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A Look at the Use of Acquitted Conduct in Sentencing

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A LOOK AT THE USE OF ACQUITTED CONDUCT IN SENTENCING

United States v. Watts, 117 S. Ct 633 (1997) (per curiam)

I. INTRODUCTION

In *United States v. Watts,*[1] the United States Supreme Court addressed whether sentencing courts, when determining a convicted defendant's sentence, may consider conduct relating to charges of which the defendant was acquitted. The Court held that a "not guilty" verdict does not preclude a sentencing court from considering the conduct underlying the acquitted charge so long as that conduct is proved by a preponderance of the evidence.[2] In so doing, the Court resolved a circuit split in which the Ninth Circuit alone maintained that a sentencing court may not consider acquitted conduct.[3] However, as Justice Kennedy pointed out in his dissent, the Court left several matters unresolved.[4] For example, the Court did not address concerns about undercutting a verdict of acquittal, the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted, nor the effect of the Sentencing Reform Act of 1984 on this issue.[5]

This Note argues that the Court's decision also ignored important constitutional considerations. The use of acquitted conduct in sentencing raises due process and double jeopardy concerns that deserved far more careful analysis than they received. The fundamental differences between uncharged and acquitted conduct which trigger these constitutional concerns should have been noted and discussed. Finally, this Note asserts that the United States Sentencing Commission has the authority to amend the United States Sentencing Guidelines, even to the

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[1] 117 S. Ct. 633, 634 (1997) (per curiam).
[2] *Id.*
[3] *Id.* at 638. *See* United States v. Brady, 928 F.2d 844 (9th Cir. 1991).
[4] *Watts,* 117 S. Ct. at 644 (Kennedy, J., dissenting).
[5] *Id.* (Kennedy, J., dissenting).

extent it proposes a change contrary to the Court's decision with regard to acquitted conduct.

II. BACKGROUND

A. THE UNITED STATES SENTENCING GUIDELINES

1. History

Before the promulgation of the United States Sentencing Guidelines,[6] federal judges exercised liberal and virtually unreviewable[7] discretion in sentencing.[8] Stemming from the differences in judges' sentencing philosophies, this breadth of discretion led to a wide unwarranted disparity in sentences imposed on defendants convicted of similar crimes.[9] While the federal courts lacked a uniform system of sentencing, many judges took into account the reality that the defendant typically would be paroled after serving only one-third of his or her sentence.[10] Anticipating parole, these judges regularly sentenced offenders to much longer terms than they actually intended the individuals to serve.[11]

Concerned about the implications of incongruous sentencing results and the uncertainty caused by indeterminate sentencing,[12] Congress passed the Sentencing Reform Act of 1984

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[6] *See* U.S. SENTENCING GUIDELINES MANUAL (1998) [hereinafter USSG]. Hereinafter, when citing to the USSG I have used the short cite forms recommended by the manual. *See* USSG XXXVII.

[7] Since sentencing judges were not required to state the reasons for their sentencing choices and most judges chose not to explain them, there was little on the record for an appellate court to review. *See* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1187 (1993); William J. Kirchner, *Punishment Despite Acquittal: An Unconstitutional Aspect of the Federal Sentencing Guidelines?*, 34 ARIZ. L. REV. 799, 801 (1992). Hence, it was impossible to discern if the sentencing judge was improperly influenced. *See* United States v. Grayson, 438 U.S. 41, 55 (1978) (Stewart, J., dissenting). However, if the reviewing court could determine that a sentence was illegal, or imposed in an illegal manner, that court could correct it. FED. R. CRIM. P. 35.

[8] *See* Kirchner, *supra* note 7, at 800; *see also* William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571 (1992).

[9] *See* Kirchner, *supra* note 7, at 800; *see also* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895-97 (1990).

[10] *See* Kirchner, *supra* note 7, at 801.

[11] *Id.*

[12] USSG Ch. 1, Pt. A, intro. comment. Under the indeterminate sentencing system, the sentencing judge had nearly absolute discretion to sentence within a statutorily defined range (for instance, from two to twenty years). *See* Lear, *supra* note 7, at 1179.

(the Act).[13] By establishing uniform rules to guide the federal courts in sentencing, Congress hoped the Act would correct the gross disparities in sentencing, infuse a sense of proportionality, and restore systemic integrity by requiring courts to impose sentences that offenders would actually serve.[14] Toward these ends, Congress also provided for appellate review of sentencing[15] and abolished the parole system.[16]

The Act created the United States Sentencing Commission as an independent agency in the judicial branch.[17] The Commission was "comprised of seven members (including three federal judges) appointed by the President, confirmed by the Senate, and instructed to write, by April 1987, sentencing guidelines which would automatically take effect six months later unless Congress passed another law to the contrary."[18]

By contrast, under the Guidelines, the difference between the minimum and maximum sentence within the applicable range is set at the greater of 25% or six months. *See* 28 U.S.C. § 994(b)(2) (1994). For the history of the indeterminate sentencing system and the recent shift away from it, see Nagel, *supra* note 9.

[13] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3359 (1989); 28 U.S.C. §§ 991-998 (Supp. V 1987)).

[14] *Id. See* Kirchner, *supra* note 7, at 801; *see also* 18 U.S.C. § 3553(a)(6) (1994); S. REP. NO. 98-225, at 3850 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3221; USSG Ch. 1, Pt. A, intro. comment.; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1988) (Congress intended primarily to create "honesty in sentencing" and to reduce the "unjustifiably wide" sentencing disparity); Lauren Greenwald, Note, *Relevant Conduct and the Impact of the Preponderance Standard of Proof under the Federal Sentencing Guidelines: A Denial of Due Process*, 18 VT. L. REV. 529, 529 (1994) ("These guidelines were designed to bring honesty, uniformity and proportionality to sentencing.").

[15] 18 U.S.C. § 3742 (1994). To aid in appellate review, courts are now required to state, in open court, the reasons for their imposition of a particular sentence. *See id.* § 3553(c).

[16] *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 212(a), 98 Stat. 1837, 2008-09 (1984) (codified as amended at 18 U.S.C. § 3624 (1988)).

[17] *See* 28 U.S.C. § 991(a) (1994). The Commission issues guidelines and policy statements pursuant to 28 U.S.C. § 994(a). *See* USSG, Ch. 1, Pt. A, intro. comment.

[18] Breyer, *supra* note 14, at 5 (parenthetical in original). *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017-34 (codified as amended at 28 U.S.C. §§ 991-998 (Supp. IV 1986)). The introduction to the Guidelines explains: "The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date." USSG Ch. 1, Pt. A, intro. comment. *See infra* note 273 and accompanying text for amendment process.

The federal judiciary initially greeted the Guidelines with hostility.[19] It was not until the Supreme Court upheld their constitutionality in *United States v. Mistretta*[20] that the federal courts began imposing the Guidelines in earnest.[21]

2. *How the Guidelines Work*

Determination of an offender's sentence typically begins with a recommended sentence from the probation department.[22] The probation department includes its recommendation in the pre-sentence investigation report it prepares, in which it describes the circumstances of the offense and the history of the offender.[23] A probation officer will determine an offender's sentencing guideline range according to the mandates limned in the Sentencing Guidelines.[24]

The Guidelines assign a "base offense level" to each type of conviction.[25] Determining the base offense level is the first step in calculating an individual's sentencing range.[26] To ascertain

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[19] *See* Lear, *supra* note 7, at 1179 n.2.

[20] 488 U.S. 361 (1989). Former Sentencing Commissioner, now Justice, Breyer explained:

> The Court [in *Mistretta*] concluded that Congress had not violated the separation of powers principle by placing the Commission in the judicial branch, where substantive sentencing decisions and judicial rulemaking have traditionally been carried out by judges. The Court also concluded that Congress had not violated the non-delegation doctrine in authorizing the Commission to promulgate the Guidelines because Congress had provided "significant statutory direction." Moreover, the Court noted that "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."

Breyer, *supra* note 14, at 1 n.3 (internal citations omitted).

[21] *See* Lear, *supra* note 7, at 1180 n.2.

[22] *See* Kirchner, *supra* note 7, at 801.

[23] *Id.* The Guidelines provide that:

> A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record. Rule 32(b)(1), FED. R. CRIM. P. The defendant may not waive preparation of the presentence report.

USSG § 6A1.1.

[24] Kirchner, *supra* note 7, at 801. Section 1B1.1 outlines the steps to follow in determining a sentencing guideline range. *See* USSG § 1B1.1(a)-(i).

[25] Kirchner, *supra* note 7, at 801.

[26] *Id.*

the base offense level, one must locate the offense in the Guidelines Manual.[27] This can be done by referencing the manual's statutory index.[28]

The next step is to add the "specific offense characteristics."[29] Every offense category carries "specific offense characteristics" which must be assessed in calculating the base offense level.[30] The base offense level is then adjusted to reflect any mitigating or aggravating circumstances that might apply under the Guidelines.[31] The result is an "adjusted offense level."[32]

Finally, in order to find the appropriate guideline range on the Sentencing Table,[33] the probation officer must determine the defendant's "criminal history category."[34] The Sentencing Table is a matrix with forty-three offense levels listed on the vertical axis and six criminal history categories listed on the horizontal axis.[35] The point at which the defendant's offense level and criminal history category meet when plotted on the 258-box grid shows the recommended sentencing range (in terms of months of imprisonment) for that individual.[36]

Once calculated, the probation department gives its recommendation to the sentencing judge and a sentencing hearing is held at which both the prosecution and the defendant may argue whether the probation officer's determinations are correct.[37] Based on the probation officer's report and the arguments of both parties, the judge ultimately decides the applicable range under the guidelines.[38] The judge usually will

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[27] *See* Breyer, *supra* note 14, at 6.

[28] *See id.* The statutory index is found in Appendix A of the Guidelines Manual. *See* USSG App. A.

[29] Breyer, *supra* note 14, at 6. For example, add two levels for money taken, *see* USSG § 2B3.1(b)(1), and/or three more levels for use of a gun, *see* USSG § 2B3.1(b)(2).

[30] *See* Lear, *supra* note 7, at 1198.

