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Criminal Law: The Appropriateness of Proving Premediation and Deliberation by Prior Association and the Constitutionality of Nonconviction Offense Sentencing under the United States Sentencing Guidelines

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CASENOTE

CRIMINAL LAW: THE APPROPRIATENESS OF PROVING PREMEDITATION AND DELIBERATION BY PRIOR ASSOCIATION AND THE CONSTITUTIONALITY OF NONCONVICTION OFFENSE SENTENCING UNDER THE UNITED STATES SENTENCING GUIDELINES: *United States v. Wilson*, 992 F.2d 156 (8th Cir.), *cert. denied*, 114 S. Ct. 242 (interim ed. 1993)

I. INTRODUCTION

United States v. Wilson[1] demonstrates that sentencing enhancement[2] under the United States Sentencing Guidelines[3] is "merely law without justice."[4] The *Wilson* case confronts a development whereby criminal defendants are sentenced under the United States Sentencing Guidelines for crimes never charged by the prosecution.[5] In *Wilson*, the United States Court of Appeals for the Eighth Circuit affirmed an eighty-eight month sentence imposed pursuant to a sentencing enhance-

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1. 992 F.2d 156 (8th Cir.), *cert. denied*, 114 S. Ct. 242 (interim ed. 1993).

2. As used in this Note, a "sentencing enhancement" is any procedure used by a court to increase the length of a criminal defendant's prison term. Although courts have previously enhanced sentences, via broad judicial authority, such non-statutory sentence enhancement is beyond the scope of this Article. For a brief discussion of sentencing systems prior to the enactment of the United States Sentencing Guidelines, see *infra* note 118; *see also* Williams v. New York, 337 U.S. 241 (1949) (Constitution does not prohibit judicial discretion in the use of uncharged and unproven conduct to determine a sentence).

3. *See* UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (1993) [hereinafter 1993 U.S.S.G.]. This Casenote will refer to the United States Sentencing Guidelines as the "Sentencing Guidelines" or the "Guidelines." The Sentencing Guidelines are mandatory, uniform federal guidelines used to sentence criminal offenders. Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1179-81 (1993). The guidelines arose from the Sentencing Reform Act of 1984 and were enacted into law in November 1987. *Id.* at 1179 n. 1; see *infra* note 38 and accompanying text for a discussion of proper application of the Guidelines.

4. *Wilson*, 992 F.2d at 159 (Heaney, J., concurring) (quoting Boyce F. Martin, Jr., *Advisory Guidelines and Constitutional Infirmities*, 5 FED. SENT. REP. 192 (1993)).

5. See *infra* notes 120-49 and accompanying text for a discussion of nonconviction offense sentencing.

ment under the United States Sentencing Guidelines.[6] The case is significant in two respects. First, the court concluded that premeditation[7] and deliberation[8] may be properly established when a defendant knowingly associates himself with persons involved in drive-by shootings.[9] Second, the court upheld the defendant's imprisonment, based on a sentence enhancement of attempted first-degree murder, a crime never charged by the prosecution.[10] By allowing the court such broad discretionary powers at sentencing, sentencing enhancements, under the Sentencing Guidelines, severely restrict the constitutional rights of the criminally accused.

This Note explores the scope and impact of the court's inference of premeditation and deliberation from the circumstantial evidence surrounding a crime.[11] Additionally, this Note analyzes whether the use of nonconviction offenses[12] to increase punishment is constitutionally permissible.[13] Section II of this Note presents the facts of the case and the rationales of the district court and the court of appeals in *Wilson*.[14] Section III focuses on case law that considers the appropriateness of determining premeditation and deliberation from circumstances surrounding the crime.[15] Section III also develops the theory of the use of nonconviction offenses to increase punishment at the time of sentencing.[16] Section IV analyzes the appropriateness of the *Wilson* decision, focusing first on the degree of proof necessary to establish the elements of premeditation and deliberation.[17] Section IV then considers whether nonconviction offense sentencing is constitutional.[18] This Note con-

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6. *Wilson*, 992 F.2d at 158-59. Attempted first-degree murder refers to conduct that would have constituted first-degree murder under 18 U.S.C. § 1111 had a death occurred. UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL, § 2A2.1 (1992) [hereinafter 1992 U.S.S.G.]. See *infra* note 47 for the definition of first-degree murder.

7. Premeditation is the design or plan to kill, requiring proof of thought beforehand. *See, e.g.*, Flores v. Minnesota, 906 F.2d 1300, 1301 (8th Cir.), *cert. denied*, 498 U.S. 945 (1990). For a detailed analysis of premeditation, see *infra* notes 74-82 and accompanying text.

8. Deliberation is a planned thought that is reflected upon in a cool state of blood. Virgin Islands v. Lanclos, 477 F.2d 603, 606 (3d Cir. 1973). For a detailed analysis of deliberation, see *infra* note 73 and text accompanying notes 83-84.

9. *Wilson*, 992 F.2d at 158.

10. *Id.* at 157.

11. See *infra* notes 87-103 and accompanying text for a discussion of proving premeditation and deliberation from the circumstances surrounding a crime.

12. A nonconviction offense refers to conduct "that has never been the subject of a conviction but is defined as criminal by statute." Lear, *supra* note 3, at 1181 n.4. This Note uses the terms "nonconviction offense" and "unadjudicated claims" synonymously.

13. *See infra* notes 200-54 and accompanying text.

14. *See infra* notes 20-63 and accompanying text.

15. *See infra* notes 69-114 and accompanying text.

16. *See infra* notes 115-49 and accompanying text.

17. *See infra* notes 164-99 and accompanying text.

18. *See infra* notes 200-54 and accompanying text.

cludes that although premeditation and deliberation may be properly inferred from association with known criminals, nonconviction offense sentencing is unconstitutional.[19]

II. Facts and Holding

A. *Facts*

At approximately 10:45 p.m. on September 27, 1991, Detectives Roy Douglas and Ken McConnell of the St. Louis Police Department were in a police vehicle at the 3600 block of Indiana Avenue.[20] While investigating the scene of an earlier shooting, Detective Douglas heard a shotgun blast.[21] He immediately turned his head and observed the flash of a second shotgun blast.[22] At trial, Douglas testified that from his vantage point, the second shot was fired from the right front passenger side of a car traveling past a crowd of people near 3630 Indiana Avenue.[23]

The vehicle from which the shots were fired fled the scene at a high rate of speed, and the officers pursued.[24] Shortly thereafter, the vehicle crashed.[25] Three black males immediately exited the car: one from the driver's side door, the second from the front passenger side door, and the third from the rear passenger side door.[26] Although the officers pursued, the assailants successfully escaped on foot and were not identified at that time.[27]

While searching the abandoned vehicle, the police officers recovered a twenty-gauge, single-shot, sawed-off shotgun from the right front floorboard.[28] The detectives also recovered two discharged shotgun shell casings.[29] Fingerprints taken from the shotgun matched those

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19. *See infra* notes 255-67 and accompanying text.

20. Daniel B. Hoggatt, Department of Treasury: Bureau of Alcohol, Tobacco, and Firearms Report on Richard Frank Wilson, December 26, 1991, (on file with *University of Dayton Law Review*) [hereinafter Hoggatt, Report on Richard Wilson]; Brief for Appellee at 3, United States v. Wilson, 992 F.2d 156 (8th Cir.) (No. 92-2709), *cert. denied*, 114 S. Ct. 242 (interim ed. 1993) [hereinafter Brief for Appellee].

21. Sentencing Transcript for Eastern District of Missouri at 7-8, United States v. Wilson, 992 F.2d 156 (8th Cir.) (No. 92-2709), *cert. denied*, 114 S. Ct. 242 (interim ed. 1993) [hereinafter Sentencing Transcript].

22. *Id.* at 8-9.

23. *Id.*

24. *See* Brief for Appellee, *supra* note 20, at 7.

25. Police Incident Report System, Incident Report, Complaint # 91-153182, (on file with *University of Dayton Law Review*) [hereinafter Police Incident Report].

26. Sentencing Transcript, *supra* note 21, at 16.

27. Sentencing Transcript, *supra* note 21, at 16.

28. United States v. Wilson, 992 F.2d 156, 157 (8th Cir.), *cert. denied*, 114 S. Ct. 242 (interim ed. 1993).

29. *Id.* Later, police officers learned that Mr. Markowski, the victim, was standing in front of a house at 3630 Indiana Avenue when the shootings occurred. Police Incident Report, *supra*

of the defendant, Richard Frank Wilson.[30] On October 8, 1991, officers from the St. Louis Metropolitan Police Department arrested Wilson in connection with the shooting that occurred at 3630 Indiana Avenue on September 27, 1991.[31] Following his arrest, Wilson admitted in a written statement that he occupied the front passenger seat of the vehicle involved in the shooting and that he fired the shotgun.[32] Furthermore, Wilson admitted that he knew, prior to entering the vehicle, that its occupants had just committed a crime.[33]

B. Opinion of the United States District Court for the Eastern District of Missouri

A federal grand jury indicted Wilson on January 23, 1992.[34] The indictment charged him with two counts of possession of an illegal

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note 25, at 2. Mr. Markowski was injured when a pellet struck him in the forehead. *Id.* Detective McConnell indicates in his report that:

> Markowski stated he was standing in front [of 3630 Indiana Avenue] when a late model Chevy, beige in color, drove south on Indiana to the dead end street and then the driver turned around and drove north and stopped in front of 3630 Indiana. Markowski further stated a black male, . . . who was seated in the right front seat, pointed a shotgun out the window and then fired two shots at him, at which time he was struck. He further stated the auto then drove off at a high rate of speed, north on Indiana, at which time he observed the police vehicle pursuing the auto. Markowski was then conveyed to where the auto was abandoned, and he positively identified the auto, which had been occupied by three black males, as being the one he had seen when he was shot.

Id. The injury was not serious and Mr. Markowski refused medical attention. *Id.*

30. Hoggatt, REPORT ON RICHARD WILSON, *supra* note 20, at 2. On September 30, 1991, police identified the fingerprint impressions lifted from the short-barrelled shotgun as the left palm print and right index, middle, and ring fingers of the defendant, Richard Frank Wilson. *Id.*

31. Hoggatt, REPORT ON RICHARD WILSON, *supra* note 20, at 2.

32. Brief for Appellant at 5, United States v. Wilson, 992 F.2d 156 (8th Cir.) (No. 92-2709), *cert. denied*, 114 S. Ct. 242 (interim ed. 1993) [hereinafter Brief for Appellant]; see *infra* note 33 for the text of Wilson's statement.

33. The statement given by Richard Wilson upon his arrest reads:

> I was in the house when Ernest pulled up and got out and told Nick to go get his pump. Nick gave Ernest the pump, Ernest ran down the street and shoot [sic] the man and Nick and Ernest jumped in the Firebird and pulled off. They came back in a creme car and Ernest told me to get in and I did. Nick was in the back and I was in the front passenger side. Ernest yelled shoot and Nick shoot [sic] and I shoot [sic] in the air cause [sic] I was scared to shoot those people. [sic] cause [sic] they didn't do nothing [sic] to me.

Richard Wilson, METROPOLITAN POLICE DEPARTMENT, CITY OF ST. LOUIS WARNING AND WAIVER FORM, at 1, October 8, 1991, (on file with *University of Dayton Law Review*).

34. Brief for Appellee, *supra* note 20, at 1.

weapon.[35] Wilson plead guilty to both counts on April 16, 1992.[36] The court scheduled Wilson's sentencing hearing for July 16, 1992.[37]

Pursuant to the Sentencing Guidelines, the Honorable Edward J. Filippine, Chief Judge for the United States District Court for the Eastern District of Missouri, sentenced Richard Wilson for the offense of attempted first-degree murder.[38] Although the prosecutor never

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35. Brief for Appellee, *supra* note 20, at 1. Richard Wilson was charged with a two-count indictment. *Id.* The first count was for violation of 18 U.S.C. § 922(g), Possession of a Firearm by a Convicted Felon. *Id.* The second count was for violation of 26 U.S.C. §§ 5861(d) and 5871, Possession of a Firearm Not Registered in the National Firearms Registration and Transfer Act. *Id.* Section 922(g) provides:

> It shall be unlawful for any person—
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;. . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate commerce.

