENS

Even under the advisory Guidelines, a defendant's due process rights are violated at sentencing when findings of uncharged conduct become the "tail that wags the dog of the substantive offense."[196] For example, imagine that a defendant pleads guilty to two of four counts of an indictment by a federal grand jury: (1) conspiracy to defraud the Internal Revenue Service ("IRS") and (2) identity theft.[197] Based on what the defendant admitted in their guilty plea and criminal history, the Guidelines recommend a sentence of twelve to eighteen months (about one and a half years) imprisonment.[198] However, at sentencing, the judge finds by a preponderance that the defendant facilitated their offense through special skill, obstructed justice, and harmed between 50–250 victims.[199] Based on these facts found by a preponderance, the Guidelines now advise a sentencing range of 84–105 months (about nine years).[200] And now, the judge sentences the defendant to 84 months (about seven years), a bottom-of-the-guidelines sentence that is seven times greater than the initial bottom-of-the-guidelines sentence without the finding of relevant conduct.[201] In this scenario, the relevant uncharged conduct was the driving force of the sentence, not the

192 *Id.* (noting that the constitutional ruling in *Booker* and *Blakely* "focused solely on conforming comprehensive sentencing schemes to the jury trial requirement of the Sixth Amendment").

193 *See, e.g.*, United States v. Fitch, 659 F.3d 788 (9th Cir. 2011).

194 *See* FED. R. EVID. 1101(d)(3).

195 USSG § 6A1.3(a) ps.

196 *See* United States v. Fisher, 502 F.3d 293, 311 (3d Cir. 2007) (Rendell, J., concurring) (quoting United States v. Kikumura, 918 F.2d 1084, 1100–01).

197 *See* David C. Holman, *Death By A Thousand Cases: After Booker, Rita, And Gall, The Guidelines Still Violate the Sixth Amendment*, 50 Wm. & Mary L. Rev. 267, 269 (2008) (citing United States v. Sedore, 512 F.3d 819, 821 (6th Cir. 2008).

198 *Id.* (citing *Sedore*, 512 F.3d at 829 (Merritt, J., dissenting)).

199 *Id.* (citing *Sedore*, 512 F.3d at 821).

200 *Id.* (citing *Sedore*, 512 F.3d at 821–22).

201 *Id.* (citing Sedore, 512 F.3d at 821).

charged offense, and was only proven by a preponderance of the evidence.

This section will address arguments against implementing a heightened proof standard for uncharged conduct and provide responsive justifications. Additionally, this section will address failed legislative efforts to resolve the issue and put forth a proposal to amend the Relevant Conduct Provision, USSG §1B1.3, by adding a new subsection that provides for when a sentencing judge should find uncharged conduct by clear and convincing evidence. This proposal would also amend the commentary to §6A1.3 to make conforming revisions addressing the use of uncharged conduct to determine the guideline range.

A. The Need for a Clear and Convincing Standard

Whenever a judge, by a preponderance of the evidence, finds a separate, uncharged crime at sentencing, that defendant's due process rights are violated.[202] By strategically using the relevant conduct provision of the sentencing guidelines,[203] prosecutors can charge individuals with minor crimes or crimes they believe they can prove beyond a reasonable doubt, which carry shorter Guideline sentences, and then argue for significantly longer terms of imprisonment by relying on uncharged crimes.[204] Such dramatic increases in a sentence suggest that the defendant is really being sentenced for the uncharged crime rather than the crime of conviction.[205] Due process interests at sentencing do not magically disappear when a defendant pleads guilty to the offense of conviction or is found guilty of the same.[206] Due process concerns are particularly implicated when a sentence includes

202 *See generally id.* at 269–270.

203 *See generally* USSG §1B1.3(a).

204 *See* United States v. St. Hill, 768 F.3d 33, 39 (1st Cir. 2014) (Torruella, J., concurring) (noting the "disturbing trend" that "prosecutors charge individuals with relatively minor crimes, carrying correspondingly short sentences, but then use section 1B1.3(a) of the Sentencing Guidelines to argue for significantly enhanced terms of imprisonment under the guise of "relevant conduct"), *mandate recalled, opinion vacated*, No. 13-2097, 2016 WL 8540306 (1st Cir. Feb. 22, 2016).