[31] *See* Kirchner, *supra* note 7, at 802. Such factors may include, for example, the defendant's "role in the offense," obstructing justice, acceptance of responsibility, or the vulnerability of the victim. *See generally* USSG Ch. 3.

[32] Kirchner, *supra* note 7, at 802.

[33] *See* USSG Ch. 5, Pt. A, Sentencing Tbl.

[34] *See* Kirchner, *supra* note 7, at 802. Chapter 4 of the Sentencing Guidelines Manual explains the point system used to determine a defendant's criminal history category. *See* USSG Ch. 4, Pt. A.

[35] *See* USSG Ch. 5, Pt. A, Sentencing Tbl.

[36] *See* Kirchner, *supra* note 7, at 802.

[37] *Id.*

[38] *Id. See also* USSG § 6A1.3(b).

select a term from within what she has determined to be the appropriate guideline range; however, she may depart from it if there is sufficient reason to do so.[39] In any event, the judge may neither exceed the statutory maximum nor fall below the statutory minimum (if one exists) for the crime of conviction.[40]

3. Relevant Conduct

In 1970, during the era of individualized sentencing, Congress enacted 18 U.S.C. § 3661,[41] "which codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information" that may otherwise be inadmissible as evidence.[42] The Guidelines incorporated the language of § 3661 into sections 1B1.3 and 1B1.4, which define relevant conduct under the Guidelines.[43] In *Witte v. United States*, the Supreme Court explained that the relevant conduct provisions were "designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional."[44]

Relevant conduct as explained in the Guidelines describes the conduct a sentencing judge may take into account when formulating a sentence.[45] It includes an array of activity, usually

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[39] *See* Kirchner, *supra* note 7, at 803. A limited right to depart can be exercised where factors "not adequately taken into consideration by the Sentencing Commission" exist in a specific case. 18 U.S.C. § 3553(b) (1994).

[40] *See* Kirchner, *supra* note 7, at 802.

[41] Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title X, § 3577, 84 Stat. 922 (1970) (codified as 18 U.S.C. § 3577 (1982), later incorporated into the Act as 18 U.S.C. § 3661 (1988)).

[42] United States v. Watts, 117 S. Ct. 633, 635 (1997) (per curiam). Section 3661 provides that: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661 (1994).

[43] *Watts*, 117 S. Ct. at 635-36. Although the Guidelines now control judicial discretion, § 3661 is still on the books. *Id.* at 639 (Stevens, J., dissenting).

[44] 515 U.S. 389, 402 (1995). *See* United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.) ("very roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment").

[45] The Guidelines provide:

> *Relevant Conduct (Factors that Determine the Guideline Range)*
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> (a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii)

considered to be unlawful acts or omissions, that occurred in relation to the offense of conviction (not including the activity constituting the offense of conviction itself) deemed pertinent to assessing the defendant's culpability.[46] When determining the applicable guideline range, a sentencing court may consider conduct that is neither formally charged nor is an element of the offense of conviction.[47]

Uncharged or unadjudicated conduct—acts potentially characterized as criminal for which the offender's legal guilt has

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cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

USSG § 1B1.3 (italicization in the original). *See also* USSG § 1B1.3, comment. Section 1B1.3, which outlines factors that determine the applicable guideline range, should be distinguished from section 1B1.4, which discusses information that a court may consider in imposing a sentence within that range. *See* USSG § 1B1.4, comment. (backg'd.). USSG § 1B1.4 provides: "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661." USSG § 1B1.4; *see also* USSG § 1B1.4, comment.

[46] *See* Barry L. Johnson, *If At First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 159-60 (1996). See Greenwald, *supra* note 14, at 539-41, 540 n.51, for cases demonstrating examples of what is considered relevant conduct by the appellate courts.

[47] USSG § 1B1.3, comment. (backg'd.).

not been formally adjudicated—clearly falls within this rubric.[48] However, acquitted conduct is distinct from unadjudicated conduct, and less clearly within the court's purview at sentencing.[49] Acquitted conduct refers to "acts for which the offender was criminally charged and formally adjudicated not guilty, typically by the finder of fact after trial."[50] Use of acquitted conduct occurs when the sentencing judge relies on such acts as justification for enhancing the defendant's sentence.[51]

A judge must examine conduct surrounding the offense of conviction to determine whether an increase or decrease in the sentencing range is warranted.[52] Consideration of relevant conduct is no longer discretionary but mandatory—a judge's failure to review relevant conduct is grounds for reversal.[53] Although the courts regularly consider acquitted conduct within the scope of relevant conduct for sentencing purposes, whether acquitted conduct ought to be treated as relevant conduct under the Guidelines is much debated by scholars.[54]

Although the Guidelines contain no specific language authorizing the use of acquitted conduct in sentencing, the courts have broadly construed the language and commentary of sections 1B1.3 and 1B1.4 to allow such evidence.[55] These provisions make clear that the courts may consider a broad range of conduct for which the defendant was not convicted.[56] There is no limiting language indicating that acquitted conduct should be treated any differently from other forms of unconvicted con-

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[48] *See* Johnson, *supra* note 46, at 157.

[49] *Id.* Acquitted conduct is typically considered either as part of the defendant's relevant conduct used to calculate the guideline sentencing range, or as a basis for departure—that is, for delivering a sentence beyond the prescribed range. *Id.*

[50] *Id.*

[51] *Id.*

[52] *See* USSG §§ 1B1.2(b), 1B1.3(a).

[53] *See* Greenwald, *supra* note 14, at 530-31. The judge's information for the purposes of sentencing comes from either the trial record or the presentence report which is compiled by the state. This has the effect of transferring discretion to the prosecution who, in its discretion, has already decided what is relevant to sentencing in deciding what information to present to the judge. *See id.* at 558 (discussing United States v. Kikumura, 918 F.2d 1084, 1120 (3d Cir. 1990) (Rosenn, J., concurring)).

[54] *See, e.g.*, Lear, *supra* note 7; Kirchner, *supra* note 7; Johnson, *supra* note 46.

[55] *See* Johnson, *supra* note 46, at 162; *see also supra* note 45 for specific language of these sections.

[56] *See* Johnson, *supra* note 46, at 163.

duct.[57] Furthermore, pre-Guidelines case law predominantly held that a sentencing judge could consider acts for which the defendant had not been charged or convicted, including acquitted conduct.[58] Thus, courts can legitimately support their conclusions with regard to the use of acquitted conduct in sentencing, and they have continually done so.[59] However, the fact remains that acquitted conduct differs from other unconvicted conduct in that it represents a legal conclusion of innocence with regard to the criminality of that conduct.[60]

4. Real Offense vs. Charge Offense System

The Sentencing Commission looked at two basic sentencing models in structuring the Guidelines.[61] One, a "charge offense" system,[62] links punishment directly to the offense of conviction.[63] The other, a "real offense" system, allows the sentencing judge to evaluate various other factors—beyond the convicted offense—which are considered a part of the "actual" offense.[64]

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[57] *Id.*

[58] *See, e.g.*, United States v. Rodriguez-Gonzalez, 899 F.2d 177, 182 (2d Cir. 1990) ("Traditionally, a sentencing judge exercised broad discretion in considering all relevant information in determining an appropriate sentence, including evidence of uncharged crimes, dropped counts of a criminal indictment and criminal activity resulting in acquittal."); United States v. Ryan, 866 F.2d 604, 609 (3d Cir. 1989); United States v. Mocciola, 891 F.2d 13, 16 (1st Cir. 1989). *See also* United States v. Johnson, 823 F.2d 840 (5th Cir. 1987); United States v. Bernard, 757 F.2d 1439 (4th Cir. 1985); United States v. Ray, 683 F.2d 1116 (7th Cir. 1982); United States v. Morgan, 595 F.2d 1134 (9th Cir. 1979); United States v. Sweig, 454 F.2d 181 (2d Cir. 1972).

[59] *See infra* note 82 for examples.

[60] *See* Johnson, *supra* note 46, at 193.

[61] USSG Ch. 1, Pt. A, intro. comment.

[62] This is sometimes called a "conviction-offense" system.

[63] *See* Lear, *supra* note 7, at 1192-93. The Guidelines define a "charge offense" system as one which bases the offender's sentence upon "the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted." USSG Ch. 1, Pt. A, intro. comment.

[64] *See* Lear, *supra* note 7, at 1193. The Guidelines describe a "real offense" system as one in which sentences are based on "the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted." USSG Ch. 1, Pt. A, intro. comment. Then-Commissioner Breyer defined a "real offense" system as one which connects punishment to "the elements of the specific circumstances of the case." Breyer, *supra* note 14, at 10.

Under the charge offense model, punishment is designated straight from the books.[65] To reach the appropriate sentence, the judge simply looks up the crime of conviction and applies the prescribed punishment for that crime.[66] The drawback to this system is that it does not take into account the different ways in which a crime can be committed.[67] As a result, it cannot apportion punishment accordingly.[68] For instance, a professional bank robber who planned for months, carried a gun, treated his victims cruelly, stole a substantial amount of money and injured the teller may receive, unless the statute distinguishes these differences in defining the crime, the same punishment as a robber who had no weapon, took little money, acted impulsively in desperation to feed his children and injured no one—even though arguably the former robber deserves a punishment greater than the latter.[69] While achieving procedural fairness, this system fails to achieve substantive justice.[70]

A pure real offense system, by contrast, focuses on the individual circumstances of the case and adjusts an offender's sentence accordingly to reflect the specific way in which the offense was committed.[71] While this system provides a way to differentiate between offenders who engage in meaningfully different behavior during the course of committing like offenses, it creates other problems.[72] For example, critics contend that it jeopardizes procedural fairness because sentencing is normally carried out without the limitations of evidentiary procedures.[73]

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[65] *See* Breyer, *supra* note 14, at 9; *see also* USSG Ch. 1, Pt. A intro. comment. ("A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.").

[66] *See* Breyer, *supra* note 14, at 9.

[67] *Id.*

[68] *Id.*

[69] *Id.*; Lear, *supra* note 7, at 1204; USSG Ch.1, Pt. A, intro. comment.

[70] *See* Breyer, *supra* note 14, at 9-10.