18 U.S.C. § 922(g) (1988). "To support a conviction under 18 U.S.C. § 922(g), the government must show beyond a reasonable doubt that (1) the defendant had been convicted of a felony, . . . (2) the defendant thereafter possessed a firearm; and (3) the firearm traveled in or affected interstate commerce." United States v. Williams, 941 F.2d 682, 683 (8th Cir. 1991).

Richard Wilson was convicted of Illegal Possession of Cocaine (cause no. 901-01214) and Unlawful Use of a Weapon (cause no. 901-01551) on October 22, 1990, in the Circuit Court for the City of St. Louis, Missouri. Hoggatt, REPORT ON RICHARD WILSON, *supra* note 20, at 2. The court sentenced Wilson to one year on each of these charges, with the sentences to run concurrently. *Id.* He was committed to the Missouri Department of Corrections. *Id.* Based on these convictions, the government was able to show beyond a reasonable doubt that Wilson was a convicted felon for purposes of applying 18 U.S.C. § 922(g)(1). *Id.*

The government also successfully established that the firearm was in the possession of Richard Wilson and had moved in interstate commerce. Statement of James N. Stabile, Special Agent, ATF (Dec. 17, 1991) (on file with *University of Dayton Law Review*). Special Agent Stabile, an expert in the interstate movement of firearms, determined the origin of the short-barrelled shotgun to be the New England Firearms Company, Inc., Gardener, Massachusetts. *Id.* Because the shotgun was not manufactured in Missouri, it had to be physically moved in interstate commerce to be physically present in Missouri. *Id.* For these reasons, 18 U.S.C. § 922(g)(1) applied to Wilson.

The second count of Wilson's indictment was for violation of 26 U.S.C. §§ 5861(d) and 5871, Possession of a Firearm not Registered in the National Registration and Transfer Act. Hoggatt, REPORT ON RICHARD WILSON, *supra* note 20, at 2. Section 5861(d) provides: "[i]t shall be unlawful for any person . . . (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. § 5861(d) (1988). Section 5871 provides: "Any person who violates or fails to comply with any provisions of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both." 26 U.S.C. § 5871 (1988).

A National Firearms Act (NFA) record search found no record of Richard Frank Wilson owning a New England Firearms Company brand, Parchner Model, 20 gauge, single-shot, break-open, short-barrelled shotgun, with 12-3 1/16 inch barrel length, 27-⅛ inch overall length, bearing serial number NB227753. Hoggatt, REPORT ON RICHARD WILSON, *supra* note 20, at 4. Because Mr. Wilson possessed this weapon, he was charged under 26 U.S.C. §§ 5861(d) and 5871.

36. Brief of Appellee, *supra* note 20, at 1.

37. Brief of Appellee, *supra* note 20, at 1.

38. Sentencing determinations require structured analysis and proper application of the Sentencing Guidelines. Lear, *supra* note 3, at 1191. These provisions are mandatory under the federal system. *Id.* at 1191-92. The Sentencing Guidelines provide instruction for more than 1000

charged Wilson with that offense,[39] Judge Filippine determined that Richard Wilson possessed the gun in an attempt to commit first-degree murder and sentenced him for this crime.[40] As a result of this sentencing enhancement, the court sentenced Mr. Wilson to eighty-eight months imprisonment.[41]

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federal crimes. *See, e.g.*, 1993 U.S.S.G., *supra* note 3. Application of the Guidelines requires the user to "engage in an elaborate scoring process to determine the sentence in a given case." Lear, *supra* note 3, at 1191.

Section 1B1.1 of the Sentencing Guidelines requires the sentencing judge to determine the appropriate sentence for any given offense. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988). First, the statute of conviction is referenced with the Guidelines' statutory index to determine the Guideline section which is most applicable. *Id.* at 6. Each Guideline section establishes a base offense level for the charged offense. *Id.* The base offense level can be increased or decreased depending upon the presence or absence of mitigating and aggravating factors, more commonly referred to as "specific offense characteristics." *Id.* Next, determination of "adjustments" listed in Chapter Three is necessary. *Id.* Adjustments add or subtract levels based on, but not limited to, the offender's role in the offense, acceptance of responsibility, efforts to obstruct justice, and multiple count convictions. *Id.* Finally, a criminal history score is calculated on the basis of the offender's past criminal record. *Id.*

The scores are arranged on a 258-box grid provided on the rear inside cover of the Guidelines Manual. *See* Lear, *supra* note 3, at 1192. The point at which the offense level and criminal history category intersect provides the presumptive sentencing range. *Id.* Departure from the Guidelines' range is permissible when the judge determines that factors in a specific case were "not adequately taken into consideration by the Sentencing Commission." *Id.* Any such departure is then subject to appellate review using a reasonableness standard. *See* Breyer, *supra*, at 7; *see also* 18 U.S.C. § 3742(d) (1988). Section 3742(d) provides that appellate courts may review sentences to ascertain violations of law, to correct inappropriate application of the Guidelines, and to remedy unreasonable departures. 18 U.S.C. § 3742(d) (1988).

39. *See supra* note 35 and accompanying text.

40. *See infra* notes 42-53 and accompanying text.

41. United States v. Wilson, 992 F.2d 156, 157 (8th Cir.), *cert. denied*, 114 S. Ct. 242 (interim ed. 1993). Wilson's sentence was calculated as follows: first, because the defendant was convicted of Illegal Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g)(1)) and Possession of a Firearm Not Registered with the National Firearms and Transfer Record (26 U.S.C. §§ 5861(d) and 5871), he was sentenced under the 1990 Sentencing Guidelines, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). *Id.* at 158. Sentencing Guidelines § 2K2.1(a)(1) provides: "(a) Base Offense Level: (1) 18, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861." UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (1990) [hereinafter 1990 U.S.S.G.]. Current guidelines provide that the base offense level in (1) above is 26. 1992 U.S.S.G., *supra* note 6, § 2K2.1. The court, however, used 18 because Wilson was indicted on January 23, 1992, a year in which the November 1990 Guidelines were still in effect. *Wilson*, 992 F.2d at 158. In November 1992, the U.S.S.G. increased the base offense level to 26. 1992 U.S.S.G., *supra* note 6, § 2K2.1(a)(1).

Although Sentencing Guidelines § 2K2.1(a)(1) provided a base offense level of 18, section 2K2.1(c) establishes a cross reference to § 2X1.1 (Attempt, Solicitation, or Conspiracy). *Id.* Section 2K2.1(c) provides:

> (c) Cross Reference
>
> (1) If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply

Richard Wilson objected to the court's finding that he used the weapon in connection with an attempt to commit first-degree murder.[42] Judge Filippine held a hearing on this disputed finding at the time of sentencing.[43] At the hearing, Detective Douglas' testimony established that Richard Wilson shot into a crowd of people.[44] Wilson argued he merely shot into the air and claimed there was no proof he intended to shoot anyone.[45] Thus, Wilson argued that his sentence, based on the offense of attempted first-degree murder, was unconstitutional.[46]

The district court determined that sentencing Wilson pursuant to a charge of attempted first-degree murder required proof of premeditation and deliberation as provided in § 1111 of Title 18 of the United States Code (U.S.C.).[47] In determining the elements of premeditation and deliberation, Judge Filippine focused on the circumstances sur-

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(A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above;

Id. Section 2X1.1(c)(1) provides: "(c) Cross Reference: (1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply the guideline section." *Id.* § 2X1.1(c)(1).

Because another offense guideline section expressly covers attempted murder, the court applied that section. *Wilson*, 992 F.2d at 158. Sentencing Guidelines § 2A2.1(a)(1) provides: "(a) Base Offense Level: (1) 28, if the object of the offense *would have constituted first degree murder*." 1992 U.S.S.G., *supra* note 6, § 2A2.1 (emphasis added).

Wilson received a two-level reduction for acceptance of responsibility pursuant to Guidelines section 3E1.1. *Wilson*, 992 F.2d at 158; *see also* 1992 U.S.S.G., *supra* note 6, § 3E1.1 ("[i]f the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels"). The court calculated his criminal history level as category III; thus, his adjusted offense level was 26. *Wilson*, 992 F.2d at 159. According to the Sentencing Table provided on the back inside cover of the Guidelines Manual, Wilson's sentencing range was 78-97 months imprisonment. 1993 U.S.S.G., *supra* note 3.

42. Brief for Appellant, *supra* note 32, at 2.

43. Sentencing Transcript, *supra* note 21, at 15-16.

44. *Wilson*, 992 F.2d at 158. Detective Douglas testified that Wilson admitted to being in the front passenger seat of the car. Sentencing Transcript, *supra* note 21, at 25. Wilson also admitted to firing a shot. *Id.* The dispute concerned whether the defendant shot horizontally into a crowd of people or vertically into the air. *Id.* Responding to this disputed discrepancy, Judge Filippine stated:

> [Wilson] says, "I shot up in the air." That's refuted by the direct testimony of the officers and I believe that under the circumstances that is the credible evidence and as a result of that, I believe that there had been sufficient evidence by preponderance of the evidence . . . I cannot help but from that evidence and based upon the testimony of the officer[s] that they actually saw the blast of the gun, the discharge from the muzzle, that it was not up in the air but it was straight horizontal to the ground.

Id. at 57-58.

45. Brief for Appellant, *supra* note 32, at 5.

46. Brief for Appellant, *supra* note 32, at 5.

47. According to Sentencing Guidelines § 2A2.1, a charge of attempted murder exists where "the object of the offense would have constituted first-degree murder" had death occurred. 1992 U.S.S.G., *supra* note 6, § 2A2.1. Thus, first-degree murder and attempted first-degree murder require proof of the same elements. *Id.* The elements are established in 18 U.S.C. § 1111.

rounding the crime.[48] He found that Wilson fired a shotgun from a car that he entered voluntarily.[49] Further, Wilson knew its occupants had previously engaged in a shooting.[50] When told to shoot by the vehicle's driver, Wilson fired the shotgun.[51] Thus, Judge Filippine found that the evidence established that Wilson acted with premeditation and deliberation in an attempt to commit first-degree murder.[52] The court, however, failed to consider whether nonconviction offense sentencing is constitutionally permissible.[53]

C. *United States Court of Appeals for the Eighth Circuit*

Richard Wilson appealed his conviction to the United States Court of Appeals for the Eighth Circuit.[54] He claimed that the eighty-eight month sentence imposed by the district court, pursuant to section 2A2.1(a)(1) of the Sentencing Guidelines, was reversible error for two reasons.[55] First, Wilson argued that the district court clearly erred in holding, based solely on the oral testimony of the officers, that he aimed his gun at someone.[56] Second, Wilson argued that the evidence

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(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

18 U.S.C. § 1111 (1988).

48. Sentencing Transcript, *supra* note 21, at 57-58.

49. Sentencing Transcript, *supra* note 21, at 57-58.

50. Sentencing Transcript, *supra* note 21, at 57-58. Judge Filippine stated:

I do find that knowing there were guns and loaded and shooting and where they were going and what had happened before by [Wilson's] own statement, going to this particular place where there were people that he saw, [Wilson] pointed a gun out that window on a level of a horizontal and shot it and there was another shot as well . . . a pellet struck someone . . . [and] that's sufficient here for attempted murder and the Court so finds . . . .

Id. at 59.

