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GETTING TIME FOR AN ACQUITTED CRIME: THE UNCONSTITUTIONAL USE OF ACQUITTED CONDUCT AT SENTENCING AND NEW YORK'S CALL FOR CHANGE

*Megan Sterback**

I. INTRODUCTION

In 2005, Mark Hurn's home in Wisconsin was raided by police resulting in his arrest and indictment on charges of possessing fifty or more grams of cocaine base with intent to distribute, violating 21 U.S.C. § 841(a).¹ At trial, Hurn's live-in girlfriend testified that the cocaine base belonged to other people living in his home.² After two days, the jury convicted him of possession of cocaine, but acquitted him of the cocaine base offenses.³ For his possession conviction, Hurn should have faced a sentence between twenty-seven and thirty-three months under the Federal Sentencing Guidelines ("Guidelines").⁴ However, the sentencing judge treated Hurn as guilty of the cocaine base charge and he was sentenced to 210 months in prison.⁵

On appeal, the Seventh Circuit acknowledged that Hurn's sentence was based almost entirely on acquitted conduct, but failed to conduct a constitutional analysis.⁶ The Court instead followed Supreme Court precedent and held that "the district court's use of acquitted conduct did not violate Hurn's Sixth Amendment or [D]ue [P]rocess rights."⁷ On March 31, 2008, the Supreme Court declined

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¹ United States v. Hurn, 496 F.3d 784, 786 (7th Cir. 2007).

² *Id.*

³ *Id.* at 785.

⁴ *Id.* at 786.

⁵ *Id.* at 787.

⁶ *Hurn*, 496 F.3d at 788 ("[A]cquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." (quoting *United States v. Watts*, 519 U.S. 148, 155 (1997) (internal quotations omitted))).

⁷ *Id.* at 789.

to consider Hurn's appeal and the federal rule allowing acquitted conduct to be considered as a relevant factor in sentencing remains.⁸

In all federal sentencing proceedings, the judge is permitted to enhance a defendant's sentence based on conduct, which he was acquitted of at trial, if that conduct can be shown by a preponderance of the evidence.⁹ However, the leading Supreme Court case, *United States v. Watts*,¹⁰ which established the rule permitting the consideration of acquitted conduct during the sentencing phase, conducted an insufficient evaluation and analysis of Sixth Amendment concerns and the policy arguments against such practice.¹¹

In 2005, the Court in *United States v. Booker*¹² addressed the constitutionality of the use of acquitted conduct at sentencing and whether the Guidelines, as interpreted, violated the Sixth Amendment by allowing judges to take on the role of fact-finder on issues that the government failed to prove beyond a reasonable doubt.¹³ In *Booker*, the Court set forth two separate majority opinions: one opinion on the merits and another regarding remedies.¹⁴ The Court held that the Guidelines violated the Sixth Amendment on the merits, and in the remedial opinion the Court simultaneously held the Guidelines to be valid as advisory.¹⁵ *Booker* did not affect the holding in *Watts* nor overrule it; but the question remains whether *Booker* should be interpreted as declaring the use of acquitted conduct in sentencing a violation of a defendant's right to a trial by an impartial jury under the Sixth Amendment of the United States Constitution.¹⁶

Although the federal circuits generally adhere to the federal rule as proscribed by *Watts*, "there is a growing chorus—from the bench and bar—calling into question the constitutionality and fundamental fairness of this rule, which has been called a 'repugnant' and [a] 'uniquely malevolent' aspect of the current federal sentencing re-

⁸ Hurn v. United States, 552 U.S. 1295 (2008).

⁹ *Watts*, 519 U.S. at 157.

¹⁰ 519 U.S. 148 (1997).

¹¹ *Id.* at 154. In *Watts*, the United States Supreme Court held that acquitted conduct used in consideration at sentencing is "consistent with the Double Jeopardy Clause." *Id.*

¹² 543 U.S. 220 (2005).

¹³ *Id.* at 245.

¹⁴ *See id.* at 220.

¹⁵ *See id.* at 226.

¹⁶ *See id.* at 240.

gime.”¹⁷ New York courts have recently expressed distaste for the federal rule and have reversed sentences that relied on evidence of acquitted conduct at sentencing.¹⁸ This Comment will focus on federal cases and New York state court decisions that have illustrated the concern over the federal rule. Part II will give a background and history of the Guidelines and its application. Part III will provide an analysis of the current federal rule as established in *United States v. Watts*. Part IV will illustrate the need for change and the argument that the federal rule is unconstitutional by examining recent decisions in the New York Court system rejecting the federal rule.