[71] *See id.* at 10; *see also* USSG Ch. 1, Pt. A, intro. comment. ("A pure real offense system would sentence on the basis of all identifiable conduct.").

[72] *See* Lear, *supra* note 7, at 1204; Breyer, *supra* note 14, at 11.

[73] *See* Breyer, *supra* note 14, at 11. Some feel a pure real offense system also jeopardizes constitutional rights. *See, e.g.*, Elizabeth T. Lear, *Double Jeopardy, The Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma*, 60 BROOKLYN L. REV. 725, 741 n.67 (1994) ("Real-offense sentencing allows the government to obtain punishment for a criminal offense without adhering to the affirmative commands of the Fifth and Sixth Amendments.").

Additionally, a sentencing judge applies a lower standard of proof than is required by a jury verdict on the offense of conviction in a trial where the evidentiary rules structure what is admissible for the jury to consider.[74] Hence, there is little to constrain the judge's discretion. Thus, in the case of our two bank robbers, each may get a different sentence, but those sentences will be completely discretionary and beyond the reach of many procedural constraints that usually protect the defendant.[75]

The Sentencing Commission embraced neither a pure real offense nor a pure charge offense system.[76] Instead it adopted what former United States Sentencing Commissioner Ilene H. Nagel characterized as a "modified real offense" system.[77] This model looks first to the offense charged to assign a "base offense level."[78] It then accounts for "real" factors by listing categories of general adjustments and modifications for mitigating and aggravating circumstances, and by considering the criminal history of the offender.[79] The Guidelines control which real factors a judge may consider and how each factor weighs into the equation that generates the final sentence. Thus, they considerably narrow the breadth of discretion the pre-Guidelines courts exercised with regard to real offense factors.[80] The Commission chose this system as a workable compromise which best advanced its goals of attaining both procedural and substantive fairness.[81]

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[74] *See* Breyer, *supra* note 14, at 11.

[75] The Supreme Court endorsed real-offense sentencing in *Williams v. New York*, 337 U.S. 241, 251 (1949), finding nothing in the Due Process Clause to limit a judge's discretion with regard to uncharged and unproved conduct. The Court concluded that sentencing decisions were outside the constitutional framework established for trials. *Id.*

[76] *See* Johnson, *supra* note 46, at 161-62.

[77] *See id.* at 161; *see also* Nagel, *supra* note 9, at 925.

[78] *See* Breyer, *supra* note 14, at 11-12. Additionally, for some offenses there is a mandatory statutory minimum sentence and for all offenses there is a statutory maximum. Thus, the perimeters function on a conviction-based system.

[79] *Id.*

[80] *See* Lear, *supra* note 7, at 1194.

[81] *See* Breyer, *supra* note 14, at 8-12. This system has been criticized for shifting discretion to prosecutors, thus opening the door to prosecutorial abuse. *See* Greenwald, *supra* note 14, at 530-31 n.12; Lear, *supra* note 7, at 1205-06. The argument is that it is easier for prosecutors to obtain punishment for a given offense at sentencing under a lower burden of proof and unrestricted by the rules of evidence, than to secure a conviction at trial; consequently, they will choose to prosecute only for the simplest

B. THE CIRCUIT SPLIT

With the exception of the Ninth Circuit, the United States Courts of Appeals have held that a sentencing court may properly consider acquitted conduct in determining a defendant's sentence.[82] The Ninth Circuit alone has maintained, since a divided holding in *United States v. Brady*,[83] that a sentencing judge may not consider acquitted conduct.[84]

The defendant in *Brady* was charged with first degree murder and assault with intent to commit murder.[85] The jury found him guilty of the lesser included offenses of voluntary manslaughter and assault with a dangerous weapon.[86] The probation department calculated a sentencing guideline range of fifty-one to sixty-three months.[87] After first adjusting the range under the Guidelines to satisfy his understanding of the facts, the judge fully departed from the guideline range and sentenced Brady to 180 months imprisonment.[88] Contrary to and despite the jury's verdict, the judge believed that Brady had intentionally tried to kill his victims and sentenced him accordingly.[89] Brady appealed.[90]

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crime and rely on the sentencing hearing to extract punishment for other criminal activity without pursuing a conviction. Lear, *supra* note 7, at 1206.

[82] United States v. Watts, 117 S. Ct. 633, 634 (1997) (per curiam). *See* United States v. Boney, 977 F.2d 624 (D.C. Cir. 1992); United States v. Coleman, 947 F.2d 1424 (10th Cir. 1991); United States v. Rivera-Lopez, 928 F.2d 372 (11th Cir. 1991) (per curiam); United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir. 1990); United States v. Fonner, 920 F.2d 1330 (7th Cir. 1990); United States v. Dawn, 897 F.2d 1444 (8th Cir. 1990); United States v. Mocciola, 891 F.2d 13 (1st Cir. 1989); United States v. Ryan, 866 F.2d 604 (3d Cir. 1989); United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989); United States v. McGhee, 882 F.2d 1095 (6th Cir. 1989); United States v. Restrepo, 884 F.2d 1294 (9th Cir. 1989). The dissent in *Watts* points out that, despite these circuit decisions, there is still ongoing vigorous debate among judges in the courts of appeals on this issue. *Watts*, 117 S. Ct. at 641 n.3 (Stevens, J., dissenting).

[83] 928 F.2d 844 (9th Cir. 1991). Warning against creating a split among the circuits, Chief Judge Wallace dissented. *Id.* at 854-55 (Wallace, C.J., dissenting). Sentencing courts, he argued, traditionally have been allowed to consider conduct other than the offense of conviction in sentencing and Congress did not intend to change that practice in enacting the Sentencing Guidelines. *Id.* at 855 (Wallace, C.J., dissenting).

[84] *See Watts*, 117 S. Ct. at 634.

[85] *Brady*, 928 F.2d at 845.

[86] *Id.* at 845-46.

[87] *Id.* at 846.

[88] *Id.*

[89] *Id.*

[90] *Id.*

Acknowledging the substantial contrary precedent in other circuits, the Ninth Circuit nonetheless held that a sentencing judge could not reconsider facts rejected by the jury's verdict of acquittal.[91] The court found it unacceptable to allow a defendant to suffer punishment for a criminal charge on which the defendant had been acquitted.[92]

The Ninth Circuit explained that although the Guidelines permit sentencing courts to consider relevant conduct beyond the count of conviction, it does not follow that acquitted conduct is included within the type of conduct that may be considered.[93] The court felt that examination of acquitted conduct improperly permits a judge to circumvent the jury's verdict.[94] In subsequent cases addressing the issue of the use of acquitted conduct in sentencing, the Ninth Circuit followed its reasoning in *Brady* to reach the same conclusion that use of acquitted conduct in sentencing is improper.[95] Every other circuit, in contrast, has continued to reach the opposite result[96] offering arguments similar to those the Supreme Court made in *United States v. Watts*.[97]

III. FACTS AND PROCEDURAL HISTORY

A. DEFENDANT VERNON WATTS

During a probation search of Vernon Watts' residence, conducted in accordance with California law, police found crack cocaine in a kitchen cabinet and two loaded firearms and ammunition in a bedroom closet.[98]

The probation search occurred because John Demmel, Watts' probation officer, had learned that Watts was not living with his mother as he claimed, but was instead living with his

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[91] *Id.* at 850-51.

[92] *Id.* at 851.

[93] *Id.*

[94] *Id.* at 851-52. Although Brady argued that the sentencing court's approach contained constitutional defects, the appellate court did not reach these issues because it decided the matter on statutory grounds. *Id.* at 852 n.14.

[95] *See* United States v. Watts, 67 F.3d 790 (9th Cir. 1995); United States v. Putra, 78 F.3d 1386 (9th Cir. 1996).

[96] *See supra* note 83.

[97] 117 S. Ct. 633 (1997) (per curiam). The Court's reasoning is discussed *infra* Part IV.

[98] *Watts*, 67 F.3d at 793.

girlfriend Sonja Lee and selling cocaine.[99] As a result, Demmel placed Watts under surveillance.[100] Shortly thereafter, police observed evidence of drug trafficking, stopped Watts, and searched his car.[101] They found a set of keys and a garage door opener to Ms. Lee's home.[102] The police then proceeded to Ms. Lee's residence.[103] They let themselves in with Watts' key and conducted a probation search in accordance with California law.[104] The search uncovered crack cocaine in a kitchen cabinet and two loaded firearms and ammunition in a bedroom closet.[105] Ms. Lee admitted to the police that she and Watts lived there together.[106] Watts then admitted ownership of the drugs and guns.[107]

Watts was subsequently indicted for possession with intent to distribute cocaine base (crack), in violation of 21 U.S.C. § 841(a)(1),[108] and for using a firearm in relation to a drug offense, in violation of 18 U.S.C. § 924(c).[109] At trial, a jury con-

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[99] *Id.* at 792. A confidential informant gave this information to a Detective James Cooper who passed it along to Demmel. *Id.*

[100] *Id.*

[101] *Id.* at 793.

[102] *Id.*

[103] *Id.*

[104] *Id.* In California, probationers are lawfully subject to warrantless searches of their property. *Id.* at 792.

[105] *Id.* at 793.

[106] *Id.*

[107] *Id.*

[108] *Id.* In pertinent part, § 841 states: "(a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." 21 U.S.C. § 841(a)(1) (1994).

[109] *Watts*, 67 F.3d at 793. In pertinent part, § 924 provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

victed Watts on the narcotics charge, but acquitted him on the weapons count.[110] At sentencing, however, the United States District Court for the Eastern District of California found by a preponderance of the evidence that "Watts had possessed the guns in connection with the drug offense."[111] Accordingly, despite Watts' acquittal on the firearms charge, the district court, in calculating Watts' sentence pursuant to the Sentencing Guidelines, added two points to his base offense level for possession of a weapon during the offense of conviction.[112]

The district court sentenced Watts to 262 months in prison to be followed by 60 months of supervised release.[113] Watts appealed both his conviction and his sentence to the Ninth Circuit Court of Appeals.[114] The Ninth Circuit affirmed his conviction, but vacated his sentence and remanded for resentencing.[115]

The Ninth Circuit found that the "only difference" between USSG § 2D1.1(b)(1) and 18 U.S.C. § 924(c) is the assignment and standard of the burden of proof regarding the connection between the firearm and the predicate offense.[116] In *United States v. Brady*,[117] the court held that "a sentencing judge may not, 'under any standard of proof,' rely on the facts of which the defendant was acquitted."[118] Following its own precedent, the Ninth Circuit rejected the Government's argument that the district court could have enhanced Watts' sentence under § 2D1.1 without considering facts "necessarily rejected" by the jury's ac-

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18 U.S.C. § 924(c)(1) (1994).