51. Sentencing Transcript, *supra* note 21, at 57-58.

52. Sentencing Transcript, *supra* note 21, at 60. Judge Filippine reasoned:

[Both premeditation and deliberation exist] for this reason: the statement that [Wilson] gave says that somebody took a gun and he went out and he shot a gun and he came back. They went out in the Firebird, . . . [and] . . . off they went, with guns. Now this wasn't quail season . . . two men, [Wilson] says, had just shot someone and they are getting in a different car . . . with loaded weapons and they're . . . driving along and somebody says "shoot" and [Wilson] shot. Now premeditation didn't mean that you have to sit there for four days and contemplate; that [Wilson] went in the car with the gun after knowing what was going on . . . to me that is premeditation and deliberation.

Id.

53. United States v. Wilson, 992 F.2d 156, 158 (8th Cir.), *cert. denied*, 114 S. Ct. 242 (interim ed. 1993).

54. *Id.* at 157.

55. *Id.* at 158.

56. *Id.*

of premeditation or deliberation on his part was insufficient to support an attempted first-degree murder charge and therefore, section 2A2.1 of the Sentencing Guidelines was not applicable.[57] In a per curiam opinion, the Court of Appeals for the Eighth Circuit affirmed Wilson's conviction.[58]

In addressing Wilson's second claim, the court of appeals upheld the applicability of section 2A2.1 of the Sentencing Guidelines.[59] The court noted that section 2A2.1 "refers to 18 U.S.C. Section 1111 for the definition of first-degree murder."[60] Under § 1111, first-degree murder requires, "in addition to an unlawful killing with malice aforethought, proof of premeditation and deliberation."[61] To establish premeditation, the defendant need not deliberate "for any particular length of time."[62] By focusing on Wilson's actions prior to the shooting, the court of appeals concluded that the sentencing judge could infer premeditation and deliberation from Wilson's association with known criminals.[63]

III. BACKGROUND

The *Wilson* decision rests upon a determination that the elements of premeditation and deliberation were established based on the facts of the case and that the Sentencing Guidelines were properly applied.[64] Thus, an understanding of both premeditation and deliberation and the proper application of the Guidelines is necessary for a thorough analysis of the decision. First, the elements of premeditation and deliberation, as they relate to a conviction for first-degree murder, must be considered.[65] This requires an examination of case law that supports the determination of premeditation and deliberation from circumstantial evidence surrounding a crime.[66] Additionally, nonconviction offense sentencing under the Sentencing Guidelines and its relationship to Due Process must also be considered.[67] An examination of the recent trend

57. *Id.*

58. *Id.* at 157. The appellate court failed to address Wilson's concern that his sentence was increased due to a nonconviction offense. *Id.*

59. *Id.* at 158.

60. *Id.*

61. 1993 U.S.S.G., *supra* note 3, § 2A2.1.

62. United States v. Blue Thunder, 604 F.2d 550, 553 (8th Cir.), *cert. denied*, 444 U.S. 902 (1979). See *infra* notes 74-82 and accompanying text for a discussion of the amount of time necessary to constitute premeditation and deliberation.

63. *Wilson*, 992 F.2d at 158.

64. *Id.*

65. *See infra* notes 69-86 and accompanying text.

66. *See infra* notes 87-103 and accompanying text.

67. *See infra* notes 115-49 and accompanying text.

in federal criminal cases reveals that the use of nonconviction offense sentencing is constitutionally infirm.[68]

A. *Premeditation and Deliberation*

1. The Elements of Premeditation and Deliberation

Murder, pursuant to § 1111(a) of Title 18 of the U.S.C., is "the unlawful killing of a human being with malice aforethought."[69] Specifically, first-degree murder is "perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing."[70] A conviction for first-degree murder, therefore, requires proof that a defendant killed another unlawfully,[71] with malice aforethought,[72] and in a deliberate[73] and premeditated[74] manner.[75]

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68. *See infra* notes 200-54 and accompanying text.

69. 18 U.S.C. § 1111(a) (1988). See *supra* note 47 for the full text of § 1111(a).

70. 18 U.S.C. § 1111(a) (1988).

71. *See supra* note 47.

72. Malice aforethought is the intentional killing of another human being without excuse or mitigating circumstance. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 445 (1987). While proof of malice aforethought is necessary for a first-degree murder conviction, it does not require proof of a subjective intent to kill. United States v. Shaw, 701 F.2d 367, 392 n.20 (5th Cir. 1983), *cert. denied*, 465 U.S. 1067 (1984). As articulated in *Shaw*:

> Malice required for a conviction of first degree murder . . . may be established by evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, of such nature that the jury is warranted in inferring that defendant was aware of serious risk of death or serious bodily harm.

Id.; see also United States v. Sides, 944 F.2d 1554, 1557-58 (10th Cir.) (malice aforethought necessary for first-degree murder conviction can be established by evidence of reckless and wanton behavior which deviates from a reasonable standard of care), *cert. denied*, 112 S. Ct. 604 (interim ed. 1991). For a discussion of the malice aforethought necessary for second-degree murder, see *infra* note 77.

73. Deliberation is "a weighing in the mind of consequences of course of conduct, as distinguished from acting upon a sudden impulse without exercise of reasoning powers." BLACK'S LAW DICTIONARY 427 (6th ed. 1990); *see also* Thomerson v. Lockhart, 835 F.2d 1257, 1259 (8th Cir. 1987) (citing Robinson v. State, 598 S.W.2d 421, 424 (Ark. 1980)). Deliberation describes the quality of the thought process a person puts into formulating a design to kill. DRESSLER, *supra* note 72, at 459. A deliberate killing occurs when it is "planned and reflected upon by the accused and is committed in a cool state of blood, not in sudden passion engendered by just cause of provocation." Virgin Islands v. Lanclos, 477 F.2d 603, 606 (3d Cir. 1973) (quoting Virgin Islands v. Lake, 362 F.2d 770, 775 (3d Cir. 1966)).

74. Premeditation is the design or plan to kill, requiring proof of thought beforehand. Flores v. Minnesota, 906 F.2d 1300, 1301 (8th Cir.), *cert. denied*, 498 U.S. 945 (1990). Premeditation describes the quantity of time a person puts into formulating a design to kill. DRESSLER, *supra* note 72, at 459. To premeditate a killing, one must meditate or deliberate upon a contemplated act in advance. *Lanclos*, 477 F.2d at 606. Although premeditation requires that the killing be planned in the mind beforehand, such determination need not exist for any appreciable length of time. *Id.* The law fails to establish any time limit which must elapse between the formation of an intent to kill and its consummation in a homicide. *Id.* Any time period, however short, will generally suffice to establish premeditation if the intent to kill was conceived in the mind of the slayer before he committed the homicide. Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986); *see also* Allen v. United States, 164 U.S. 492, 495 (1896) ("intent

Premeditation is the crucial element of first-degree murder.[76] The element of premeditation distinguishes first-degree from second-degree murder.[77] "To premeditate a killing is to conceive the design or plan to kill."[78] Meditation upon a plan or design to kill is sufficient to establish the element of premeditation so long as it is done before the crime is actually committed.[79] Moreover, a thought beforehand, for any length

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necessary to constitute [premeditation and deliberation] need not have existed for any particular time before the act of killing"); *Flores*, 906 F.2d at 1301 (premeditation may be formed at any time, moment or instant before the killing); *Thomerson*, 835 F.2d at 1258 (premeditation and deliberation "can be formulated in the assailant's mind upon an instant") (quoting Shipman v. State, 478 S.W.2d 421, 422 (Ark. 1972)); Williams v. Nix, 751 F.2d 956, 961 (8th Cir.), ("[p]remeditation and deliberation need not exist for any particular length of time") (quoting State v. Fryer, 226 N.W.2d 36, 41 (Iowa 1975)), *cert. denied*, 471 U.S. 1138 (1985); United States v. Blue Thunder, 604 F.2d 550, 553 (8th Cir.) (to establish premeditation, "government was not required to show the defendant deliberated for any particular length of time before perpetrating the murder"), *cert. denied*, 444 U.S. 902 (1979); United States v. Brown, 518 F.2d 821, 826 (7th Cir.) (no particular period of time is necessary to establish premeditation; appreciable time for determination of premeditation and deliberation "does not require the lapse of days or hours, or even minutes") (quoting Bostic v. United States, 94 F.2d 636 (D.C. Cir. 1937), *cert. denied*, 303 U.S. 635 (1938)), *cert. denied*, 423 U.S. 917 (1975); *Lanclos*, 477 F.2d at 606 ("a brief moment of thought may be sufficient to form a fixed, deliberate design to kill").

75. Fryer v. Nix, 775 F.2d 979, 988 (8th Cir. 1985) ("[a]mong the essential elements of murder in the first degree are deliberation, premeditation, and a specific intent to kill"); *see also* Fisher v. United States, 328 U.S. 463, 464-65 (1946) ("[d]eliberation and premeditation are necessary elements of first degree murder"); United States v. Free, 841 F.2d 321, 325 (9th Cir.) ("[t]he essential elements of first-degree murder are: (1) the act or acts of killing a human being; (2) doing such act or acts with malice aforethought; and (3) doing such act or acts with premeditation"), *cert. denied*, 486 U.S. 1046 (1988); Beardslee v. United States, 387 F.2d 280, 291 (8th Cir. 1967) (premeditation and malice aforethought are both necessary elements for a first degree murder conviction).

76. United States v. Kelly, 1 F.3d 1137, 1140 (10th Cir. 1993) ("[p]remeditation is the only element which distinguishes first degree murder from second").

77. Jackson v. Virginia, 443 U.S. 307, 309 (1979) ("[p]remeditation, or specific intent to kill, distinguishes murder in the first from murder in the second degree"); *Beardslee*, 387 F.2d at 291 ("[g]enerally, that which distinguishes first from second degree murder is the presence in the former of premeditation").

Second-degree murder is murder not found in the first degree. 18 U.S.C. § 1111(a) (1988); *see also supra* note 47. Second-degree murder requires proof of malice aforethought, but lacks the premeditated and deliberate design to kill necessary for a first-degree murder conviction. United States v. Bordeaux, 980 F.2d 534, 536 (8th Cir. 1992); *Beardslee*, 387 F.2d at 292 ("second degree murder does not require a finding of premeditation but does require a finding of malice"). Malice may be established by evidence of reckless and wanton conduct. *Bordeaux*, 980 F.2d at 536. Any gross deviation from a reasonable standard of care which warrants an inference that the defendant was aware of serious risk of death or serious bodily injury may also establish malice aforethought. *Id.* For application of this doctrine, see generally *Bordeaux*, 980 F.2d at 536; Williamson v. Jones, 936 F.2d 1000, 1003 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 901 (interim ed. 1992); United States v. Johnson, 879 F.2d 331, 334 (8th Cir. 1989); United States v. Eder, 836 F.2d 1145, 1149 (8th Cir. 1988); United States v. Black Elk, 579 F.2d 49, 51 (8th Cir. 1978).

78. *Lanclos*, 477 F.2d at 606 (quoting Virgin Islands v. Lake, 362 F.2d 770 (3d Cir. 1966)).

79. Flores v. Minnesota, 906 F.2d 1300, 1301 (8th Cir.), *cert. denied*, 498 U.S. 945 (1990).

of time, no matter how short, will support a finding of premeditation.[80] It is not necessary for the accused to "brood over his plan to kill . . . for any considerable period of time."[81] A fixed, deliberate design to kill can be formed in an instant.[82]

Whereas premeditation describes the quantity of time a person will deliberate upon such action, deliberation describes the quality of the thought processes a person puts into formulating a design to kill.[83] A deliberate design to kill arises when the killing is "planned and reflected upon by the accused . . . in a cool state of blood."[84]

A deliberate, premeditated killing is considered the most serious form of murder because one who acts under such circumstances is considered "more dangerous, more culpable or less capable of reformation than one who kills on . . . impulse."[85] As such, one who takes a life with premeditation is more deserving of condemnation than one acting without a premeditated intent to kill.[86]

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80. Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986); see *supra* note 74 for a discussion of premeditation.