II. BACKGROUND AND HISTORY

Our criminal justice system imposes punishment upon those defendants who are afforded the right to a trial by jury and a conviction by the standard of proof beyond a reasonable doubt.¹⁹ However, federal judges are permitted to enhance a defendant’s sentence based on conduct from which he was acquitted at trial if that conduct can be shown by a preponderance of the evidence.²⁰ The Supreme Court case establishing this rule, *United States v. Watts*, led to difficulty in application among the courts and constitutional concerns due to an insufficient analysis of the Sixth Amendment and lack of guidance on the proper scope of allowing adjudicated conduct to weigh in on a defendant’s sentence.²¹ In an effort to clarify the issue, the Court considered whether the Guidelines violated the Sixth Amendment by allowing judges to reevaluate issues that the government failed to prove beyond a reasonable doubt at trial in the 2005 case *United States v. Booker*.²²

¹⁷ Eric Tirschwell & Michael Eisenkraft, *Use of Acquitted Conduct in Federal Sentencing*, 242 N.Y. L.J. 4 (2009) (citing *Watts*, 519 U.S. 148 (Stevens, J., dissenting)); *United States v. Canania*, 532 F.3d 764 (8th Cir. 2008) (Bright, J., concurring)).

¹⁸ See *People v. Black*, 821 N.Y.S.2d 593, 596 (N.Y. App. Div. 2006) (stating that “[t]his [c]ourt has repeatedly held that a sentencing court may not base its sentence on crimes of which the defendant was acquitted”); *People v. Varlack*, 687 N.Y.S.2d 93, 96 (N.Y. App. Div. 1999) (“The court abused its discretion in sentencing defendant as a persistent felony offender on the robbery count, because the court wrongly took into account the charges of which defendant was acquitted.”).

¹⁹ U.S. CONST. amend. VI.

²⁰ *Watts*, 519 U.S. at 157.

²¹ *Id.* at 154.

²² *Booker*, 543 U.S. at 245.

A. Pre-Guidelines

Before the Federal Sentencing Guidelines were imposed, judges had virtually unlimited discretion in sentencing and it was difficult, if not impossible, to determine the motivations behind a judge's sentence.²³ In *Williams v. New York*,²⁴ the Supreme Court sanctioned the use of acquitted conduct in sentencing for the first time.²⁵ Subsequently, judges grew accustomed to the practice of individualized sentencing to reflect the accused and not the *crime* accused.²⁶ The sentencing system was grounded on judicial discretion in support of indeterminate sentencing.²⁷ Criticism of the “ ‘almost wholly unchecked and sweeping’ ” powers of the judiciary rapidly developed.²⁸ In response, Congress enacted the Sentencing Reform Act of 1984.²⁹ The Act created the United States Sentencing Commission, consisting of seven members appointed by the President and confirmed by Congress, to come up with the guidelines sentencing system.³⁰

B. The Creation of the Guidelines: Charge Offense vs. Real Offense System

The Commission was created to provide a fair system of sentencing and had to decide whether to promote a charge offense system or a real offense system of sentencing.³¹ A “charge offense” system is where a defendant's conviction is a direct result of his sentence.³² On the other hand, a “real offense” system allows judges

²³ See *United States v. Grayson*, 438 U.S. 41, 55 (1978) (Stewart, J., dissenting).

²⁴ 337 U.S. 241 (1949).

²⁵ See generally *id.*

²⁶ See *id.* at 247.

²⁷ See *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

²⁸ Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 (1993) (quoting MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973)).

²⁹ *Id.* at 224.

³⁰ 28 U.S.C.A. § 991 (West 2010) (effective Oct. 13, 2008).

³¹ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-9 (1988).