[110] *Watts*, 67 F.3d at 793.

[111] United States v. Watts, 117 S. Ct. 633, 634 (1997) (per curiam).

[112] *Id.* In referring to drug offenses involving the unlawful manufacturing, importing, exporting, or trafficking (including possession with intent to commit these offenses), attempt or conspiracy this section provides: "Specific Offense Characteristics (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels." USSG § 2D1.1(b)(1).

[113] *Watts*, 67 F.3d at 793.

[114] *Id.* at 792.

[115] *Id.* Watts had contested the lawfulness of the probation search and hence the admissibility of the evidence gained from that search at trial. *Id.* at 793-95. However, this issue was not taken up by the Supreme Court. There is thus no need to give it further attention here.

[116] *Id.* at 797. Both punish the defendant for possession of a firearm in connection with the crime of conviction, but the burden of proof for substantive criminal charges is proof beyond a reasonable doubt, *see In re* Winship, 397 U.S. 358, 361-62 (1970), whereas the burden of proof for sentencing purposes is only a preponderance of the evidence, *see* McMillan v. Pennsylvania, 477 U.S. 79, 86-89 (1986).

[117] United States v. Brady, 928 F.2d 844 (9th Cir. 1991).

[118] *Watts*, 67 F.3d at 797 (citing *Brady*, 928 F.2d at 851 & n.12).

quittal on the § 924(c) charge.[119] The Government explained that the statute requires a defendant to have used a firearm in relation to, or to facilitate, an offense; whereas the enhancement merely requires that a defendant possessed a weapon during the offense.[120] Thus, argued the Government, the jury could have acquitted Watts on the statutory charge believing he possessed a firearm but that the firearm was not connected to the offense.[121] Finding the Government's reasoning unpersuasive, the Ninth Circuit maintained that a jury's acquittal on a more serious count bound the sentencing judge: "[W]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted."[122]

B. DEFENDANT CHERYL ANN PUTRA

Surveillance officers documented two transactions in which Cheryl Ann Putra and codefendant Vassilios Liaskos, a major drug dealer, sold cocaine to a government informant.[123] Among other allegations, Putra's indictment charged her with aiding and abetting in the crime of possession with intent to distribute

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[119] *Id.*

[120] *Id.* *Watts* was decided before *Bailey v. United States*, 116 S. Ct. 501, 505 (1995), in which the Supreme Court held that to sustain a conviction under § 924(c)(1), the Government must show "an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Id.* at 503. Under *Bailey*, it is not enough to show mere possession of a firearm by a person who commits a drug offense. *Id.* at 506. Watts, however, was acquitted under the pre-*Bailey* standard that required only that the firearm was "within the possession or control of the defendant and available to him thus emboldening him to commit the underlying offense." United States v. Watts, 79 F.3d 768, 769 (9th Cir. 1996). In a pre-*Bailey* regime, a person could be convicted under § 924(c)(1) for mere possession. The Ninth Circuit's reasoning in *Watts* is more persuasive in a pre-*Bailey* situation where, if a jury found possession, it could convict under § 924. At a minimum, under the pre-*Bailey* interpretation of the statute, acquittal shows that the Government failed to establish possession beyond a reasonable doubt. In contrast, in a post-*Bailey* case, the jury, even if it found possession, could not convict unless it also found that the firearm had been actively employed. Thus, it would be unclear if the jury was acquitting because it did not believe a defendant actively employed a firearm, or because it did not believe the defendant possessed one at all.

[121] *Watts*, 67 F.3d at 797.

[122] *Id.* (quoting United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991)).

[123] United States v. Watts, 117 S. Ct. 633, 634 (1997) (per curiam). *See also* United States v. Putra, 78 F.3d 1386, 1391 (9th Cir. 1996) (Wallace, C.J., dissenting); United States v. Putra, No. 94-10040, 1996 U.S. App. LEXIS 5234, at *3 (9th Cir. Mar. 5, 1996); Government's Petition for Certiorari at 5, United States v. Watts, 117 S. Ct. 633 (1997) (No. 95-1906).

one ounce of cocaine on May 8, 1992, in violation of 21 U.S.C. § 841(a)(1)[124] and 18 U.S.C. § 2;[125] and with aiding and abetting in possession with intent to distribute five ounces of cocaine on May 9, 1992, in violation of the same statutes.[126]

Before the United States District Court for the District of Hawaii, a jury convicted Putra of the May 8th incident, but acquitted her with regard to the activities of May 9th.[127] At sentencing, however, the district court determined by a preponderance of the evidence that Putra did, in fact, participate in the May 9th transaction.[128] Explaining that Putra's involvement in the May 9th transaction constituted "relevant conduct" under USSG § 1B1.3, the district court aggregated the drug amounts from both sales in calculating her base offense level under the Guidelines.[129] Arriving at a guideline range of twenty-seven to thirty-three months imprisonment, the court sentenced Putra to twenty-seven months in prison to be followed by thirty-six months supervised release.[130] Had the jury originally found Putra guilty of the May 9th crimes, the sentencing guideline range would have been twenty-seven to thirty-three months.[131] By contrast, had the district court not added the cocaine from the May 9th charge, the guideline range would have been fifteen to twenty-one months imprisonment.[132]

Putra appealed both her conviction and her sentence to the Ninth Circuit.[133] The appellate court affirmed her conviction, along with the convictions of her codefendants, in an unpublished memorandum disposition.[134] However, in a separate opinion, the Ninth Circuit vacated her sentence and remanded for resentencing.[135] The court acknowledged that under § 1B1.3

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[124] *See supra* note 108 for statutory language.

[125] This section provides in pertinent part that: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a) (1994).

[126] *Watts*, 117 S. Ct. at 634.

[127] *Id.*

[128] *Id.* at 635.

[129] *Id.* For the text of § 1B1.3, see *supra* note 45.

[130] Government's Petition for Certiorari at 5, *Watts* (No. 95-1906).

[131] *Id.*

[132] *Watts*, 117 S. Ct. at 640.

[133] United States v. Putra, 78 F.3d 1386, 1386 (9th Cir. 1996).

[134] United States v. Putra, No. 94-10040, 1996 U.S. App. LEXIS 5234 (9th Cir. Mar. 5, 1996).

[135] *Putra*, 78 F.3d at 1386.

it is proper to include the total quantity of drugs involved in the same course of conduct even if the defendant is only convicted of one count.[136] Nonetheless, the Ninth Circuit insisted that USSG § 1B1.3 addresses only uncharged conduct and does not apply to a situation where the defendant is charged with, and acquitted of, the other count involved.[137] Once again, relying on *Brady*'s holding that the Guidelines do not permit "'a court to reconsider facts during sentencing that have been rejected by a jury's not guilty verdict,'"[138] the Ninth Circuit concluded that allowing an increase in Putra's sentence would render the jury's findings of fact pointless and would effectively punish her for an offense for which she was acquitted.[139] The panel noted that *Brady* creates "a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines."[140]

Then-Chief Judge Clifford Wallace filed an emphatic dissent concluding that the majority opinion "contradicts the Guidelines, our practice prior to enactment of the Guidelines, decisions of other circuits, and recent Supreme Court authority."[141] Chief Judge Wallace argued that it is reasonable to infer that USSG § 1B1.3 encompasses acquitted conduct.[142] In support of his view, he pointed to language found in the background note to that section and to the judiciary's pre-Guidelines practice of reviewing a wide range of evidence in sentencing, including acquitted conduct.[143] Chief Judge Wallace acknowledged that *Brady* and its progeny diverged from this common practice, setting a different precedent in the Ninth Circuit.[144] But, he stated, *Brady* has been undermined by the Supreme Court's decision in

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[136] *Id.* at 1390. *See* USSG § 1B1.3 comment. (n.3).

[137] *Putra*, 78 F.3d at 1388-89.

[138] *Id.* at 1389 (quoting United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991)). *See supra* notes 82-97 and accompanying text for a discussion of *Brady*.

[139] *Putra*, 78 F.3d at 1389.

[140] *Id.*

[141] *Id.* at 1390 (Wallace, C.J., dissenting).

[142] *Id.* (Wallace, C.J., dissenting).

[143] *Putra*, 78 F.3d at 1390-92 (Wallace, C.J., dissenting). *See* USSG § 1B1.3, comment. (backg'd.) ("Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.").

[144] *Putra*, 78 F.3d at 1393 (Wallace, C.J., dissenting).

Witte v. United States[145] and therefore "must not be considered as continuing circuit authority."[146]

The Ninth Circuit denied the Government's requests for rehearing in both *Watts* and *Putra*.[147] The Government then filed a single petition for certiorari to the United States Supreme Court seeking review of both cases.[148] The Supreme Court granted certiorari to determine whether a sentencing court may consider the conduct of a defendant's underlying charges of which he or she has been acquitted.[149]

IV. SUMMARY OF OPINIONS

A. PER CURIAM OPINION

In this unsigned opinion, the Court held that a sentencing judge may consider, in determining the defendant's sentence, conduct of which the defendant has been acquitted, if that conduct has been proved by a preponderance of the evidence.[150] In finding that a judge's review of acquitted conduct in sentencing determinations violates neither the federal Sentencing Guidelines nor the United States Constitution, the Court reversed two panels of the Ninth Circuit Court of Appeals.[151]

The Court first pointed to 18 U.S.C. § 3661, which codifies the canon that courts have broad discretion to consider various kinds of information at sentencing.[152] Citing *Williams v. New York*,[153] the Court asserted that it has already embraced the principles embodied in § 3661.[154] Prior to the promulgation of the Sentencing Guidelines, sentencing courts were allowed to take into account "facts introduced at trial relating to other charges,

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[145] 515 U.S. 389 (1995) (holding that the use of relevant conduct to increase the punishment for a charged offense does not punish the offender for the relevant conduct within the meaning of the Double Jeopardy Clause).