81. *Lanclos*, 477 F.2d at 606.

82. Thomerson v. Lockhart, 835 F.2d 1257, 1258 (8th Cir. 1987).

83. DRESSLER, *supra* note 72, at 458-59; see *supra* note 74 for a discussion of premeditation.

84. *Lanclos*, 477 F.2d at 606.

85. Bullock v. United States, 122 F.2d 213, 214 (D.C. Cir. 1941), *cert. denied*, 317 U.S. 627 (1942). Killing on impulse, in the heat of passion, or upon a sudden quarrel are distinguishing characteristics of manslaughter. United States v. Bordeaux, 980 F.2d 534, 537 (8th Cir. 1992). Manslaughter is the unlawful killing of a human being without malice, deliberation, and premeditation, and "is generally provoked or induced by anger, fear, inducement, terror, or rage." *Id.* The heat of passion, which reduces the classification of a killing to manslaughter, must be of the type which would naturally cause a reasonable person to act upon that impulse without deliberate and premeditated thought. *Id.; see also* Beardslee v. United States, 387 F.2d 280, 292 (8th Cir. 1967) ("[m]anslaughter requires a finding of killing upon sudden quarrel or heat of passion but does not require either premeditation or malice").

Manslaughter is defined in 18 U.S.C. § 1112. This section provides:

> (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary— Upon a sudden quarrel or heat of passion.
>
> Involuntary— In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.
>
> (b) Within the special maritime and territorial jurisdiction of the United States, Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years; Whoever is guilty of involuntary manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

18 U.S.C. § 1112 (1988).

86. *Bullock*, 122 F.2d at 214.

2. Proving Premeditation and Deliberation

Whether a defendant acted with deliberation and premeditation before taking a life is a question of fact.[87] The United States Constitution forbids the criminal conviction of any person "except upon proof of guilt beyond a reasonable doubt."[88] The United States Supreme Court articulated in *Jackson v. Virginia*:[89] "No person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."[90]

For a first-degree murder charge, the prosecution must prove, beyond a reasonable doubt, that the defendant acted with premeditation and deliberation.[91] A mere "suspicion or speculation" that the defendant committed a criminal act will not be sufficient to support the elements of first-degree murder.[92] Likewise, "presumptions" of an element of a crime are clearly unconstitutional because they are insufficient to establish guilt beyond a reasonable doubt.[93] Evidence of circumstances surrounding a crime, however, may be sufficient to support a conviction if, "when viewed in the light most favorable to the jury verdict, there is substantial evidence to support it."[94] Thus, as expressed in *Jackson*, the

87. United States v. Blue Thunder, 604 F.2d 550, 553 (8th Cir.), *cert. denied*, 444 U.S. 902 (1979); *Beardslee*, 387 F.2d at 290.

88. Jackson v. Virginia, 443 U.S. 307, 309 (1979) (citing *In re* Winship, 397 U.S. 358, 364 (1970)). In *In re Winship*, the Supreme Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a criminal defendant against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364. The Court emphasized that proof beyond a reasonable doubt separates criminal culpability and civil liability and "plays a vital role in the American scheme of criminal procedure." *Id.* at 358-63. The standard of proof beyond a reasonable doubt also gives "concrete substance" to the presumption of innocence, which ensures against the risk of unjust convictions. *Id.* at 363.

89. 443 U.S. 307 (1979).

90. *Id.* at 316.

91. *Id.* at 309 ("proof of [premeditation] is essential [for a] conviction of [first-degree murder], and the burden of proving it clearly rests with the prosecution").

92. United States v. Free, 841 F.2d 321, 325 (9th Cir. 1988) ("[t]he elements of first-degree murder can be established by circumstantial evidence and inferences drawn from it . . . [h]owever, mere suspicion or speculation cannot be the basis for the creation of logical inference"); *see also* Sandstrom v. Montana, 442 U.S. 510, 516-17 (1979) (a jury's presumption that the defendant deliberately killed is constitutionally deficient); Carter v. Jago, 637 F.2d 449, 456 (6th Cir. 1980) (a jury may infer from the given facts and circumstances the elements of murder; however, "presumptions of [such] elements[s] are clearly unconstitutional"), *cert. denied*, 456 U.S. 980 (1982). See *supra* note 75 for the necessary elements of a first-degree murder conviction.

93. *Sandstrom*, 442 U.S. at 516-17; *Jago*, 637 F.2d at 456.

94. United States v. Drape, 753 F.2d 660, 663 (8th Cir.), *cert. denied*, 474 U.S. 821 (1985). "While presumptions of an element are clearly unconstitutional, permissive inferences do not run afoul of the Constitution." *Id.*; *see also Jago*, 637 F.2d at 455-56; *Sandstrom*, 442 U.S. at 516-17.

standard for determining the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[95]

In *United States v. Blue Thunder*,[96] the United States Court of Appeals for the Eighth Circuit explained that "relevant evidentiary factors [may] be considered in determining the existence of premeditation."[97] The *Blue Thunder* court held that "[on] the basis of events before and at the time of the killing, the trier of fact will sometimes be entitled to infer that the defendant actually premeditated and deliberated his intentional killing."[98] The court identified three categories of evidence from which the trier of fact may infer that the defendant deliberated and premeditated his intentional killing:

> (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, planned activity; (2) facts about the defendant's prior relationship and conduct with the victim from which motive may be inferred; and (3) facts about the nature of the killing from which it may be in-

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95. *Jackson*, 443 U.S. at 319.

96. 604 F.2d 550 (8th Cir.), *cert. denied*, 444 U.S. 902 (1979).

97. *Id.* at 553; *see also* Mason v. Lockhart, 881 F.2d 573, 575 (8th Cir.) ("[p]remeditated and deliberated action may be inferred from the circumstances"), *cert. denied*, 493 U.S. 998 (1989); United States v. Brown, 518 F.2d 821, 826 (8th Cir.) ("[d]espite the difficulties in adducing proof as to a state of mind, premeditation and deliberation are susceptible to proof . . . [and] premeditation may be established by adducing evidence from the facts and circumstances surrounding the killing"), *cert. denied*, 423 U.S. 917 (1975).

98. *Blue Thunder*, 604 F.2d at 553; *see also* Thomerson v. Lockhart, 835 F.2d 1257, 1258 (8th Cir. 1987) ("[p]remeditation and deliberation need not be proven by direct evidence"); Way v. Wainwright, 786 F.2d 1095, 1096 (11th Cir. 1986) (premeditation may be inferred from circumstantial evidence).

For cases supporting the proposition that premeditation and deliberation may be inferred from the circumstances surrounding the crime, see Fisher v. United States, 328 U.S. 463, 466 (1946) (evidence of choking and strangling victim was sufficient to prove deliberation and premeditation); Wilkins v. Iowa, 957 F.2d 537, 542 (8th Cir. 1992) (evidence that defendant drew his gun, called victim's name, and shot him twice formed a specific intent to kill); *Mason*, 881 F.2d at 575 (evidence that defendant shot victim in the head shows that such action was premeditated and deliberate); *Thomerson*, 835 F.2d at 1259 (evidence of a severe beating that resulted in death constitutes proof of premeditation and deliberation); United States v. Slader, 791 F.2d 655, 657-58 (8th Cir.) (evidence that defendant shot his wife twice in the back of the head with a rifle that was usually kept unloaded establishes premeditation), *cert. denied*, 479 U.S. 964 (1986); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985) (evidence that defendant shot three shotgun blasts through windshield of officers patrol car after stating he was going to kill the next officer who stopped him is sufficient to show deliberation and premeditation), *cert. denied*, 475 U.S. 1020 (1986); Fryer v. Nix, 775 F.2d 979 (8th Cir. 1985) (one who makes a wrongful assault on another with a deadly weapon can be inferred to have acted with malice aforethought, when considered with all the evidence in the case); Virgin Islands v. Lanclos, 477 F.2d 603, 607 (3d Cir. 1973) (evidence that defendant shot victim several times when victim emerged from a building supports finding that shooting was premeditated and deliberate).

> ferred that the manner of the killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.[99]

The most important type of evidence the prosecutor can offer to establish premeditation and deliberation is planned activity.[100] A "jury is generally allowed to infer premeditation from the fact that the defendant brought a deadly weapon to the scene of the [crime]."[101] Furthermore, evidence that a defendant fired a weapon into a crowd of people[102] or had the presence of mind to dispose of the murder weapon constitutes premeditation and deliberation.[103]

In addition to establishing premeditation and deliberation from the circumstances surrounding the crime, a first-degree murder conviction requires establishing the necessary "mental state."[104] In this regard, two additional considerations provide assistance when considering premeditation and deliberation. First, criminal law presumes that every sane man intends the natural and probable consequences of his deliberate actions.[105] Absent evidence to the contrary, one who voluntarily

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99. *Blue Thunder*, 604 F.2d at 553.

100. *Id.*; *see also* DRESSLER, *supra* note 72, at 457.

101. *Blue Thunder*, 604 F.2d at 554. For cases supporting the general proposition that premeditation may be inferred from the fact that the defendant possessed a deadly weapon at the scene of the crime, see generally United States v. Free, 841 F.2d 321, 325 (9th Cir.) (circumstantial evidence which shows that the defendant carried a murder weapon to the crime scene proves premeditation), *cert. denied*, 486 U.S. 1046 (1988); *Way*, 786 F.2d at 1096 (premeditation may be inferred from circumstantial evidence, including the nature of the weapon used); United States v. Brooks, 449 F.2d 1077, 1084-85 (D.C. Cir. 1971) (evidence that defendant brought shotgun and a knife to the scene of the crime was sufficient to infer that killing was done with premeditation).

102. Tyler v. Phelps, 643 F.2d 1095, 1102 (5th Cir. 1981) (evidence that defendant fired into a crowd of people was sufficient to conclude defendant possessed an intent to kill), *cert. denied*, 456 U.S. 935 (1982); *see also* Procter v. Butler, 831 F.2d 1251, 1256 (5th Cir. 1987) (testimony by victim that he saw two shots fired directly at him, and that he saw the flash from the discharge of the weapon provided ample evidence to show defendant possessed the intent to kill as required for attempted first-degree murder), *cert. denied*, 488 U.S. 888 (1988); United States v. Shaw, 701 F.2d 367, 394 (5th Cir. 1983) (evidence that defendant shot at a passing car was sufficient to support defendant's conviction of first degree murder, notwithstanding defendant's testimony that he slipped and fell and shot into the air), *cert. denied*, 465 U.S. 1067 (1984); *Lanclos*, 438 F.2d at 330 (evidence that defendant fired a shotgun at a small house which he knew had three occupants inside was sufficient to support a first-degree murder conviction).

103. Flores v. Minnesota, 906 F.2d 1300, 1304 (8th Cir.), *cert. denied*, 498 U.S. 945 (1990).

104. *See infra* notes 107-14 and accompanying text.

105. Allen v. United States, 164 U.S. 492, 496 (1896); *see also Procter*, 831 F.2d at 1253; United States v. Brown, 518 F.2d 821, 828 (7th Cir.) ("[e]very sane man is presumed to intend the natural and probable consequences of his own act"), *cert. denied*, 423 U.S. 917 (1975); *Lanclos*, 477 F.2d at 606; Virgin Islands v. Jacobs, 438 F.2d 329, 331 (3d Cir.), *cert. denied*, 402 U.S. 976 (1971); Virgin Islands v. Lake, 362 F.2d 770, 776 (3d Cir. 1966).

acts to take another's life is presumed to have intended that result.[106] Second, the elements of premeditation and deliberation may be analyzed in terms of criminal intent, known as *mens rea*.[107] Section 2.02 of the Model Penal Code[108] (MPC) provides the general rule for criminal liability.[109] While the federal courts have not adopted the provisions of the MPC, many decisions do incorporate the mental states of culpability as provided in section 2.02 of the MPC.[110] Section 2.02 states that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each element of the offense."[111] These standards of culpability, the fed-

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106. *Lanclos*, 477 F.2d at 606 ("if one does . . . an act, the direct and natural tendency of which is to destroy another's life, it may fairly be inferred, in the absence of evidence to the contrary, that the destruction of that other's life was intended").