205 *Id.* at 40.

206 *See* United States v. Grier, 475 F.3d 556, 606 (3d Cir. 2007) (McKee, J., dissenting) ("[The defendant] waived his Sixth Amendment right to a jury trial when he pled guilty. This fact, however, does not place him beyond the reach of the Fifth Amendment's protection against being punished for a crime unless guilt is established beyond a reasonable doubt.").

punishment for an uncharged crime that a judge has found by a preponderance of the evidence.[207]

Post-*Blakely* and *Booker*, the Supreme Court's current sentencing jurisprudence is rooted in the Due Process clause and jury trial right of the Sixth Amendment.[208] *Booker* did not address what standard of proof the Fifth Amendment may require for sentence-enhancing facts under the mandatory or advisory Guidelines. Before the Guidelines, the Supreme Court held in *In re Winship* that the Due Process clause required proof beyond a reasonable doubt for facts that could result in loss of liberty in a juvenile delinquency proceeding.[209] The Court explained that the beyond-a-reasonable-doubt standard is vital and gives substance to the presumption of innocence.[210]

Proof standards instruct the fact-finder on the level of confidence they should have in the correctness of their factual conclusions.[211] A preponderance standard is acceptable in civil suits for damages because "an erroneous verdict in the defendant's favor [is no more serious] than for there to be an erroneous verdict in the plaintiff's favor."[212] In contrast, liberty is at stake for criminal defendants, so the margin of error for an erroneous verdict is reduced by having the other party persuade the fact-finder beyond a reasonable doubt.[213] The more exacting a proof burden, the more that party "bears the risk of an erroneous decision."[214]

Requiring a clear and convincing standard for uncharged conduct that disproportionately impacts or drives a defendant's sentence would increase the government's burden to produce reliable evidence at sentencing.[215] Real offense sentencing shifts sentencing power from the

207 *Id.*

208 *See* Berman, *supra* note 21, at 676.

209 397 U.S. 358, 368 (1970).

210 *Id.* at 363 ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence-that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'") (quoting Coffin v. United States, 156 U.S. 432 (1895).

211 *Id.* at 370 (Harlan, J., concurring).

212 *Id.* at 371.

213 *Id.* at 363, 370–72 (Harlan, J., concurring); *see also* Addington v. Texas, 441 U.S. 418, 423 (1979) (holding that clear and convincing standard is required for civil commitment "to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision").

214 *See* Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 283 (1990).

215 *See* Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 209 (2014).

judiciary to prosecutors.[216] Since prosecutors control the "facts" provided to the probation officers preparing PSRs, the relevant conduct rules "'tend to work in one direction,' *i.e.*, to the disadvantage of defendants."[217] Upping the proof burden for facts that would disproportionately impact a defendant's sentence would have the downstream effect of reducing the risk that the judge's fact-finding is incorrect.[218]

The need for a heightened proof standard at sentencing should not turn on whether the district court's determination in imposing a sentence enhancement is mandatory or discretionary. For example, the Ninth Circuit's heightened proof standard rule turns on whether the district court's factual finding was actually determinative.[219] If a fact supporting a Guideline enhancement disproportionately impacts the ultimate sentence, it must be found by clear and convincing evidence.

When a sentencing factor disproportionately impacts the sentence relative to the offense of conviction, due process requires that the government prove the facts underlying the enhancement by clear and convincing evidence.[220] In determining when the government must meet a clear and convincing proof standard, the Ninth Circuit's totality of the circumstances test provides guidance. The test considers six factors: (1) whether the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment; (2) whether the enhanced sentence negates the presumption of innocence or the burden of proof for the alleged crime; (3) whether the facts offered in support of the enhancement create new offenses requiring separate punishment; (4) whether the increase in sentence is based upon the extent of conspiracy; (5) whether the increase in the number of offense levels is less than or equal to four; and (6) whether the length of the

216 *See* Mark T. Doerr, *Not Guilty? Go To Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS L. REV. 235, 250 (2009) (explaining how prosecutors affect the ultimate sentence by presenting suspect evidence at sentencing that is subject to a lower proof burden).

217 *See* Amy Baron-Evans, The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker 1-6, 25 (Aug. 2006) (unpublished manuscript) (citation omitted), https://fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/the-continuing-struggle-for-just-effective-and-constitutional-sentencing-after-united-states-v-booker.pdf.