[146] *Putra*, 78 F.3d at 1393 (Wallace, C.J., dissenting).

[147] *See* United States v. Watts, 79 F.3d 768 (9th Cir. 1996); United States v. Putra, 110 F.3d 705 (9th Cir. 1997).

[148] Government's Petition for Certiorari, *Watts* (No. 95-1906).

[149] United States v. Watts, 117 S. Ct. 633, 634 (1997) (per curiam). Supreme Court Rule 12.4 allows for the combination of cases for review where the questions are "identical or closely related." *See* SUP. CT. R. 12.4.

[150] *Watts*, 117 S. Ct. at 638.

[151] *Id.* at 634.

[152] *Id.* at 635. *See supra* note 42 for relevant language of § 3661.

[153] 337 U.S. 241 (1949).

[154] *Watts*, 117 S. Ct. at 635.

even ones of which the defendant was acquitted."[155] The Guidelines, argued the Court, did not alter this aspect of a sentencing court's discretion.[156] In fact, § 1B1.4 of the Guidelines adopted the same philosophy laid out in § 3661.[157] Furthermore, the sweeping language of § 1B1.3, and the explanations offered in its accompanying commentary and background notes, support the conclusion that the Sentencing Commission contemplated acquitted conduct as relevant conduct and hence appropriate to consider at sentencing.[158]

The Court then responded to the dissent's argument that, in view of its statutory directive to provide incremental punishment for multiple offenses,[159] Congress could not have intended for the Guidelines to increase sentences based on acquitted conduct.[160] The Court stressed that § 994(1) does not preclude the sentencing court from considering uncharged or acquitted conduct.[161] Rather, it merely mandates that the Guidelines increase the penalties when defendants are convicted of multiple offenses.[162]

Next, the Court addressed the Ninth Circuit's concern that consideration of acquitted conduct punishes a defendant for a criminal charge for which he or she has been found "not guilty."[163] In response, the Court offered the explanation it articulated in *Witte v. United States*:[164] "sentencing enhancements do not punish a defendant for crimes of which he was not con-

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[155] *Id.* (quoting United States v. Donelson, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.)).

[156] *Id.*

[157] *Id.*

[158] *Id.* at 635-36. For example, the Court characterized Putra's position as paradigmatic of the § 1B1.3 Application Note 3, which reads:

> [W]here the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales.

Id. (quoting USSG § 1B1.3 comment. (n.3)).

[159] *See* 28 U.S.C. § 994(1) (1994).

[160] *Watts*, 117 S. Ct. at 636.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] 515 U.S. 389 (1995).

victed, but rather increase his sentence because of the manner in which he committed the crime of conviction."[165]

With regard to the preclusive effect of an acquittal, the Court found that the Ninth Circuit "failed to appreciate the significance of the different standards of proof that govern at trial and sentencing" in asserting that the jury rejects some facts when it returns a not guilty verdict.[166] An acquittal on criminal charges, explained the Court, "does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt."[167] Citing Chief Judge Wallace's dissent in the Ninth Circuit's *Putra* decision, the Court emphasized that there is no way to know a jury's specific reasons for acquittal on any charge, and therefore it cannot be said that the jury rejected any particular facts by its verdict.[168] The Court indicated that, under the Guidelines, facts relevant to sentencing need be proved only by a preponderance of the evidence.[169] Moreover, that standard has passed due process inspection.[170]

Concluding that 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," the Court reversed both *Putra* and *Watts* and remanded the cases for further proceedings consistent with its opinion.[171]

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[165] *Watts*, 117 S. Ct. at 636 (citing Witte v. United States, 515 U.S. 389 (1995)). The Ninth Circuit did not describe the problem as one of double jeopardy in its analysis. *See* United States v. Watts, 67 F.3d 790 (9th Cir. 1995); United States v. Putra, 78 F.3d 1386 (9th Cir. 1996). However, the Supreme Court labeled it as such and answered it accordingly. *See Watts*, 117 S. Ct. at 636.

[166] *Watts*, 117 S. Ct. at 637.

[167] *Id.* (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984)).

[168] *Id.*

[169] *Id.* The Court acknowledged a divergence among the circuit courts as to whether in extreme cases, where relevant conduct would dramatically increase a defendant's sentence, a clear and convincing standard ought to be employed. *Id.* However, the Court declined to address that issue here, as the instant case did not present such "exceptional circumstances." *Id.*

[170] *Id.* The Court ruled on this point in *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986), holding that the preponderance of evidence standard at sentencing generally satisfies due process.

[171] *Watts*, 117 S. Ct. at 638. On remand from the Supreme Court, the Ninth Circuit accepted that *Brady* was wrongly decided; withdrew the majority published opinion in *Putra;* adopted the reasoning of the prior dissent; and affirmed the district court's sentence which considered Putra's acquitted conduct in determining her offense level. *See* United States v. Putra, 110 F.3d 705, 705-06 (9th Cir. 1997).

B. JUSTICE BREYER'S CONCURRENCE

Justice Breyer joined the Court's per curiam opinion, writing separately to note that the Court's decision "poses no obstacle to the [Sentencing] Commission itself deciding whether or not to enhance a sentence on the basis of conduct that a sentencing judge concludes did take place, but in respect to which a jury acquitted the defendant."[172] While Justice Breyer agreed that the Guidelines do not include any specific exception for acquitted conduct under its sentencing directives pertaining to relevant conduct, he asserted that the Sentencing Commission has the authority to amend the Guidelines so as to instruct the sentencing judge not to consider acquitted conduct.[173]

C. JUSTICE SCALIA'S CONCURRENCE

In contrast to the sentiment expressed in Justice Breyer's concurrence, Justice Scalia strongly disagreed with the proposition that the Sentencing Commission could effectively reverse the Supreme Court by electing to modify the Guidelines.[174] Justice Scalia maintained that 28 U.S.C. § 924(b)(1),[175] read in conjunction with 18 U.S.C. § 3661,[176] prohibits the Commission, as well as the courts, from declaring that acquitted conduct may not be considered for sentencing purposes.[177] If the Commission seeks change in this regard, argued Justice Scalia, it must submit its recommendations to Congress.[178]

D. JUSTICE STEVENS' DISSENT

In a lengthy dissent, Justice Stevens criticized the per curiam decision on several fronts, including the Court's cursory treatment of the case.[179] Unlike Justice Kennedy's dissent which mostly objected to the Court's procedure,[180] Justice Stevens took issue with the merits of the majority's conclusion.[181] To begin

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[172] *Watts*, 117 S. Ct. at 638 (Breyer, J., concurring).

[173] *Id.* at 638-39 (Breyer, J., concurring).

[174] *Id.* at 638 (Scalia, J., concurring).

[175] Section 924(b)(1) requires the Guidelines to be "consistent with all pertinent provisions of Title 18, United States Code." 28 U.S.C. § 924 (b)(1) (1994).

[176] *See supra* note 42 for specific language of § 3661.

[177] *Watts*, 117 S. Ct. at 638 (Scalia, J., concurring).

[178] *Id.* (Scalia, J., concurring).

[179] *Id.* at 639 (Stevens, J., dissenting).

[180] *See infra* notes 207-11 and accompanying text.

[181] *Watts*, 117 S. Ct. at 639 (Stevens, J., dissenting).

with, Justice Stevens challenged the majority's reliance on 18 U.S.C. § 3661.[182] He contended that, while § 3661 clearly allows judges to consider otherwise inadmissible evidence in the exercise of their sentencing discretion, it does not address questions of relevance or weight of that evidence.[183] Nor, he continued, does it "shed [any] light on whether the district judges' application of the Guidelines in the manner presented in these cases was authorized by Congress, or is allowed by the Constitution."[184]

Justice Stevens pointed out that the Sentencing Reform Act of 1984 confined the discretion of sentencing judges to a set of uniform rules.[185] The Guidelines, he continued, already proscribe reliance on certain kinds of evidence in sentencing without offending § 3661 because the statute does not command that any particular weight, or any weight at all, be given to any particular type of evidence.[186] Furthermore, Justice Stevens asserted, the broad inclusive language of § 3661 found in the Guidelines relates only to the sections where the judge retains discretion.[187] To the extent that judges exercise discretion in determining a sentence within the prescribed guideline range, Justice Stevens agreed that reference to acquitted conduct was acceptable.[188] However, he concluded, with regard to calculating the appropriate guideline range, judges ought not consider acquitted conduct because doing so would produce perverse results.[189] As an example of such a result, Justice Stevens demonstrated that Putra's sentence as calculated with the enhancement based on acquitted conduct was the same as it would have been if she had been convicted of the second count.[190]

Then Justice Stevens attacked the Court's application of the case law upon which its decision relied.[191] First, he discredited the usefulness of *Williams v. New York*[192] on the grounds that: (1)

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[182] *Id.* (Stevens, J., dissenting).
[183] *Id.* (Stevens, J., dissenting).
[184] *Id.* at 639-40 (Stevens, J., dissenting).
[185] *Id.* at 639 (Stevens, J., dissenting).
[186] *Id.* (Stevens, J., dissenting).
[187] *Id.* at 640 (Stevens, J., dissenting).
[188] *Id.* (Stevens, J., dissenting).
[189] *Id.* at 641 (Stevens, J., dissenting).
[190] *Id.* (Stevens, J., dissenting).
[191] *Id.* (Stevens, J., dissenting).
[192] 337 U.S. 241 (1949).

the case involved the exercise of discretion within an authorized range, not with the definition of that range; (2) the case did not challenge the judge's statements or the applicable standard of proof at sentencing before the court; and (3) the pre-Guidelines regime under which the *Williams* court operated was based on an entirely different rationale.[193]

Justice Stevens also discounted the holding in *McMillan v. Pennsylvania*,[194] calling it a "misguided five-to-four decision."[195] According to Stevens, *McMillan* is unpersuasive because the sentence imposed was within the range that would have been available without the enhancement.[196] Furthermore, he explained, *McMillan* dealt only with the constitutionality of a pellucid Pennsylvania statute, not with the federal Sentencing Guidelines.[197]

Next Justice Stevens distinguished *Watts* from *Witte*,[198] where the Court specifically limited its holding to the context of double jeopardy.[199] By contrast, the issue here, he declared, is not whether the defendants were punished or prosecuted twice for the same crime, but whether the initial punishment was correctly and constitutionally imposed.[200]

Additionally, Justice Stevens focused on the multiple offense aspect of Putra's case.[201] Explaining that 28 U.S.C. § 994(1) directs the Commission to provide for incremental punishment for multiple offenses of which a defendant is convicted, he expressed his inability to square this mandate with the majority's conclusion that Congress also intended incremental punishment for each of the offenses of which the defendant was acquitted.[202]

In conclusion, Justice Stevens invoked the constitutional command that criminal charges be sustained by proof beyond a

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[193] *Watts*, 117 S. Ct. at 641 (Stevens, J., dissenting).