107. *Mens rea* is "a particular kind of intent . . . a criminal intent, that is, the intent to commit a crime . . . [an intent] to do that which, whether the defendant knew it or not, constitutes a breach of the criminal law." Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 686-87 (1983); *see also* United States v. Bailey, 444 U.S. 395, 403 (1980); Vick v. State, 453 P.2d 342, 344 (Alaska 1969) (defining *mens rea* as a guilty or wrongful purpose).

108. Fairness, precision, clarity, and rationality in the area of criminal law was significantly advanced in 1952 when the American Law Institute began to draft a penal code that would serve as a model for all states. DRESSLER, *supra* note 72, at 16. After completion of thirteen drafts, the American Law Institute published its Proposed Official Draft of the MPC in 1962. *Id.* at 17. Between 1962 and 1984, thirty-four states enacted completely new criminal codes, all of them influenced by the MPC. *Id.* The sixteen states which have failed to enact penal codes that reflect the internal consistencies of the MPC are: California, District of Columbia, Florida, Georgia, Maryland, Massachusetts, Michigan, Mississippi, New Mexico, North Carolina, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and West Virginia. Robinson & Grall, *supra* note 107, at 692 n.45.

109. Section 2.02 of the MPC sets out the "General Requirements of Culpability." MODEL PENAL CODE § 2.02 (1993). These general provisions of liability are extremely important because they establish elements of criminal offenses. *Id.* The prosecutor is required to prove that the defendant possessed a particular mental state regarding each material element of the offense. *Id.* Section 2.02 of the MPC has been described as perhaps the " 'single most important provision of the Code' and the most significant and enduring achievement of the Code's authors." Robinson & Grall, *supra* note 107, at 691.

110. *See e.g.*, Tyler v. Phelps, 643 F.2d 1095, 1102 (5th Cir. 1981) (defendant "knowingly" fired into a crowd of people), *cert. denied*, 456 U.S. 935 (1982) ; United States v. Shaw, 701 F.2d 367, 394 (5th Cir. 1983) (defendant "purposely" shot at a passing car), *cert. denied*, 465 U.S. 1067 (1984); *Lanclos*, 438 F.2d at 330 (defendant "knowingly" shot into a house that possessed three occupants). See *supra* note 72 for a discussion of malice aforethought which can be proven by "recklessness." See *supra* note 77 for a discussion of "recklessness" necessary to support a conviction for second-degree murder.

111. MODEL PENAL CODE § 2.02(1) (1993). According to the MPC, a person acts "purposely" if "he is aware of the existence of such circumstances or he believes or hopes that they exist." *Id.* § 2.02(2)(a)(ii). A person acts "knowingly" if "he is aware that it is *practically certain* that his conduct will cause such a result." *Id.* § 2.02(2)(b)(ii) (emphasis added). A person acts "recklessly" if "he *consciously disregards* a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Id.* § 2.02(2)(c) (emphasis added). Finally, a person acts "negligently" if "he *should be aware* of a substantial and unjustifiable risk that the [element exists or will result from his conduct]." *Id.* § 2.02(2)(d) (emphasis added).

eral case law which supports murder convictions based on circumstances surrounding a crime,[112] and the presumption that every sane man intends the natural and probable consequences of his actions[113] provide the basic framework necessary to analyze the *Wilson* court's decision.[114]

B. Sentencing Enhancements under the United States Sentencing Guidelines

Congress enacted the Sentencing Guidelines[115] in November 1987.[116] The Guidelines, which evolved from the Sentencing Reform Act of 1984[117] represented "an effort to rationalize the federal sentencing process and further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment and rehabilitation."[118] Re-

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112. *See supra* notes 96-103 and accompanying text.

113. *See supra* notes 105-06 and accompanying text.

114. United States v. Wilson, 992 F.2d 156, 157-59 (8th Cir.), *cert. denied,* 114 S. Ct. 242 (interim ed. 1993).

115. See *supra* note 38 for a discussion on the proper application of the Sentencing Guidelines.

116. Breyer, *supra* note 38, at 1; *see also* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 212(a), 98 Stat. 1837, 1987, 2008-09 (codified as amended at 18 U.S.C. § 3624 (Supp. IV 1986)); 1993 U.S.S.G., *supra* note 3.

117. 18 U.S.C. §§ 3551-3586 (1988 & Supp. III 1991); 28 U.S.C. §§ 991-998 (1988 & Supp. II 1990). The Sentencing Reform Act created the United States Sentencing Commission to design a federal guideline system. 28 U.S.C. § 991 (1988 & Supp. II 1990). The Act required that the Commission, comprised of seven members, including three federal judges, and appointed by President Reagan, write, by April 1987, guidelines to automatically take effect six months later unless Congress passed another law to the contrary. *Id.* See *infra* note 118 for a discussion of the purposes and compromises of the Sentencing Guidelines.

118. David Looney & Katherine Zimmerman, *Prison and its Alternatives,* 5 FED. SENT. REP. 209 (1993). In enacting the Sentencing Guidelines, Congress had two primary purposes. Breyer, *supra* note 38, at 4. The first purpose was to promote an "honest" sentencing system that provides certainty and fairness in determining appropriate punishment levels. *Id.* The second purpose was to promote the goal of avoiding "unwarranted" or "unjustifiably wide" sentencing disparities. *Id.* Bearing these principles in mind, the United States Sentencing Commission began drafting guidelines. *Id.* at 6.

Prior to the Sentencing Guidelines, federal judges possessed great discretion in determining the imposition of a sentence. 18 U.S.C. App. § 4 (1993). The sentencing courts and parole commissions took into account many factors and types of conduct in which the defendant was actually engaged, before determining the severity of the sentence. *Id.* Pre-sentence reports, along with testimony provided at sentencing hearings and before parole commissions, gave the pre-guideline sentencing system the appearance of a pure real offense system. *Id.*

A real offense system of sentencing "bases punishment on the element of the specific circumstances of the case." Breyer, *supra* note 38, at 10. This system requires that each added harm committed by an offender lead to an increased sentence. *Id.* Further, an increased sentence results "regardless of the charge for which [one] was indicted or convicted." 18 U.S.C. App. § 4 (1993). In contrast to a real offense system, the charge offense system "ties punishment directly to the offense for which the defendant was convicted." Breyer, *supra* note 38, at 9. Under a charge offense system, "[o]ne would simply look to the criminal statute . . . and read off the punishment provided in the sentencing guidelines." *Id.*

cently, however, the Sentencing Guidelines have been subject to severe criticism by judges and scholars.[119] One of the most controversial aspects of the Guidelines is "[their] reliance on unadjudicated conduct to determine proper punishment levels."[120] While federal courts continue to resist constitutional challenges[121] to punishment for nonconviction offenses,[122] critics remain steadfast in their opposition to sentence enhancements that effectively restrict an offender's right to liberty without due process of law.[123]

Critics argue that sentencing a defendant for uncharged criminal conduct raises serious constitutional concerns.[124] The ability to increase punishment by virtue of sentencing enhancements violates "the central role of [juries] . . . in the constitutional plan for the administration of justice."[125] The Sixth Amendment to the United States Constitution[126] provides that juries must determine questions of fact.[127] Thus, juries act to guarantee fundamental rights to individual liberty. As articu-

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Both the real offense and charge offense sentencing systems have inherent weaknesses. *Id.* at 9-11. A pure charge offense sentencing tends to disregard the fact that particular crimes may be committed in different ways. *Id.* at 9. Pure charge offense statutes generally fail to consider relevant factors about how a crime was committed, such as the cruelty a defendant showed to a victim. *Id.* at 9-10. Likewise, the pure real offense sentencing system often proves unworkable because it requires "decid[ing] precisely which harm to take into account [in determining a sentence], how to add them [sic] up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements." 18 U.S.C. App. § 4 (1993).

The disparities arising between the two types of sentencing systems resulted in a compromise. Lear, *supra* note 3, at 1194. The Sentencing Guidelines adopted a "modified" real offense system that contains a combination of real offense charges, but not to the level of becoming "unwieldy or procedurally unfair." Breyer, *supra* note 38, at 11. The Guidelines are a modified version of the two systems in the sense that the conviction offense charged secures the base sentencing offense level. *Id.* at 11-12. See *supra* note 38 for a description of base offense level. The base offense level is then determined according to specific circumstances surrounding the crime, such as aggravating or mitigating factors, relevant conduct, and previous criminal history. Breyer, *supra* note 38, at 6-7.

119. *See* Martin, *supra* note 4, at 192.

120. Lear, *supra* note 3, at 1179.

121. Lear, *supra* note 3, at 1183; *see also* cases cited *infra* note 136. These constitutional challenges are rooted in the Due Process Clause of the Fourteenth Amendment, which provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

122. *See infra* note 136.

123. Martin, *supra* note 4, at 192.

124. Lear, *supra* note 3, at 1181.

125. Lear, *supra* note 3, at 1185.

126. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . 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 defense.

U.S. CONST. amend. VI.

127. *Id.*

lated in *Jackson v. Virginia*,[128] "[i]t is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."[129] "A person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend [himself]."[130] Thus, there exists a due process right not to be sentenced based on unadjudicated claims.[131]

Despite the serious constitutional concerns raised by the Sentencing Guidelines,[132] the Supreme Court has never addressed the question of whether certain procedures within the Sentencing Guidelines violate the due process rights of a criminal defendant.[133] In *Burns v. United States*,[134] Justice Souter acknowledged that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."[135] Still, most constitutional challenges to a punishment for nonconviction offenses have been consistently rejected by the federal courts.[136] With the exception of the Ninth Circuit,[137] most federal ap-

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128. 443 U.S. 307 (1979).

129. *Id.* at 314; *see also supra* notes 87-95 and accompanying text (discussing the due process requirement that guilt be proved beyond a reasonable doubt).

130. *Jackson*, 443 U.S. at 314. The Fifth Amendment to the United States Constitution provides: "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

131. *Jackson*, 443 U.S. at 314.

132. *See supra* notes 119-31 and accompanying text.

133. *See* Lear, *supra* note 3, at 1183-84.

134. 111 S. Ct. 2182 (interim ed. 1991).

135. *Id.* at 2191 (Souter, J., dissenting) (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion)).

136. *See, e.g.*, United States v. Mobley, 956 F.2d 450, 457 (3d Cir. 1992) (defendant's due process argument "seeks to blur the distinction among a sentence, sentence enhancement, and definition of an offense"); United States v. Rivera-Lopez, 928 F.2d 372, 372-73 (11th Cir. 1991) (government's failure to prove all the elements of a drug-related offense did not preclude sentencing for that crime if evidence was established by a preponderance of the evidence); United States v. Dawn, 897 F.2d 1444, 1449-50 (8th Cir.) (jury acquittal on charge of using firearm "does not undermine the fact that a preponderance of the evidence supported the conclusion that a firearm was used during a robbery," and thus, possession of firearm was considered for purposes of sentencing), *cert. denied*, 498 U.S. 960 (1990); United States v. Restrepo, 903 F.2d 648, 653 (9th Cir. 1990) (judge's obligation to increase sentence under Guidelines does not violate due process), *cert. denied*, 112 S. Ct. 1564 (interim ed. 1992); United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989) (due process challenge dismissed because use of acquittal conduct was based on "flawed" assumption that acquittal conduct established defendant's innocence); United States v. McGhee, 882 F.2d 1095, 1098 (6th Cir. 1989) (sentencing enhancement for uncharged firearms possession was allowed over due process challenge because "[n]ot all factors that bear on punishment need to be proven before a jury").