218 Hessick, *supra* note 215; *see also* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1328 (1982) (describing a survey of federal judges determining the clear and convincing evidence standard is approximately 75%).

219 United States v. Staten, 466 F.3d 708, 719 (9th Cir. 2006).

220 *See* United States v. Munoz, 233 F.3d 1117, 1126–27 (9th Cir. 2000).

enhanced sentence more than doubles the length of the sentence authorized by the initial guidelines range "in a case where the defendant would otherwise have received a relatively short sentence."[221]

In evaluating the six factors, no one factor is dispositive, and the court considers only the cumulative effect of the "disputed enhancements."[222] Post-*Booker*, the first two factors have been overshadowed by developments in Sixth Amendment jurisprudence.[223] The first two factors, whether the enhanced sentence falls within the maximum sentence allowed and whether it negates the presumption of innocence, practically carry little force in the analysis.[224] The two heaviest factors are the fifth and sixth: whether the increase in offense levels is greater than four and whether the enhancement more than doubles the length of the initial guidelines range.

The fifth and sixth factors generally apply together. When an offense level increases substantially, it may generate a sentence that is more than twice the length of a "relatively short sentence."[225] Regarding the fifth factor, the Ninth Circuit has consistently held that when a sentencing enhancement is greater than four levels and more than doubles the applicable sentencing range, the enhancements must be proved by clear and convincing evidence.[226] In cases where the fifth factor is met but the sixth is not, the general preponderance of the evidence standard can be applied.[227] These two factors guide determining when clear and convincing evidence is required for findings of uncharged crimes and protect a defendant's due process interests at sentencing.

B. Refining the Guidelines by Adopting and Adapting Its Current

221 United States v. Jordan, 256 F.3d 922, 928 (9th Cir. 2001).

222 *Id.*.

223 United States v. Lonich, 23 F.4th 881, 911 (9th Cir. 2022) (referencing *Booker*, *Blakely*, and *Apprendi* and how the rule of *Apprendi* requires any fact that increases the statutory maximum to be found beyond a reasonable doubt).

224 *Id.* (noting that Ninth Circuit jurisprudence generally disregards the first four factors and focuses on the last two).

225 *Id.* at 912 (citation omitted).

226 *Jordan*, 256 F.3d at 934–35 (O'Scannlain, J., concurring) (collecting cases that demonstrate requiring "clear and convincing" proof for enhancements based on factors five and six).

227 *Lonich*, 23 F.4th at 912 ("Consistent with the objective of applying a heightened standard of proof only when the combined effect of contested enhancements would have an 'extremely disproportionate effect' on the sentence imposed, we have recognized that district courts may apply a preponderance of the evidence standard, notwithstanding an increase in the offense level of four or more, when the sentence did *not* otherwise double.") (citations omitted) (cleaned up).

Proof Burdens

Legislative efforts at prohibiting judicial reliance on certain relevant conduct have failed. Two different bipartisan bills aimed at prohibiting judicial reliance on acquitted conduct in the federal sentencing system emerged in 2019 and 2021, only to fail.[228] On the judicial front, post-*Booker*, the Supreme Court has similarly shown a lack of interest in addressing the constitutionality of either acquitted or uncharged conduct sentencing. The Court has repeatedly denied petitions for writs of certiorari in cases raising the issue of acquitted conduct sentencing.[229] With the confirmation of new commissioners to make a quorum on the Commission,[230] and the 2023 Proposed Preliminary Amendments tackling acquitted conduct sentencing,[231] the time is ripe for the Commission to address uncharged conduct.

The Commission could potentially amend or revise the relevant conduct provision to address uncharged conduct in two ways. The Commission could reverse track and move closer to a charge-offense system by narrowing the scope of relevant conduct. Narrowing the scope of relevant conduct would likely decrease what facts a sentencing court could consider, thereby limiting the broad discretion judges traditionally have at sentencing. It would also shift more power to prosecutors who make charging decisions. Alternatively, the Commission could simplify the relevant conduct provision by having a single upward adjustment for any real offense conduct in the sentence calculation. None of these solutions would address a defendant's due process concerns at sentencing.