[194] 477 U.S. 79 (1986). Note that Justice Stevens dissented in *McMillan*. *Id.* at 95 (Stevens, J., dissenting).

[195] *Watts*, 117 S. Ct. at 642 (Stevens, J., dissenting).

[196] *Id.* (Stevens, J., dissenting).

[197] *Id.* (Stevens, J., dissenting).

[198] Witte v. United States, 515 U.S. 389 (1995).

[199] *Watts*, 117 S. Ct. at 643 (Stevens, J., dissenting).

[200] *Id.* (Stevens, J., dissenting).

[201] *Id.* (Stevens, J., dissenting).

[202] *Id.* (Stevens, J., dissenting).

reasonable doubt.[203] The Guidelines, he argued, ought to be construed in accordance with this protected procedural requirement because "[t]he notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence."[204]

Justice Stevens supported Justice Breyer's conclusion that the Sentencing Commission has authority to disallow the consideration of acquitted conduct by amending the Guidelines to reflect that decision.[205] On that matter, he added, the Commission could mandate a greater burden of proof at sentencing if it so chose.[206]

E. JUSTICE KENNEDY'S DISSENT

In his dissent, Justice Kennedy expressed his disapproval of the Court's handling of the case.[207] He asserted that the case should have been set for full briefing and oral argument.[208] Justice Kennedy expressed his displeasure with the Court's approach in three particular areas. First, he felt the Court merely shrugged off the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted—a distinction that should have been confronted by reasoned discourse.[209] Next he argued that the Court should have addressed the concerns raised by Justice Stevens and other federal judges with regard to undercutting the verdict of acquittal—even if the Court could do no more than acknowledge a "theoretical contradiction from which [it] cannot escape because of overriding practical considerations."[210] Finally, in agreement with Justice Stevens, and in light of Justice Scalia's and Justice Breyer's differing views on the Sentencing Commission's role, Justice Kennedy contended that the effect of the

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[203] *Id.* at 644 (Stevens, J., dissenting). *See In re* Winship, 397 U.S. 358 (1970).
[204] *Watts*, 117 S. Ct. at 644 (Stevens, J., dissenting).
[205] *Id.* (Stevens, J., dissenting).
[206] *Id.* (Stevens, J., dissenting).
[207] *Id.* (Kennedy, J., dissenting).
[208] *Id.* (Kennedy, J., dissenting).
[209] *Id.* (Kennedy, J., dissenting).
[210] *Id.* (Kennedy, J., dissenting).

Sentencing Reform Act of 1984 deserved further exploration by the Court.[211]

V. ANALYSIS

In *United States v. Watts*, the Supreme Court ignored the crucial distinction between uncharged conduct and acquitted conduct, and in so doing turned its back on relevant constitutional concerns. The encroachment on constitutional rights resulting from the use of acquitted conduct in sentencing outweighs the arguments for permitting the use of acquitted conduct in sentencing. Furthermore, the policy implications of a judge's power to undercut the jury's verdict will undermine finality and faith in the American criminal justice system. This Note will first consider the policy concerns raised by the use of acquitted conduct in sentencing before turning to the constitutional issues.

A. POLICY CONSIDERATIONS

The *Watts* Court lumped acquitted conduct together with all the other types of relevant information a court may consider for the purposes of sentencing.[212] The Court insisted judges have always been free to consider a wide range of information, including acquitted conduct.[213] Be that as it may, it does not make it right.[214] (After all, judges once were able to sentence people to the stockades, too.[215]) Allowing sentencing judges to enhance sentences based on conduct underlying a charge for which the defendant has been acquitted undermines the jury's verdict and its role in the criminal justice system.[216]

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[211] *See id.* (Kennedy, J., dissenting).

[212] *Id.* at 636.

[213] *Id.* at 635. The Court cited *Williams v. New York*, 337 U.S. 241 (1949), a case dealing with the sentencing court's reliance on unconvicted conduct, and *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982), to argue that under the pre-Guideline sentencing regime it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted." *Watts*, 117 S. Ct. at 635.

[214] *See* Lear, *supra* note 7, at 1185 ("Tradition is no substitute for constitutionality; the steadfastness with which the courts have proclaimed the constitutionality of non-conviction offense sentencing should not deter its re-examination.").

[215] For a less trite example, see *Brown v. Board of Education*, 347 U.S. 483 (1954) (reversing as unconstitutional the "separate but equal" doctrine, which had been the law of the land for over half a century).

[216] *See* Johnson, *supra* note 46, at 180.

While the Guidelines explicitly allow the use of conduct "that is not formally charged or is not an element of the offense of conviction,"[217] it is wrong to equate these kinds of conduct with acquitted conduct. In the American criminal justice system an acquittal carries special weight.[218] It communicates a message about the defendant's legal innocence that cannot be found in the mere absence of a conviction.[219] It tells the community that the individual is not guilty of the crime for which he or she was charged.

The *Watts* Court explained that one cannot know exactly why a jury found a defendant not guilty: "[A]cquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt."[220] However, using the Court's own logic, one can as easily conclude that a verdict may, in fact, mean that the jury would have found the defendant completely innocent under any standard of proof. The presumption of innocence is firmly embedded in the American criminal justice system and should not be taken lightly.[221] When a jury acquits, that presumption remains intact.

The Sixth Amendment guarantees a criminal defendant the right to a trial by jury.[222] As one commentator explained, "[t]he Constitution places the jury at the heart of the criminal justice system as the fundamental guarantor of individual liberty."[223] Granting sentencing courts the right to review acquitted con-

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[217] USSG § 1B1.3, comment. (backg'd.).

[218] *See* United States v. Scott, 437 U.S. 82, 91 (1978) (noting that "the law attaches particular significance to an acquittal").

[219] Johnson, *supra* note 46, at 194.

[220] United States v. Watts, 117 S. Ct. 633, 637 (1997) (per curiam) (quoting Untied States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984)).

[221] *See, e.g., In re* Winship, 397 U.S. 358, 372 (1970) ("[A] fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free.").

[222] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

[223] Lear, *supra* note 7, at 1185 (internal quotation marks omitted). *See also id.* at 1225 ("The drafters of the Constitution . . . expect[ed] that [the jury] would play an active and important role in safeguarding American liberty.").

duct enables the government to bypass the trial system with its accompanying constitutional protections.[224] Because it eviscerates the jury's ability to protect the citizen from government overreaching, this approach upsets the jury's crucial balancing role.[225] Furthermore, it "in effect, tells the jury (and the public in general) that the jury's efforts in assessing the evidence and weighing the different charges were of limited importance, overridden by the contrary opinion of one judge."[226] In so doing, it not only diminishes the democratic nature of the criminal justice system, it undermines public confidence in the judicial system.[227]

B. CONSTITUTIONAL FLAGS

Allowing the sentencing judge to reevaluate the charges under a lower standard of proof raises several problems. Besides the negative policy implications of undercutting the role of the jury and undermining the finality of a jury verdict, it also raises certain constitutional flags—namely, due process and double jeopardy.

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[224] *See* Kirchner, *supra* note 7, at 815. Not only is the standard of proof lower at sentencing, but neither the Federal Rules of Evidence nor the Confrontation Clause apply. *See* Lear, *supra* note 73, at 733 ("Even though facts found at sentencing are of great importance to the defendant, sentencing hearings remain informal events conducted with little regard for procedural fairness or accuracy."). Thus, hearsay statements may be the foundation of the judge's sentencing decision, and although the defendant may be given the opportunity to contest any allegations at sentencing, he is not entitled to a full evidentiary hearing. Lear, *supra* note 7, at 1201. As a result, the defendant is denied protections he would have been entitled to had he been tried on the relevant conduct. Greenwald, *supra* note 14, at 545.

[225] *See* Lear, *supra* note 7, at 1222-28 ("[T]he drafters doubtless expected the jury to provide a powerful defense against the overzealous prosecutor and the corrupt judge and perhaps against abuses by the national lawmaking power as well.").

[226] *See* Johnson, *supra* note 46, at 184.

[227] *Id.* at 185. The jury expresses the "conscience of the community," investing the criminal law with a moral force it would otherwise not have. Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459, 474 (1993). The jury system impresses upon the criminal defendant and the community as a whole that a verdict is given in accordance with the law by persons who are fair. *Id.* at 482. Basing a sentence on factors for which the jury has acquitted the defendant undermines the appearance of fairness. *Id.*

1. Due Process Concerns

First, there is a due process concern with the standard of proof.[228] The Supreme Court has held that proof by a preponderance of the evidence[229] is constitutionally sufficient for sentencing.[230] This lower standard forms the basis for the widely used argument that a sentencing court may properly consider acquitted conduct, as the jury's acquittal means only that the jury did not find proof beyond a reasonable doubt that the defendant was guilty of the charges.[231] This does not preclude a finding of proof of the defendant's guilt under the lower preponderance of the evidence standard.[232] Therefore, a judge can come to a conclusion different from the jury's with regard to the defendant's responsibility for the charged offenses.[233]

However, according to the Supreme Court's holding in *In re Winship*, a criminal defendant is entitled to have each element of his or her offense of conviction proved beyond a reasonable doubt.[234] The Court declared that the "accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[235] Finding that the preponderance standard would not sufficiently protect an individual's proce-

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[228] *See* Boyce F. Martin, Jr., *The Cornerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirements of Due Process*, 3 SETON HALL CONST. L.J. 25, 35-36 (1993).