137. *See* United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991) (sentencing judge was not allowed to punish defendant for conduct "that the jury has necessarily rejected by its judgement of acquittal"). The Eighth Circuit briefly considered disallowing punishment for nonconviction offenses. United States v. Galloway, 943 F.2d 897, 899-905 (8th Cir. 1991), *reh'g granted and opinion vacated*, 976 F.2d 422, 425 (8th Cir. 1992). The case was quickly overruled, however, and it was determined that nonconviction offense provisions were statutorily authorized and that

pellate courts have determined that sentences which rely upon unadjudicated claims impose no unconstitutional punishments on defendants.[138]

Several Supreme Court cases are pertinent to a consideration of whether nonconviction offense sentencing is constitutional. In 1949, the Supreme Court, in *Williams v. New York,*[139] held that the Due Process Clause does not require a sentencing judge to hold hearings nor does it require a sentencing judge to give a convicted person an opportunity to participate in those hearings.[140] Eighteen years later, in *Specht v. Patterson,*[141] the Supreme Court distinguished the *Williams* case, holding that a defendant who is found guilty of one crime and sentenced for another has been denied basic due process protections.[142] Most recently, in *McMillan v. Pennsylvania,*[143] the Supreme Court determined that the Due Process Clause merely requires proof by preponderance of the evidence[144] when determining sentencing considerations.[145] Since

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they did not violate the constitutional rights to indictment, jury trial, and proof beyond a reasonable doubt. United States v. Galloway, 976 F.2d 422, 425 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1420 (interim ed. 1993).

138. *See supra* notes 136-37. See *infra* note 144 for a list of cases allowing courts to use nonconviction offenses proven by a preponderance of the evidence to enhance sentences.

139. 337 U.S. 241 (1949).

140. *Id.* at 250-52. In *Williams*, Justice Black found nothing in the Due Process Clause that inherently limits a judge's discretion to consider uncharged and unproven conduct in determining a sentence. *Id.* at 242. Williams was convicted of first-degree murder and challenged his sentence to life imprisonment on the grounds that he had not been given "reasonable notice of the charges against him." *Id.* at 245. In rejecting Williams' claim, the Supreme Court suggested that sentencing is a unique phenomenon, which operates outside the strictures of constitutional protections. *Id.* at 246.

141. 386 U.S. 605 (1967).

142. *Id.* at 608. The Court stated: "We adhere to *Williams v. People of State of New York* . . . but we decline the invitation to extend it to this radically different situation." *Id.* at 608. In *Specht,* the defendant was convicted for indecent liberties under one Colorado statute carrying a maximum sentence of ten years, but was sentenced under a second statute. *Id.* at 607. The Court determined that the sentence was imposed for an offense not charged; thus the defendant "was entitled to a full judicial hearing before the magnified sentence was imposed." *Id.* at 609. The Court continued: "A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental and essential to a fair trial." *Id.* at 609-10.

143. 477 U.S. 79 (1986).

144. The preponderance of the evidence standard is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not." Greenwich Collieries v. Director, Office of Workers' Compensation Programs, 990 F.2d 730, 733 (3d Cir. 1993) (citing BLACK'S LAW DICTIONARY 1182 (6th ed. 1990)), *cert. granted,* 114 S. Ct. 751 (interim ed. 1994). The federal courts that have addressed the issue of standard of proof in sentencing hearings determined that sentencing factors need only be proven by a preponderance of the evidence. *See, e.g.,* United States v. Macklin, 927 F.2d 1272 (2d Cir.), *cert. denied,* 112 S. Ct. 146 (interim ed. 1991); United States v. Manor, 936 F.2d 1238 (11th Cir. 1991); United States v. Rivera-Lopez, 928 F.2d 372 (11th Cir. 1991); United States v. Dawn, 897 F.2d 1444 (8th Cir.), *cert. denied*, 498 U.S. 960 (1990); United States v. Dyer, 910 F.2d 530, 532 (8th Cir.) (ordinary,

Congress enacted the Sentencing Guidelines in 1987,[146] the Supreme Court has declined consideration of any case questioning the constitutionality of nonconviction offense sentencing.[147] The Court has acquiesced to the mandates of Congress,[148] the United States Sentencing Commission, and the Sentencing Guidelines themselves.[149]

IV. ANALYSIS

In *United States v. Wilson*,[150] the United States Court of Appeals for the Eighth Circuit addressed the issue of whether Richard Wilson demonstrated the premeditation and deliberation necessary to support an attempted first-degree murder conviction.[151] The first issue is whether Wilson's conduct and association with known felons constituted a deliberate, planned, and premeditated activity.[152] Reviewing the law in the Eighth Circuit, together with the evidence and circumstances surrounding the crime,[153] Wilson's activities do support the ap-

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familiar preponderance of the evidence standard is constitutionally sufficient standard of proof for sentencing proceedings under the Federal Sentencing Guidelines), *cert. denied*, 498 U.S. 949 (1990); United States v. Restrepo, 903 F.2d 648 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1564 (interim ed. 1992); United States v. Wright, 873 F.2d 437 (1st Cir. 1989).

145. *McMillan*, 477 U.S. 79. The *McMillan* Court stated:

> Indeed, it would be extraordinary if the Due Process Clause as understood in *Patterson* plainly sanctioned Pennsylvania's scheme, while the same Clause explained in some other line of less clearly relevant cases imposed more stringent requirements. There is, after all, only one Due Process Clause of the Fourteenth Amendment. Furthermore, petitioners do not and could not claim that a sentencing court may never rely on a particular fact in passing sentence without finding that fact by "clear and convincing evidence." Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. Pennsylvania has deemed a particular fact relevant and prescribed a particular burden of proof. We see nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing.

Id. at 91-92 (citation omitted).

146. *See supra* notes 115-18.

147. Lear, *supra* note 3, at 1183-84. While criminal defendants who challenge nonconviction sentence enhancements as violative of their due process rights often cite Specht v. Patterson, 386 U.S. 605 (1967), the case was decided prior to the enactment of the Sentencing Guidelines. Lear, *supra* note 3, at 1183-84. Federal judges, therefore, are bound to adhere to the Guidelines rather than following *Specht*.

148. Many federal judges urge that the Sentencing Guidelines need to be reevaluated. Martin, *supra* note 4, at 192. According to most judges, lawyers, and probation officers, the federal guideline system is not working well and substantial change is needed. *See generally* Marc Miller & Daniel J. Freed, *Suggestions for the President and the 103rd Congress on the Guideline Sentencing System*, 5 FED. SENT. REP. 187 (1993); *see also infra* notes 247-63 and accompanying text.

149. *See generally* Miller & Freed, *supra* note 148.

150. 992 F.2d 156, 158 (8th Cir.), *cert denied*, 114 S. Ct. 242 (interim ed. 1993).

151. *Id.*

152. See *supra* notes 73-86 and accompanying text for a discussion of the elements of premeditation and deliberation.

153. *See* cases cited *supra* notes 97-98.

pellate court's finding that he acted with premeditation and deliberation.[154] The court correctly determined that Wilson's actions, associating with those known to have been previously engaged in a shooting, supported a finding of premeditation and deliberation.[155]

Although premeditation and deliberation can be properly inferred from the circumstances surrounding the crime, the appellate court failed to consider the ramifications of sentencing Wilson for an offense that was never adjudicated.[156] As such, the *Wilson* court failed to address the propriety of sentence enhancements under the Sentencing Guidelines.[157] Accordingly, the *Wilson* decision raises the issue of whether the use of nonconviction offense sentencing is constitutionally permissible.[158] The Eighth Circuit upheld the district court which sentenced and imprisoned Richard Wilson based on attempted first-degree murder, an offense for which he was neither charged nor prosecuted.[159] As a result of the enhancement under the Sentencing Guidelines,[160] Wilson received roughly a threefold increase in his sentencing range.[161] The *Wilson* court, therefore, inappropriately applied the Guidelines and imposed a sentence for a crime not prosecuted by the government.[162] Considering the relevant political and social ramifications of nonconviction offense sentencing and the mounting criticism against the current Sentencing Guidelines, the *Wilson* case was inappropriately resolved because the Constitution does not permit sentencing a person for a nonconviction offense.[163]

A. Determining Premeditation and Deliberation by Association With Known Criminals

The *Wilson* court correctly determined that Richard Wilson's conduct demonstrated the elements of premeditation and deliberation which are essential to first-degree murder or attempted first-degree murder.[164] For a conviction under § 1111(a) of Title 18 of the U.S.C., the prosecution must prove that a killing was done unlawfully, with

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154. *Wilson*, 992 F.2d at 158.

155. *Id.*

156. *Id.*

157. *Id.*

158. See *supra* note 136 for a partial list of cases allowing nonconviction offense sentencing.

159. *Wilson*, 992 F.2d at 158. Wilson was charged with two counts of illegal possession of a handgun. *See supra* note 35.

160. See *supra* note 38 for a discussion on the proper usage of the Sentencing Guidelines.

161. *Wilson*, 992 F.2d at 159. Wilson's sentencing range was increased from 27-33 months to 79-97 months. *Id.*

162. *Id.*

163. *See infra* notes 200-54 and accompanying text.

164. *Wilson*, 992 F.2d at 158. See *supra* note 47 for the definition of first-degree murder.

malice aforethought, and in a deliberate and premeditated manner.[165] Circumstances surrounding the crime are often crucial and, in the context of first-degree murder, may establish sufficient proof of premeditation and deliberation.[166]

Wilson witnessed two men entering a house on Indiana Avenue.[167] He then saw the same two men leave with a shotgun, run down the street, and shoot a man.[168] Wilson watched the two assailants flee the crime scene in one car and return in another.[169] When the driver told Wilson to get in the car, he did so.[170] He did not, at any time, attempt to disassociate himself from the two assailants.[171] The vehicle traveled to 3630 Indiana Avenue, and when the driver told Wilson to shoot, he did.[172] Although there is some controversy as to whether Wilson attempted to commit first-degree murder, it is undisputed that he knew the severity of the situation he voluntarily entered.[173] Thus, the record reflects that Wilson knowingly and voluntarily entered a car with two men he knew were previously involved in a shooting.[174]

Whether Wilson was armed when he entered the vehicle or given the weapon once inside the vehicle is immaterial to the elements of premeditation and deliberation.[175] Wilson fired the gun when told to do so; therefore his conduct constituted a premeditated and planned action.[176] In *Thomerson v. Lockhart*,[177] the United States Court of Appeals for the Eighth Circuit reasoned that "premeditation and deliberation do not have to exist in the assailant's mind for any definite period of time."[178] A brief moment of thought beforehand, no matter how short, constitutes premeditation and deliberation.[179] Since firing a shotgun requires the deliberate act of pulling the trigger, it was necessary for Mr. Wilson to think about the shooting before he fired the gun,

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165. 18 U.S.C. § 1111(a) (1988); *see supra* note 47 and accompanying text.

166. United States v. Blue Thunder, 604 F.2d 550, 553 (8th Cir.), *cert. denied*, 444 U.S. 902 (1979).

167. *Wilson*, 992 F.2d at 158.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *See generally* United States v. Free, 841 F.2d 321, 325 (9th Cir.), *cert. denied*, 486 U.S. 1046 (1988); Way v. Wainwright, 786 F.2d 1095, 1096 (11th Cir. 1986); United States v. Blue Thunder, 604 F.2d 550, 554 (8th Cir.), *cert. denied*, 444 U.S. 902 (1979); United States v. Brooks, 449 F.2d 1077, 1084-85 (D.C. Cir. 1971).

176. *See, e.g., Way*, 786 F.2d at 1096.

177. 835 F.2d 1257 (8th Cir. 1987).

178. *Id.* at 1258.