A solution that does not alter the scope of relevant conduct while addressing defendants' due process interests at sentencing is to clarify what uncharged conduct is and amend the relevant policy statement to

228 *See* Press Release, Chuck Grassley, U. S. Senate, Durbin, Grassley Introduce Bipartisan Criminal Justice Reform Bill (Sept. 26, 2019), https://www.grassley.senate.gov/news/news-releases/durbin-grassley-introduce-bipartisan-criminal-justice-reform-bill; Press Release, Dick Durbin, United States Senate, Durbin, Grassley, Cohen, Armstrong Introduce Bipartisan Bicameral Prohibiting Punishment of Acquitted Conduct (Mar. 4, 2021), https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-cohen-armstrong-introduce-bipartisan-bicameral-prohibiting-punishment-of-acquitted-conduct-act.

229 *See* Brief for the United States in Opposition at 11–12, 14 McClinton v. United States, – U.S. – (No. 21-1557) (collecting cases where there was a denial of certiorari).

230 *See* Press Release, U. S. Sent'g Comm'n, *Acting Chair Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners* (Aug. 5, 2022), www.ussc.gov/about/news/press-releases/august-5-2022.

231 *See* U.S. SENT'G COMM'N, *supra* note 107, at 13–14.

require clear and convincing evidence for facts that disproportionately impact a defendant's sentence. Below is a possible proposed amendment that would add a new subsection to USSG §1B1.3 to define "uncharged conduct" and add additional commentary to §6A1.3 to indicate when a clear and convincing proof standard should be applied:

Proposed Amendment to §1B1.3 Relevant Conduct:

New language = red background

(d) Uncharged Conduct.—

(1) LIMITATION.—Uncharged conduct may be considered relevant conduct for purposes of determining the guideline range. For purposes of determining the guideline range, uncharged conduct may be considered relevant conduct if it—

(A) constitutes another offense, in whole or in part, and was admitted by the defendant during a guilty plea colloquy; or

(B) was found by the trier of fact to establish another offense in whole or in part.

(2) DEFINITION OF UNCHARGED CONDUCT.—For purposes of this guideline, "***uncharged conduct***" means conduct (*i.e.*, any acts or omissions) underlying a crime of which the defendant has not been charged in any state, local, or tribal jurisdiction, and conduct underlying a crime of which the defendant's charge was dismissed.[232]

Proposed Amendment to §6A1.3 Resolution of Disputed Factors (Policy Statement):

The Commission believes that using a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding applying the guidelines to the facts of a case. Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range. *See* subsection (c) of §1B1.3 (Relevant Conduct). The court is not precluded from considering acquitted conduct in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* §1B1.3 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the

232 Note that the proposed amendment indicates the new subsection as subsection (d) to follow the proposed subsection (c) in option one of the second set of 2023 Proposed Amendments, with subsection (c) defining "acquitted conduct" in the 2023 Preliminary Proposed Amendments. *See supra* note 110.

> Guidelines)). Additionally, uncharged conduct may be considered in determining the sentence to impose within the guidelines range or whether a departure from the guidelines is warranted. However, when finding facts concerning uncharged conduct will have an extremely disproportionate impact on the sentence relative to the offense of conviction, the Commission believes a *clear and convincing standard* should apply to the finding of the determinative fact.[233]

An amendment to the guidelines like the above would allow judges to consider uncharged conduct at sentencing but would require a heightened proof burden for facts that disproportionately impact the sentence. Similarly, this would also place a higher burden on the government to prove such facts when they seek much larger sentences relying on uncharged crimes. By using a heightened standard of proof, appellate review would allow the circuits to further refine whether applying a clear and convincing standard was proper and reverse and remand when it was not.[234]

Requiring a clear and convincing proof standard would also impact reasonableness review on appeal. When a sentencing court finds a fact, it becomes part of the appellate record that is then used to determine a sentence's reasonableness.[235] Under the current Guidelines, when the government does not have the evidence to charge a defendant with a crime and prove it beyond a reasonable doubt but does, perhaps, have sufficient evidence to prove the charge by a preponderance, they can leave the crime uncharged and simply present the evidence at sentencing. For facts underlying uncharged conduct that would disproportionately impact a defendant's sentence, requiring clear and convincing evidence would prevent uncertain facts from becoming part of the record and allocate the risk of an erroneous finding more fairly.[236]

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233 This Proposed Amendment to USSG §6A1.3 is aligned with option one of the Sentencing Commission's most recent proposed amendments, which also addresses acquitted conduct, as it adds additional language to §6A1.3's commentary. *See supra* note 111.