[229] The preponderance standard requires a judge to find that it is more likely than not that the defendant engaged in the conduct during the commission of the underlying offense of conviction. Greenwald, *supra* note 14, at 544-45.

[230] McMillan v. Pennsylvania, 477 U.S. 79 (1986). The Sentencing Commission adopted this standard by amendment effective November 1, 1991, *see* USSG App. C, amend. 387, and incorporated its approval into the Guidelines, *see* USSG § 6A1.3 comment. ("The Commission believes that use of a preponderance of the evidence standard 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, in extreme cases the clear and convincing standard has been required. United States v. Watts, 117 S. Ct. 633, 637 n.2 (1997)(per curiam). *See also* Greenwald, *supra* note 14, at 560-63.

[231] *See* Kirchner, *supra* note 7, at 811.

[232] *Id.*

[233] *Id.*

[234] *In re* Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[235] *Id.* at 363.

dural rights, the *Winship* Court concluded that the reasonable doubt standard was necessary to maintain public confidence in the criminal justice system.[236] In *Winship*, the Court said that adjudging someone guilty and imprisoning her for years on the same strength of evidence as would suffice in a civil case would amount to a lack of fundamental fairness.[237] Yet, when a sentencing judge enhances a defendant's sentence this is exactly what occurs—the defendant is imprisoned for a greater number of years based only on a preponderance of the evidence.

While it has been held that proof by a preponderance of the evidence is enough to satisfy the requirements of due process for sentencing purposes, elements of an offense should not be before the sentencing judge in the first instance. It is within the province of the jury to decide whether or not the Government has carried its burden on the elements of an offense.[238] If the jury acquits, then the issue is settled.[239] The judge does not have the power to issue a judgment of guilt notwithstanding an acquittal by the jury.[240] Allowing a judge to circumvent a jury ver-

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[236] *Id.* at 361-64.

[237] *Id.* at 363.

[238] A fact may be both an element of a crime and a specific offense characteristic. *See* Rosenberg, *supra* note 227, at 469. For example, 18 U.S.C. § 924(c)(1) makes it a crime to use or carry a weapon in connection with certain crimes and USSG § 2D1.1(b)(1) provides for a sentencing enhancement where the defendant used or displayed a weapon in connection with the crime of conviction. Where the jury acquits on the charge of possession of a firearm under the statutory offense, the judge will often reexamine the question of possession of a firearm for the purposes of enhancing a defendant's sentence under the Guidelines. Thus, where the jury has evaluated the evidence with regard to the offense and decided not to convict, the trier has an additional opportunity to review the same facts for sentencing purposes. Under *Watts*, the judge may conclude that the defendant did possess a firearm and impose punishment for the same conduct of which the jury just acquitted the defendant. This process makes acquittal of the charges at trial meaningless because, by employment of the Sentencing Guidelines, punishment can be exactly what it would have been had the defendant been convicted of the charges. *See* Rosenberg, *supra*, at 469.

[239] Burks v. United States, 437 U.S. 1, 16 (1978) ("[W]e necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision.").

[240] *See* Johnson, *supra* note 46, at 183. However, this is effectively what happens when the sentencing judge is permitted to review conduct relating to charges of which the defendant has been acquitted. As Professor Johnson states, "[A]llowing sentence enhancement for acquitted conduct is tantamount to permitting the judge to enter, for sentencing purposes, a judgment of guilt notwithstanding the verdict on the counts of acquittal, an action which is barred as inconsistent with the Sixth Amendment right to trial by jury." *Id.* at 183.

A telling example is found in *United States v. Juarez-Ortega*, in which the following exchange occurred:

dict, by use of the preponderance of evidence standard no less,[241] is fundamentally at odds with our system of justice.[242]

> The Court: The jury could not have made—the jury could not have listened to the instructions.
>
> Counsel: Your Honor,—
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> The Court: The testimony was so strong. The gun was even in the apartment. That's all they needed. There was no dispute of that fact. The mere fact that that gun was in the apartment, being used in association with—he didn't have to have it on his person.
>
> Counsel: They perhaps didn't believe it was being used in association with drug-related activity, your Honor.
>
> The Court: Well, I'll tell you something: I have been disappointed in jury verdicts before, but that's one of the most important ones, because what it did, it set up a disparity in result between the two defendants. Your client was consistently selling cocaine from his apartment and using a firearm. The fact is that the officers came in and testified that it was in your client's waistband and described, had an officer on the stand, a man who is an ATF agent, who is capable and knows what a firearm looks like, telling them, "This is what I saw." . . . They had to absolutely disregard the testimony of a government agent for no reason—no reason.
>
> Counsel: Perhaps they considered the testimony of the other agent who testified that he couldn't be sure, your Honor.
>
> The Court: Well, you can take it up with an appellate court because I've made my findings on the record.

United States v. Juarez-Ortega, 866 F.2d 747, 748-49 (5th Cir. 1989). The Fifth Circuit affirmed without objection. *Id.* at 747.

[241] As the *Winship* Court noted:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. . . . [A] person . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

Winship, 397 U.S. at 363 (internal quotation marks and citation omitted).

[242] *See* Kirchner, *supra* note 7, at 814; *see also* Lear, *supra* note 73, at 757 (the jury becomes dislodged from its "crucial oversight role" in the criminal justice system and is rendered "powerless to protect the citizen from the overzealous prosecutor or the unscrupulous judge.").

In defending the use of the preponderance standard, it has been suggested that a convicted criminal is entitled to less process than a presumptively innocent defendant. *See* Greenwald, *supra* note 14, at 544; *see also* Lear, *supra* note 7, at 1214-16. Once a person is convicted, the theory goes, he or she no longer deserves the protections concomitant with a presumption of innocence and is subject to any range of imprisonment up to the statutory maximum for the offense of conviction. *See* Lear, *supra* note 7, at 1214. (The Court offered this logic in *Meachum v. Fano*, 427 U.S. 215 (1976), concluding that a conviction deprives a defendant of his liberty interest to the full extent of the law. While *Meachum* was a pre-Guidelines case, the reasoning carries over.) Under this theory, the sentencing court does not violate the defendant's due process rights so long as the sentence imposed is within the statutory maximum. *See* Lear, *supra* note 7, at 1218. Professor Lear explains, "[t]his formula presumes that the very act of designating a maximum punishment presumptively vests the state with

The argument against allowing a sentencing court to consider acquitted conduct has been described as "emotionally charged . . . spring[ing] more from a common-sense recognition of the 'unfairness' involved rather than from the legal fine points of precedent and statutory construction."[243] Fairness, however, is at the core of the Due Process Clause.[244] It belies fairness when, upon acquittal of a crime, a defendant receives the exact sentence he would have received had he been convicted of that crime. And yet the *Watts* Court accepted this result.[245] Precedent can be overturned or explained away and statutes can be amended, but fairness as embodied in our Constitution can no more be tiptoed around than it can be ignored.

2. *Double Jeopardy Concerns*

Not only is due process at issue, but the specter of double jeopardy is also disturbing. The Double Jeopardy Clause of the Fifth Amendment protects individuals from multiple prosecutions for the same offense.[246] The Supreme Court has declared that the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[247] Therefore, to the extent that the judge's consideration of acquitted conduct amounts to a second review of the

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that amount of the defendant's liberty upon conviction, rendering the legislature's, or court's, choice of sentencing factors irrelevant to the due process analysis." *Id.* Professor Lear adds that while this theory historically has been justified by the argument that since the state can punish to the extent of the statutory maximum anything less represents the dispensation of grace, nowhere in the criminal code does it say the judge must start at the top and work his way down. *Id.* at 1219. Rather, indeterminate sentencing, like the Guidelines, was conceived to allow judges to pick an appropriate sentence from within a range of possibilities. *Id.*

[243] *See* Kirchner, *supra* note 7, at 814-15.

[244] *See, e.g.*, Spencer v. Texas, 385 U.S. 554, 563-64 (1967) (explaining that "the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial").

[245] *See* United States v. Watts, 117 S. Ct. 633, 640-41 (1997) (per curiam) (Petitioner Putra's sentencing range after the consideration of the acquitted conduct was identical to what the sentencing range would have been had she been convicted on that count.).

[246] *See* Johnson, *supra* note 46, at 181. The Fifth Amendment states in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

[247] North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted).

same offense resulting in additional punishment, the Fifth Amendment squarely prohibits it.[248]

The rule that a defendant may not be retried following an acquittal is the "most fundamental rule in the history of double jeopardy jurisprudence."[249] This reflects "both an institutional interest in preserving the finality of judgments, and a strong public interest in protecting individuals against government overreaching."[250] Unlike uncharged conduct, acquitted conduct has already been formally adjudicated. Thus, the use of acquitted conduct is tantamount to a redetermination by the sentencing judge.[251] Changing the standard of proof does not make it more permissible to reconsider an acquittal for the purposes of imposing criminal punishment.

There are at least two arguments against this conclusion. The first argument is that double jeopardy is not implicated because the court is not punishing the defendant for the acquitted conduct; rather the court is merely considering the acquitted conduct in relation to the offense of conviction.[252] In other words, courts make a distinction between a "sentence" and a "sentence enhancement."[253] The sentencing enhancement is not considered punishment for the acquitted conduct, but for the substantive offense of conviction.[254] Thus, although the Double Jeopardy Clause prevents courts from imposing a separate sentence based on the acquitted conduct, it does not prohibit them from using acquitted conduct to enhance a sentence based on a separate conviction because the defendant is being neither punished nor tried for the acquitted offense.[255]

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[248] *See* Kirchner, *supra* note 7, at 819.

[249] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[250] Dowling v. United States, 493 U.S. 342, 355 (1990) (Brennan, J., dissenting).

[251] *See* Johnson, *supra* note 46, at 157 n.14.

[252] United States v. Watts, 117 S. Ct. 633, 636 (1997) (per curiam).