179. *Id.*; *see supra* notes 80-82 and accompanying text.

albeit for a very brief period of time.[180] Thus, based on the theory that premeditation can be established by a brief moment of thought, the evidence in the *Wilson* case supports a finding of premeditation and deliberation.[181]

Examination of the criminal liability standards articulated in the MPC[182] offers justification for the *Wilson* court's determination that known prior association is sufficient to establish premeditation and deliberation.[183] Determination of a defendant's mental state under Section 2.02 of the MPC provides that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each element of the offense."[184] Wilson met all the requirements of the four mental states: purposely, knowingly, recklessly, and negligently.[185] Wilson knowingly and voluntarily entered a vehicle with two men who had just shot another man.[186] By voluntarily entering the vehicle with knowledge of the prior shooting, Wilson could have been practically certain that he would be participating in the subsequent drive-by shooting and likely to cause injury.[187] Furthermore, Wilson acted in conscious disregard of a substantial and unjustifiable risk by associating himself with men currently engaged in criminal conduct.[188] At the very least, Wilson should have known his actions were wrong.[189] While application of the MPC is not determinative of the issue, it provides additional support for the conclusion reached by the *Wilson* court: Wilson demonstrated both premeditation and deliberation.[190]

In addition to federal case law and the MPC which both support a conviction based on the circumstances surrounding the crime, one final consideration provides support for the *Wilson* court's holding that pre-

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180. See *supra* notes 101-02 for a partial list of cases in which evidence showing defendant possessed or fired a gun established premeditation and deliberation.

181. United States v. Wilson, 992 F.2d 156, 158 (8th Cir.), *cert. denied*, 114 S. Ct. 242 (interim ed. 1993).

182. See *supra* notes 108-09 and accompanying text for a discussion of the MPC.

183. *Wilson*, 992 F.2d at 157.

184. MODEL PENAL CODE § 2.02(1) (1993).

185. See *supra* note 111 for definitions of the four required mental states.

186. *Wilson*, 992 F.2d at 157.

187. Section 2.02 of the MPC provides that a person acts "knowingly" if "he is aware that it is *practically certain* that his conduct will cause such a result." MODEL PENAL CODE § 2.02 (1993) (emphasis added).

188. Section 2.02 of the MPC provides that a person acts "recklessly" if "he *consciously disregards* a substantial and unjustifiable risk that the material elements exist or result from his conduct." *Id.* § 2.02(a)(c) (emphasis added).

189. Negligent conduct under the MPC results if "[one] *should be aware* of a substantial and justifiable risk that the material elements will result from his conduct." *Id.* § 2.02(2)(d) (emphasis added).

190. *Wilson*, 992 F.2d at 158.

meditation and deliberation may be established by association with those known to have previously engaged in a criminal act.[191] The Supreme Court in *Allen v. United States*[192] stated that "every man is presumed to intend the natural and probable consequences of his own act."[193] Since premeditation and deliberation may be properly inferred from the character of the weapon used[194] and the manner in which the weapon is used, the fact that Mr. Wilson fired a gun into a crowd of people is sufficient to establish premeditation.[195] Firing a gun requires planned activity on the part of the assailant.[196] The natural and probable consequences presumed to flow from such a deliberate act is harm to another.[197] The nature of the crime, a drive-by shooting, and the weapon used, a short-barrelled, sawed-off shotgun, tend to support the conclusion that Mr. Wilson intended to harm or cause serious bodily injury to another human being.[198] Looking at the evidence presented by the prosecution in the light most favorable to the prosecutor, a rational trier of fact could have found beyond a reasonable doubt that Wilson demonstrated the requisite elements of premeditation and deliberation at the time he committed the offense.[199]

B. The Constitutionality of Nonconviction Offense Sentencing

The *Wilson* decision, although correct in its analysis of the elements of the crime, failed to consider whether application of the Sentencing Guidelines was constitutionally permissible.[200] By addressing only the issue of whether Wilson's conduct was deliberate and premeditated, the court failed to address this greater concern.[201]

The most troublesome result of application of the Sentencing Guidelines is that convictions often "encompass[] acts prohibited by criminal statute that have never been the subject of a formal convic-

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191. *Id.*

192. 164 U.S. 492 (1896).

193. *Id.* at 496.

194. United States v. Blue Thunder, 604 F.2d 550, 554 (8th Cir.), *cert. denied*, 444 U.S. 902 (1979).

195. *Wilson*, 992 F.2d at 158.

196. United States v. Slader, 791 F.2d 655, 657-58 (8th Cir.), *cert. denied*, 479 U.S. 964, (1986); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986); Fryer v. Nix, 775 F.2d 979, 990 (8th Cir. 1985).

197. Virgin Islands v. Lanclos, 477 F.2d 603, 606 (3d Cir. 1973).

198. *Id.*

199. *Wilson*, 992 F.2d at 158; *see also* Jackson v. Virginia, 443 U.S. 307 (1979) ("no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense").

200. *Wilson*, 992 F.2d at 158.

201. *Id.*

tion."[202] Punishment for conduct never charged "forms one of the mainstays of the fledgling federal system."[203] To allow courts to base sentencing on nonadjudicated conduct results in dramatic sentence enhancements.[204] By increasing sentencing powers, the Guidelines allow courts to sentence criminal defendants far beyond the punishment level appropriate to the crime for which they were convicted.[205] The net result, as observed by Judge Boyce F. Martin,[206] "is a system that is irrational, inhuman, and unchecked."[207]

Several federal courts of appeals have determined that sentences which rely on unadjudicated claims impose no unconstitutional punishments on defendants.[208] Examination of the procedural aspects of a sentencing hearing, however, raises grave doubts as to the validity of such a proposition.[209] Many traditional procedural safeguards available at trial are not available during sentencing hearings.[210]

At trial, it is necessary for the prosecution to persuade a jury of the guilt of the defendant beyond a reasonable doubt.[211] Furthermore, at trial, parties are bound by the rules of evidence. A sentencing hearing, on the other hand, only requires proof by a preponderance of the evidence.[212] Facts are determined by a judge, not a jury.[213] Furthermore, the rules of evidence do not apply at the sentencing stage.[214]

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202. Lear, *supra* note 3, at 1181.

203. Lear, *supra* note 3, at 1181.

204. Lear, *supra* note 3, at 1182-83; *see also* United States v. Galloway, 976 F.2d 414, 426 (8th Cir. 1992) (mere fact that defendant's term of punishment would be almost tripled as a result of application of the Sentencing Guidelines raises no due process concerns), *cert. denied*, 113 S. Ct. 1420 (interim ed. 1993); United States v. Humphries, 961 F.2d 1421, 1422 (9th Cir. 1992) (sentencing range of 21-27 months increased to 51-63 months was held appropriate even though defendant was not convicted of the conduct constituting the increased offense). *But see* United States v. Kikumura, 918 F.2d 1084, 1101-02 (3d Cir. 1990) (a twelve-fold increase in sentencing, from 27-33 months to 360 months was unconstitutional).

205. Dan Freed & Marc Miller, *Plea Bargained Sentences, Disparity and "Guideline Justice,"* 3 FED. SENT. REP. 175 (1991).

206. Judge Martin sits on the United States Court of Appeals for the Sixth Circuit.

207. Martin, *supra* note 4, at 192.

208. *See* cases cited *supra* notes 136-37.

209. William A. Norris, *Relevant Conduct: Sentencing Hearing As A Substitute For Jury Trial*, 5 FED. SENT. REP. 193 (1993).

210. *Id.; see also* United States v. Humphries, 961 F.2d 1421, 1422 (9th Cir. 1992) ("[n]ot all the procedural protections available in the guilt phase of a trial are necessary components of a sentencing hearing").

211. Jackson v. Virginia, 443 U.S. 307, 319 (1979); *In re* Winship, 397 U.S. 358, 364 (1970).

212. United States v. Dyer, 910 F.2d 530, 532 (8th Cir.), *cert. denied*, 498 U.S. 949 (1990). See *supra* note 144 for a partial list of those courts which allow a preponderance of the evidence standard at sentencing hearings.

213. United States v. Jacobo, 934 F.2d 411 (2d Cir. 1991).

214. United States v. Prescott, 920 F.2d 139, 144 (2d Cir. 1990) (allowing use of hearsay statements at sentencing).

Consequently, the defendant is not afforded the benefits of a full evidentiary hearing upon which to resolve disputes.[215] Further, by assigning different burdens of persuasion to the trial and the sentencing hearing for an identical criminal offense, the Sentencing Guidelines act to deprive criminal defendants of their fundamental right to trial by jury.[216]

In his concurring opinion in *Wilson*, Judge Heaney stated that the "uses of relevant conduct . . . in this case violate the offenders' rights to due process of law."[217] Judge Heaney also wrote a concurring opinion in *United States v. Fleming*[218] which attacked the constitutionality of nonconviction offense sentencing.[219] Judge Heaney stated: "This sentencing regime turns federalism on its head, but more importantly, it violates the offender's right to due process of law."[220] The thrust of Judge Heaney's argument in both *Wilson* and *Fleming* is that it is fundamentally unfair to consider uncharged conduct at sentencing.[221] Besides being denied his constitutional right of due process, a defendant who is sentenced for a crime, with which he has not been charged and for which he has not been convicted, is deprived of the "magnificent

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215. 1993 U.S.S.G., *supra* note 3, § 6A1.3(a). Parties are only "given an adequate opportunity to present information to the court" under the Sentencing Guidelines. *Id.* However, "[i]n resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial." *Id.*

216. Norris, *supra* note 209, at 193.

217. United States v. Wilson, 992 F.2d 156, 159 (8th Cir.) (Heaney, J., concurring), *cert. denied*, 114 S. Ct. 242 (interim ed. 1993).

218. 8 F.3d 1264 (8th Cir. 1993).

219. *Id.* In *Fleming*, the defendant was convicted and sentenced for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). *Id.* Just as the *Wilson* court applied § 2K2.1 of the Sentencing Guidelines for a cross-reference to attempted murder, the *Fleming* court likewise applied § 2K2.1 of the Sentencing Guidelines to cross-reference a charge of aggravated assault. *Id.* at 1266; *see also supra* note 41. The *Fleming* court ruled that the use of cross-referencing provisions were constitutional, and that the consideration of uncharged conduct in sentencing does not violate a defendant's constitutional rights if the government proves such conduct by a preponderance of the evidence. *Fleming*, 8 F.3d at 1267; *see also* United States v. Carroll, 3 F.3d 98, 102 (4th Cir. 1993) ("[t]he cross-reference [provisions of the Sentencing Guidelines] . . . and adjustments are no more than devices for measuring the seriousness of the offense and the conduct for which a sentence is imposed, factors which sentencing judges have routinely and historically taken into account when sentencing a defendant"); United States v. Smith, 997 F.2d 396, 397 (8th Cir. 1993) (cross-referencing provisions are constitutional); United States v. Humphries, 961 F.2d 1421, 1422-23 (9th Cir. 1992) (cross-referencing provisions are constitutional even though defendant was only charged with being a felon in possession of a firearm).

220. *Fleming*, 8 F.3d at 1267.