234 *See* United States v. Grier, 475 F.3d 556, 581 nn.26–27 (3d Cir. 2007) (Ambro, J., concurring) (collecting cases that refine whether a clear and convincing standard applies at sentencing).

235 *See* Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 452 (2010) ("[T]he district court must find such a fact for it to become part of the appellate record and thus a proper consideration in reasonableness review.").

236 *Cf.* Addington v. Texas, 441 U.S. 418, 423 (1979) (explaining that the preponderance standard spreads the risk evenly between adversaries); McMillan v. Pennsylvania, 477 U.S. 79, 92 n.8 (1986) (stating that once convicted, a defendant has already been deprived of their liberty to the extent that the State may confine him);

By simply raising the proof standard to clear and convincing evidence for uncharged conduct that disproportionately impacts a sentence, a procedural protection for a defendant's due process interests is introduced by placing an additional check on facts that may drive a sentence significantly upward.[237]

While the above amendment may not be perfect, it would not further complicate the Guidelines and would help prevent uncharged conduct from forming the basis of a sentence where proof is lacking. Even if the 2023 Proposed Preliminary Amendments are not adopted, a Guideline amendment is a more feasible solution given the Court's continued lack of interest in addressing acquitted conduct sentencing.[238]

C. Counterarguments and Responsive Justifications for Higher Proof Burdens

One counterargument for a heightened proof burden is that it asks for an exception to the historical norm of judges imposing sentences based on fact-finding by a preponderance of the evidence or even no proof standard. But this is not the case. At the sentencing stage, judges would retain discretion to determine what weight the uncharged conduct should receive. Honoring the tradition that judges have expansive access to information at sentencing, a clear and convincing proof standard would simply ask the sentencing judge not to consider uncertain facts. In contrast, prosecutors would have to exercise greater discretion in what enhancements they seek, considering whether they have the proof required for such enhancements.

Another counterargument tilts on the constitutional difference between acquitted and uncharged conduct. For example, a few state courts have concluded that acquitted conduct sentencing violates due process as it goes against the guarantees of fundamental fairness and the presumption of innocence.[239] However, it is argued that the due

United States v. Kikumura, 918 F.2d 1084, 1100 (3d Cir. 1990) (noting how a higher proof burden is warranted for a defendant's initial determination of guilt), *overruled by* United States v. Fisher, 502 F.3d 293, 305 (3d Cir. 2007).

237 *See* Hessick, *supra* note 215; McCauliff, *supra* note 218.

238 *See* Brief for the United States in Opposition, *supra* note 211.

239 *See* State v. Melvin, 258 A.3d 1075 (N.J. 2021) (relying on New Jersey's state Constitution to bar acquitted conduct sentencing); State v. Cote, 530 A.2d 775, 785 (N.H. 1987) (concluding "the presumption of innocence is as much ensconced in our due process as the right to counsel"); State v. Marley, 364 S.E.2d 133, 134 (N.C. 1988) (concluding that "due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder

process interests present at sentencing concerning acquitted conduct do not also apply to uncharged conduct.

In *People v. Beck*,[240] the Michigan Supreme Court held that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted."[241] The *Beck* court concluded that the sentencing court erred in relying on conduct underlying a murder charge directly before the jury in the same case.[242] The court reasoned that acquitted conduct sentencing "is fundamentally inconsistent with the presumption of innocence itself."[243]

Significantly, the United States has conceded that individuals are equally "presumed innocent" when they are never charged with a crime.[244] If the presumption of innocence prevents acquitted conduct sentencing, then the logical implication is that a sentencing court is precluded from sentencing on any conduct that does not directly underlie the elements of the offense for which the defendant is being sentenced.[245] If the presumption of innocence bars acquitted conduct sentencing, it would be perverse to continue to allow uncharged conduct sentencing.