[253] *See* Kirchner, *supra* note 7, at 813. This differentiation is sometimes called the "punishment-enhancement distinction." *See, e.g.*, Lear, *supra* note 73, at 726. This distinction derives from *McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901), in which the Supreme Court concluded that the prior-conviction enhancement did not constitute a second punishment for the earlier offense; rather, it only served to amplify the seriousness of the current offense, thus justifying a more serious sentence. Later Supreme Court decisions extended the punishment-enhancement distinction. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79 (1986); United States v. Grayson, 438 U.S. 41 (1978).

[254] *See* Lear, *supra* note 73, at 726.

[255] *Id. See also* Kirchner, *supra* note 7, at 813.

This is, however, a distinction without a difference.[256] The end result for the defendant is the same—his punishment will be increased due to the consideration of the acquitted conduct.[257] Whether labeled as "enhancement" or "punishment," a longer sentence is a serious restriction on the defendant's freedom;[258] hence, it violates his constitutional rights. It is immaterial that the additional punishment for the sentencing enhancement may perhaps constitute less than the punishment available had the defendant actually been convicted.

The second counter-argument points out that finding a violation of double jeopardy requires courts to equate the sentencing hearing with a trial or prosecution.[259] Some argue that it would be implausible to do this without dragging the full panoply of procedural requirements in tow.[260] However, this does not necessarily follow. It is not particularly unusual for the courts to limit the application of a law to specific contexts. In fact, in the context of sentencing, many rights and rules are already selectively applied.[261]

The Double Jeopardy Clause not only protects individuals, it also safeguards important systemic goals.[262] It preserves the finality of judicial decisions, which, in turn, conserves judicial resources and ensures that court proceedings "command the respect and confidence of the public."[263] Further, the Double Jeopardy Clause functions to protect the integrity of the criminal justice system as a whole by preventing harassment and in-

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[256] *See* Kirchner, *supra* note 7, at 820-21. In *Rodriguez-Gonzalez*, the Second Circuit used the punishment-enhancement fiction to reject a double jeopardy challenge against the use of acquitted conduct at sentencing. United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181 (2d Cir. 1990). The court noted: "Of course, from the point of view of the defendant receiving added prison time because of the presence of a gun, the distinction may be academic. But the analysis is crucial in considering the double jeopardy argument." *Id.*

[257] *See* Kirchner, *supra* note 7, at 820-21.

[258] *See* Lear, *supra* note 7, at 1185.

[259] *See* Lear, *supra* note 73, at 756. The historical distinction between trial and sentencing has formed the linchpin of constitutional review of sentencing practices. Lear, *supra* note 7, at 1208.

[260] *See* Lear, *supra* note 73, at 756.

[261] For example, the Confrontation Clause is not implicated at sentencing, but the right to counsel is constitutionally mandated. *See* Lear, *supra* note 7, at 1219 n.199. Furthermore, while the use of prior convictions is unconstitutional, the inclusion of offenses that were never even charged is permissible. *Id.*

[262] *See* Lear, *supra* note 73, at 746.

[263] *Id.* (internal quotation marks and citation omitted).

consistent results.[264] The use of acquitted conduct undermines both finality and public trust in the system.

When the legislature statutorily classifies specific conduct as criminal, it can only punish that behavior by recourse to the criminal justice system established by the Constitution.[265] A conviction is a necessary prerequisite to punishment based on that conduct.[266] While not always an accurate barometer of factual guilt, conviction symbolizes legal guilt, thereby legitimizing the government's authority to deprive a person of his life, liberty or property.[267] Acquittal may not prove factual innocence, but neither does it establish the legal guilt necessary to authorize criminal punishment.[268]

C. THE ROLE OF THE SENTENCING COMMISSION

Finally, the *Watts*[269] Court did not address whether the Sentencing Commission has the authority to amend the Guidelines to limit or forbid the consideration of acquitted conduct in sentencing. While the Sentencing Commission was created as an agency within the judicial branch of the United States government, it reports directly to Congress whose members then review its recommendations.[270] The Sentencing Commission's duties from day one have been effectively to design legislation for the federal courts.[271] Furthermore, the Sentencing Reform Act of 1984[272] directed the Commission to present regularly

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[264] *Id.*

[265] *See* Lear, *supra* note 7, at 1222.

[266] *Id. See also id.* at 1236-37 ("The jury represents the collective conscience of the community. A finding of guilt by the community gives validity to the sanction; it adds a special and irreplaceable dimension of fairness to the deprivation of an individual's liberty.").

[267] *Id.* at 1222.

[268] As Professor Lear phrased it: "In the absence of a conviction, the government lacks constitutional authority to exact punishment for allegedly criminal conduct." *Id.*

[269] United States v. Watts, 117 S. Ct. 633 (1997) (per curiam).

[270] USSG Ch. 1, Pt. A, intro. comment.

[271] *Id.* ("Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes."). *See also* Neal v. United States, 516 U.S. 284 (1996) (holding that in fulfilling its congressional mandate to measure and monitor the effectiveness of various sentencing, penal, and correctional practices, the Commission has the authority to promulgate, review, and revise binding guidelines).

[272] *See supra* notes 6-21 and accompanying text.

amendments to Congress.[273] Therefore, it seems that the Commission does possess the authority to propose any amendment it likes and submit it to Congress for review.[274] Moreover, the Court itself has suggested that the Commission's authority to revise the Guidelines reduces the need for judicial intervention to resolve circuit conflicts.[275]

In creating the Commission, Congress "delegate[d] broad authority . . . to review and rationalize the federal sentencing process."[276] The Commission initially could have adopted a charge offense system which essentially would have barred review of acquitted conduct.[277] By adopting a modified real offense system instead, the Commission has not relinquished its authority to exclude factors from judicial consideration.[278]

In *Watts,* Justice Scalia argued that § 3661 prohibits the Commission from amending acquitted conduct beyond consideration of the sentencing judge.[279] If this is correct, then much of the Guidelines would already be invalid, or at the very least inconsistent with § 3661, because the Guidelines already place numerous limitations and restrictions on the information a sentencing court may consider.[280] For example, with regard to of-

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[273] USSG Ch. 1, Pt. A, intro. comment. ("The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994 (p).").

[274] *Id.* (The Commission "expects and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress.").

[275] *See* Braxton v. United States, 500 U.S. 344, 348-49 (1991).

[276] USSG Ch. 1, Pt. A, intro. comment. *See* 28 U.S.C. § 994(o) (1994) (The Commission "periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provision of this section.").

[277] *See* Johnson, *supra* note 46, at 187 (noting that 28 U.S.C. § 994 set out in detail the duties of the Commission, but did not specify the model on which the Guidelines were to be based); *see also* discussion of sentencing models, *supra* notes 62-81 and accompanying text.

[278] *See* Johnson, *supra* note 46, at 187.

[279] United States v. Watts, 117 S. Ct. 633, 638 (1997) (Scalia, J., concurring).

[280] In fact, Congress directed the Commission to design guidelines reflecting "the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(e) (1994). *See also id.* § 994(d) ("The Commission shall assure that the Guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.").

fender characteristics, the defendant's age,[281] education,[282] mental and emotional condition,[283] physical condition including drug or alcohol abuse,[284] employment record,[285] family and community ties,[286] and prior good works in the community[287] ordinarily are not relevant in determining whether a sentence should be outside the applicable guideline range.[288] Nor are race, sex, national origin, creed, religion, or socio-economic status normally relevant.[289] Yet clearly Justice Scalia does not believe that the Guidelines are insupportable due to these restrictions: in his *Mistretta* dissent he explained that the Guidelines "have the force and effect of laws. . . A judge who disregards them will be reversed."[290]

Amending the Guidelines to clarify its position on acquitted conduct is not a novel idea to the Commission. The Commission developed, considered and rejected amendments which would have restricted use of acquitted conduct under the Guidelines in both the 1992-93 and 1993-94 amendment cycles.[291] The Commission did not consider the issue the following year,[292] but earmarked it as a priority issue for the 1996-97 amendment cycle.[293] In fact, just days before the *Watts* decision came down, the Commission had published for comment several potential options with regard to modifying the treatment of acquitted conduct.[294] Hopefully, the Court's decision in *Watts*

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[281] *See* USSG § 5H1.1.

[282] *See id.* § 5H1.2.

[283] *See id.* § 5H1.3.

[284] *See id.* § 5H1.4.

[285] *See id.* § 5H1.5.

[286] *See id.* § 5H1.6.

[287] *See id.* § 5H1.11.

[288] *See id.* at Ch. 5.

[289] *See id.* § 5H1.10.

[290] United States v. Mistretta, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). *See also* Koon v. United States, 116 S. Ct. 2035, 2044 (1996) (finding that § 3661 is not offended by the provisions in the Guidelines that proscribe use of certain offender characteristics).

[291] *See* 57 Fed. Reg. 62, 832 (Dec. 31, 1992); 58 Fed. Reg. 67522, 67541 (Dec. 21, 1993).

[292] *See* Johnson, *supra* note 46, at 189 n. 213.

[293] *See* 61 Fed. Reg. 34,465 (July 2, 1996).

[294] *See* 62 Fed. Reg. 152, 161-62 (Jan. 2, 1997). The Commission decided to publish the proposed amendments for comment during its July 18, 1996 meeting. The United States Sentencing Commission, *Upcoming Meeting Info* (visited Oct. 27, 1997) <http://www.ussc.gov>. However, in December, 1996 the Commission voted not to

will not deter the Commission from further pursuing its position on the use of acquitted conduct in sentencing—even if it happens to differ from the Court's conclusion.

VI. CONCLUSION

In *United States v. Watts*, the Court failed to reevaluate thoroughly the implications of using acquitted conduct in sentencing under the recently promulgated Sentencing Guidelines. The use of acquitted conduct in sentencing raises matters of constitutional magnitude which the Court should have addressed. Even if the Court ultimately provides a well-reasoned opinion finding that due process and double jeopardy are not offended by the use of acquitted conduct, the Sentencing Commission, considering the negative policy implications of undermining the jury verdict and the finality of a finding of innocence, should still be able to amend the Guidelines to restrict or forbid the use of acquitted conduct.

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put any amendments with regard to acquitted conduct to Congress for the 1996-97 amendment cycle (for the 1996-97 cycle the Commission presented its proposed amendments to Congress on May 1, 1997). *Id.*