221. *Id.*; *Wilson*, 992 F.2d at 159.

benefits of liberty," a result proscribed by the Constitution of the United States.[222]

Similarly, Judge Myron Bright of the United States Court of Appeals for the Ninth Circuit has expressed the opinion that nonconviction offense sentencing "flagrantly violates the Constitution."[223] In his dissent in *United States v. Galloway*,[224] Judge Bright warned that the imposition of punishment for alleged crimes that have not been subject to notice, indictment, or trial violates the Fifth and Sixth Amendments to the United States Constitution.[225] The Fifth Amendment requires that a defendant receive fair notice by "presentment or indictment."[226] The Sixth Amendment requires that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury," and shall be informed of the "nature and cause of the accusation."[227]

The Sentencing Guidelines create a system in which the defendant is not informed of the nature of the charges against him until after a conviction or guilty plea.[228] By depriving a criminal defendant of his constitutional rights to fair notice and trial by jury, the Sentencing Guidelines degrade the role of the jury.[229] Such a system invites prosecutors to indict offenders for less serious offenses that can later be expanded by application of the Sentencing Guidelines. Thus, the system undermines and trivializes the law of evidence, the prosecution's burden of proof, and the United States Constitution.[230] Since a defendant has a constitutional due process right not to be sentenced on the basis of unadjudicated conduct,[231] sentencing someone for an offense that he has never been charged with, tried for, or convicted of is absurd under a system of justice which values the rights of individual liberty.[232] As

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222. United States v. Galloway, 976 F.2d 414, 444 (8th Cir. 1992) (Bright, J., dissenting), *cert. denied*, 113 S. Ct. 1420 (interim ed. 1993); *see also* United States v. Davern, 970 F.2d 1490, 1512 (6th Cir. 1992) (Merritt, J., dissenting) ("[t]o hold that the Sentencing Commission may or has validly established a sentencing system for [nonadjudicated] conduct which treats as 'irrelevant' the differences between conviction and nonconviction flies in the face of the Constitution"), *cert. denied*, 113 S. Ct. 1289 (interim ed. 1993).

223. *Galloway*, 976 F.2d at 437 (Bright, J., dissenting).

224. 976 F.2d 414.

225. *Id.*

226. U.S. CONST. amend. V. See *supra* note 130 for the text of the Fifth Amendment.

227. U.S. CONST. amend. VI. See *supra* note 126 for the text of the Sixth Amendment.

228. *Galloway*, 976 F.2d at 438.

229. *Id.*

230. United States v. Miller, 910 F.2d 1321, 1331 (6th Cir. 1990) (Merritt, J., dissenting), *cert. denied*, 498 U.S. 1094 (1991).

231. United States v. Landry, 709 F. Supp. 908, 912 (D. Minn. 1989); *see also* United States v. Fogel, 829 F.2d 77, 90 (D.C. Cir. 1987); United States v. Safirstein, 827 F.2d 1380, 1385 (9th Cir. 1987); *see generally* Norris, *supra* note 209.

232. Judge Myron Bright of the United States Court of Appeals for the Ninth Circuit writes: "[i]t is an embarrassing injustice that the United States, a country which prides itself on

articulated by Judge Bright, "[o]nly in the World of Alice in Wonderland, in which up is down and down is up, and words lose their real meaning, does [nonconviction offense sentencing] comply with the Constitution."[233]

C. The Modern Trend — A Better Approach to the Sentencing Guidelines

Recently, the United States Court of Appeals for the Third Circuit, in *United States v. Kikumura,*[234] determined that a clear and convincing standard[235] should be applied when the factors under the Sentencing Guidelines have a particularly dramatic impact on the sentence.[236] By adopting this higher standard of proof, the Third Circuit demonstrated the growing concern that nonconviction offense sentencing is repugnant to the basic principles of due process embodied in Constitution.[237] While a clear and convincing standard does afford substantially more protection than a preponderance of the evidence standard, it fails to protect as well as the standard of guilt beyond a reasonable doubt, which is constitutionally mandated for criminal trials.[238]

Both critics and proponents of the Sentencing Guidelines agree that change is needed.[239] Many argue that fundamental problems arise from application of the Guidelines because of their mandatory nature.[240] As such, the provisions of the Sentencing Guidelines "bind the conscience and discretion of [judges] without the benefit of clarity, uni-

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the protection and promotion of human rights abroad, incarcerates people, even first time offenders, for lengthy periods on the basis of rumor and innuendo." Miller & Freed, *supra* note 148, at 191.

233. *Galloway*, 976 F.2d at 437.

234. 918 F.2d 1084 (3d Cir. 1992).

235. A clear and convincing standard requires more proof than a preponderance of the evidence standard, but requires less proof than the "beyond a reasonable doubt" standard. Alexander v. Arkansas Sch. Dist., 464 F.2d 471, 474 (8th Cir. 1972). Clear and convincing proof may be shown where the truth of the facts asserted are highly probable." Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 810 (4th Cir. 1991); Kutter, Inc. v. Koch Supplies, Inc., 634 F. Supp. 705, 709 (W.D. Mo. 1986).

236. *Kikumura*, 918 F.2d at 1099-1102. In *Kikumura*, the defendant was convicted of several explosives and passport offenses, and the Sentencing Guidelines prescribed a sentencing range of 27-33 months imprisonment. *Id.* at 1089. Evidence produced at the sentencing hearing, however, indicated that Kikumura manufactured three lethal home-made firebombs. *Id.* Thus, the district court imposed a sentence of 30 years imprisonment. *Id.* Due to the dramatic twelve-fold increase in sentencing range, the court concluded that a clear and convincing standard of proof was required. *Id.* at 1099-1102.

237. *Id.*

238. *See* Jackson v. Virginia, 443 U.S. 307, 314 (1979).

239. *Id.*

240. Martin, *supra* note 4, at 192. Judge Martin states: "I believe that the fundamental problem of the sentencing guidelines arise from the fact that Courts of Appeals have made them mandatory." *Id.*

formity, or predictability."[241] The Sentencing Guidelines should provide standards that help a sentencing judge rather than "handcuff" his discretion.[242] If nonconviction offense sentencing guideline provisions were discretionary,[243] judges could consider relevant unadjudicated conduct at sentencing, but would not be forced to sentence defendants for nonconviction offenses.[244] This would better guarantee that criminal defendants be imprisoned only for conduct for which they have been charged, tried, and convicted in a court of law.[245] If, however, the Guidelines remain mandatory, to counter their impact on one's liberty interests, the federal circuits need to adopt, uniformly, a standard of proof that provides more protection to a defendant than the preponderance of the evidence standard.[246]

The courts and Congress alike must review the current federal sentencing system and act to cure the constitutional infirmities that abound in the Guidelines.[247] Unfortunately, the Sentencing Commission and the courts have failed in this regard, and "as they currently stand, the guidelines are merely law without justice."[248] The judiciary, however, seems reluctant to tamper with the Sentencing Guidelines. Such reluctance stems from the Supreme Court's assertion in *Minstretta v. United States*[249] that the Sentencing Commission and the Sentencing Guidelines are constitutional and binding.[250] While the judicial branch has a duty to declare unconstitutional any statute which conflicts with the United States Constitution, the Supreme Court and the federal circuit courts have acquiesced to Congress and the public policy considerations of a uniform federal criminal sentencing system.[251] Congress, therefore, is in the best position to cure the infirmities

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241. Martin, *supra* note 4, at 192.
242. Martin, *supra* note 4, at 192.
243. Martin, *supra* note 4, at 192.
244. Martin, *supra* note 4, at 192.
245. Martin, *supra* note 4, at 192.
246. *See generally* Norris, *supra* note 209.
247. Miller & Freed, *supra* note 148, at 188.
248. Martin, *supra* note 4, at 192.
249. 488 U.S. 361 (1989).
250. *Id.* at 364. The *Minstretta* Court concluded: "Congress . . . has the power to fix the sentence for a federal crime . . . and . . . the scope of judicial discretion with respect to a sentence is subject to congressional control." *Id.* A law produced by congressional enactment and presidential approval has a strong presumption of constitutionality. Rostker v. Goldberg, 453 U.S. 57, 64 (1981). As articulated in United States v. Jimenez, 708 F. Supp. 964 (D. Ind. 1989) "ruling on the constitutionality of a congressional act is the 'gravest and most delicate duty that a court is called upon to perform.' " *Id.* at 965 (citation omitted).
251. *See* Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 YALE L.J. 1681, 1686 (1992); *see also* Breyer, *supra* note 38, at 8-12.

of the guidelines,[252] to provide adequate procedural protections at sentencing hearings,[253] and to restore order to what one commentator characterizes as an "incredibly insane, complicated system."[254]

V. CONCLUSION

The Sentencing Guidelines, now in their sixth year of use, are not working well.[255] In enacting the Guidelines, Congress made a noble effort to further the basic goals of criminal punishment: deterrence, incapacitation, punishment, and rehabilitation. Unfortunately, these goals have yet to be realized.[256] Judge John Noonan of the United States Court of Appeals for the Ninth Circuit believes that "if the judges of the United States could vote, the guidelines would be repealed."[257] But while the Guidelines have problems of dramatic proportion, not everyone is in agreement on how to resolve these problems.

Substantial change is needed to eliminate the possibility of sentencing an individual based upon unadjudicated conduct.[258] To impose a nonconviction offense sentence upon a defendant is unfair and unconstitutional.[259] It produces a complex and often-manipulated system of justice, "which results in enormous costs of prosecution and incarceration, but [has] little impact on crime or its sources."[260] A mandatory system of sentencing based on nonconviction offenses, therefore, must be eradicated. Absent a conviction, courts should have no authority to impose punishment. A conviction should be a mandatory prerequisite for sentencing, not vice versa. By eliminating nonconviction offense provisions from the Sentencing Guidelines, the guidelines would better serve the intended purposes of honesty, consistency, and integrity.

Another necessary change is that the constitutionally mandated evidence standard of "proof beyond a reasonable doubt" must be re-

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252. Judge Norris of the United States Court of Appeals for the Ninth Circuit explains:

> [i]t is conceivable that the Sentencing Commission and the judiciary may yet erect, plank by plank, a structure more protective of a defendant's liberty interests, but in light of the guidelines and case law as they seem to be developing, the Congress offers the only realistic hope for a course correction in the foreseeable future.

Miller & Freed, *supra* note 148, at 188.

253. To compensate for the acquiescence of the judiciary, Congress must mandate adequate procedural safeguards at sentencing. Martin, *supra* note 4, at 192.

254. Chris Carmody, *Sentencing Overload Hits the Circuits*, NAT'L L.J., Apr. 5, 1993, at 1.

255. Judge Eisele writes: "In my 22 years on the bench I cannot recall any legislation that has so pervasively affected, and disrupted the federal courts of this nation—both trial and appellate—and so bogged those courts down in meaningless, time consuming, mechanical nonsense." Miller & Freed, *supra* note 148, at 239.

256. Looney & Zimmerman, *supra* note 118, at 209.

257. Miller & Freed, *supra* note 148, at 187.

258. Miller & Freed, *supra* note 148, at 187.

259. Miller & Freed, *supra* note 148, at 187.

260. Looney & Zimmerman, *supra* note 118, at 209.

quired for all sentencing hearings. Any lower standard of proof does not adequately protect the defendant.[261] Additionally, by requiring proof beyond a reasonable doubt at sentencing hearings, use of nonconviction offense sentencing provisions of the Sentencing Guidelines would be dramatically reduced. Use of this burden of proof would require full evidentiary hearings for all charged offenses.[262] It would also limit the judiciary's ability to sentence defendants for crimes with which they were never charged, and would adequately put defendants on notice of the crimes for which they may be convicted.[263]

Aside from stretching the principle of fairness beyond constitutional boundaries,[264] the use of nonconviction offense sentencing dehumanizes the individual trapped in the federal criminal process.[265] It also undermines a system of justice that prides itself on the guarantees of individual liberty.[266] By requiring sentencing courts to provide defendants with adequate notice and jury trials to determine guilt beyond a reasonable doubt, virtually all due process inquiries into the Sentencing Guidelines' nonconviction offense provisions would be eliminated, and justice could be restored to the federal criminal system.[267]

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261. *See* Jackson v. Virginia, 443 U.S. 307, 314 (1979).

262. *See* Burns v. United States, 111 S. Ct. 2182, 2193 (interim ed. 1991) (Souter, J., dissenting) (a defendant has a constitutionally protected liberty interest in correct application of the guidelines).

263. United States v. Galloway, 976 F.2d 414, 438 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1420 (interim ed. 1993).

264. *See supra* notes 228-33 and accompanying text.

265. *See Galloway*, 976 F.2d at 444 (Lay, J., dissenting).

266. Martin, *supra* note 4, at 192.

267. *Galloway*, 976 F.2d at 436-38.