Allowing fact-finding of uncharged conduct by a preponderance of the evidence would incentivize prosecutors to charge their most provable crime and then seek a lengthy sentence by not taking the risk of acquittal on other possible charges.[246] Prosecutors may not charge

after the jury had acquitted defendant of first degree murder"); People v. Beck, 939 N.W.2d 213, 226 (Mich. 2019), *cert. denied*, 140 S. Ct. 1243 (2020) (No. 19-564) (holding that acquitted conduct sentencing violates the defendant's due process protections).

240 939 N.W.2d 213 (2019), *cert. denied*, 140 S. Ct. 1243 (2020) (No. 19-564).

241 *Id.* at 227.

242 *Id.* at 225.

243 *Id.* ("when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent").

244 Brief for the United States in Opposition at 13–14, McClinton v. United States, – U.S. – (No. 21-1557); *see also* United States v. Salerno, 481 U.S. 739, 790 (1979) (J. Marshall, dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) ("[A]ll are innocent until the state has proved them to be guilty, . . . [the presumption of innocence] is 'implicit in the concept of ordered liberty.'").

245 *Id. Contra* People v. Beck, 939 N.W.2d 213, 215 (2019), *cert. denied*, 140 S. Ct. 1243 (2020) (No. 19-564) ("When a jury has made no findings (as with uncharged conduct, for example) no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard.").

246 *See* Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 292 (1992) (observing this procedural "shortcut" through which the

for certain crimes and then sentence on uncharged conduct where a defendant lacks any notice of their potential punishment other than the statutory maximum. The bottom line is that a person is either presumed innocent or not. If a person receives the benefit of the presumption of innocence when they are charged with a crime, then they must receive the benefit of the presumption of innocence when they are *not* charged with a crime. Nevertheless, acquitted conduct is distinct from uncharged conduct. Acquitted conduct is not just the presumption of innocence but a jury's test and affirmation of such innocence.[247]

V. CONCLUSION

The injustice of enhanced sentences based on uncharged conduct has not gone unnoticed. Relevant conduct is not a choice subject to discretion, but a component required in determining a sentencing range. While it may be easy to put the onus on prosecutors and their use of the Guidelines, the blame more correctly falls on the Commission. The Commission's approach to the Guidelines and the Supreme Court's rewriting statute in *Booker* to save the Guidelines from being unconstitutional has left our sentencing regime where it currently lies. While judges retain discretion to consider uncharged conduct, they must calculate a defendant's guideline range using relevant conduct at a lower proof standard. This initial determination serves as the benchmark for a defendant's sentence, which means that the defendant's uncharged conduct can drive the severity of the sentence.

While the Supreme Court has carried the rule of *Apprendi* to deem any facts necessary to increase a mandatory minimum or statutory maximum as elements that must be proven beyond a reasonable doubt, a vast spectrum of sentencing severity remains for all other fact-finding. So long as the Guidelines remain in effect, the use of uncharged conduct to disproportionately increase a defendant's sentence should be found by clear and convincing evidence to satisfy the due process concerns at

prosecution may punish the defendant for additional offenses that they might not have been able to prove beyond a reasonable doubt); United States v. St. Hill, 768 F.3d 33, 41 (1st Cir. 2014) (Torruella, J., concurring) ("The practice of arguing for higher sentences based on uncharged and untried 'relevant conduct for, at best, tangentially related narcotics transactions seems like an end-run around the[ ] basic constitutional guarantees afforded to all criminal defendants."), *mandate recalled, opinion vacated*, No. 13-2097, 2016 WL 8540306 (1st Cir. Feb. 22, 2016) (vacating the circuit court decision, but reaffirming the district court decision).

247 *See* Sandra K. Wolkov, *Reasonable Doubt in Doubt: Sentencing and the Supreme Court in United States v. Watts*, 52 U. MIAMI L. REV. 661, 679 (1998) ("On one level, although uncharged conduct is still presumed 'innocent,' the 'innocence' of acquitted conduct is a judicially stamped fact.").

sentencing recognized by the circuits pre-*Booker* and still by the Ninth Circuit. This heightened proof burden is consistent with the Commission's proposed amendments that recognize acquitted conduct's disproportionate impact on sentences. Uncharged conduct can similarly disproportionately impact sentences and should be found by clear and convincing evidence when it *does* disproportionately impact a sentence.