³² U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subsec. 1 (2009) (defining a “charge offense” as a sentence being based “upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted”).

to consider all parts and factors surrounding the event or offense of which the conviction was based.³³

The “charge offense” is a very systematic and straightforward approach where a pre-determined punishment for a crime in which a defendant has been convicted is issued.³⁴ While there is much to be gained from this model, it does not allow consideration of the context and individuality of specific events.³⁵ The “charge offense” model addresses consistency and discretion problems, but is too objective in that it does not distinguish between the individual defendants and their crimes.³⁶ It is uncharacteristic of our criminal justice system to impose the same sentence for a defendant who is convicted of a heinous and unusually malicious murder and a defendant who commits a heat-of-blood murder.³⁷ The “charge offense” system accomplishes a certain level of fairness procedurally, but it is inadequate to serve as an effective model of punishment on a case-by-case basis.³⁸

The “real offense” system is based on an ideology from the other side of the spectrum. This model primarily focuses on the individual case and underlying factors of each crime.³⁹ Here, the opposite problems are presented. This model does virtually nothing to curtail a judge’s discretion, allowing the court to apply a lower standard of proof in deciding what conduct can be considered in punishing a defendant.⁴⁰ Moreover, it is inconsistent with the Federal Rules of Evidence and federal procedural rules, which provide limitations.⁴¹

Ultimately, the Sentencing Commission produced a complex model system of sentencing called the Federal Sentencing Guide-

³³ *Id.* (defining a “real offense” as a sentence being based “upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted”).

³⁴ Breyer, *supra* note 31, at 9.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 9-10. Compare *People v. Fink*, 674 N.Y.S.2d 793, 794-95 (N.Y. App. Div. 1998) (holding that the defendant’s sentence of twenty-five years to life in prison was not an abuse of the county court’s discretion because the defendant had committed a “brutal and senseless” murder), with *People v. Lewis*, 123 N.Y.S.2d 81, 87 (N.Y. App. Div. 1953) (holding that the defendant’s sentence for manslaughter in the first degree should be reduced to seven and one-half to fifteen years in prison because the defendant had acted in the heat of passion).

³⁸ Breyer, *supra* note 31, at 9-10.

³⁹ *Id.* at 10.

⁴⁰ *Id.* at 11.

⁴¹ *Id.*

lines.⁴² Despite the original concern of broad judicial discretion that the Sentencing Commission was designed to solve, it adopted a quasi-real offense system.⁴³ When the Commission was created by Congress, its duty was to “provide certainty and fairness in [congruence with] the purposes of sentencing, avoiding unwarranted sentencing disparities *among defendants with similar records who have been found guilty of similar criminal conduct*.”⁴⁴ However, under the regime set forth by the Commission, the relevant conduct of an offense has been interpreted to include conduct of which a criminal defendant was acquitted.⁴⁵ In other words, the court is permitted to consider almost any conduct surrounding a case. The broad and unlimited interpretation of the term relevant has more or less reinvented some of the same sentencing disparities that the Commission was created to eliminate.

C. Relevant Conduct as Defined by the Guidelines

There is a longstanding principle that a sentencing court has broad discretion to consider factors and conduct that may have been inadmissible evidence at trial.⁴⁶ The Guidelines incorporated relevant conduct, which a judge is permitted to consider at sentencing, into sections 1B1.3 and 1B1.4 of the Sentencing Guidelines.⁴⁷ The range of conduct that is permissible for a judge to consider at the sentencing phase includes unlawful acts or omissions occurring in relation to the

⁴² Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 245 (2009).

⁴³ See David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 418 (1993) (stating that while a judge under the old system had discretion to consider real offense conduct, he “was not *required* to take into account any real-offense behavior, as would be the case with binding sentencing guidelines incorporating real-offense sentencing”).

⁴⁴ U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 11 (2004), available at http://www.ussc.gov/15_year/15_year_study_full.pdf.

⁴⁵ See *United States v. Poyato*, 454 F.3d 1295, 1297 (11th Cir. 2006) (holding that the Guidelines require sentencing courts to consider whether the defendant possessed a firearm because possession constitutes “relevant conduct” for sentencing).

⁴⁶ See 18 U.S.C.A. § 3661 (West 2009) (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”); see also *Watts*, 519 U.S. at 151.

⁴⁷ See *Watts*, 519 U.S. at 151-52.

offense of conviction deemed vital in determining the defendant's culpability.⁴⁸ This definition encompasses uncharged and unadjudicated conduct that occurred in relation to a defendant's conviction as relevant to the determination of an appropriate punishment, but the use of acquitted conduct at sentencing is not explicitly addressed in the Guidelines.⁴⁹ It was the Court in *Watts* that established acquitted conduct as permissible under the scope of evidence to be considered during sentencing.⁵⁰ Acquitted conduct is an act "for which the offender was criminally charged and formally adjudicated not guilty, typically by the finder of fact after trial."⁵¹ While there is an obvious difference between unadjudicated "other act" evidence and acquitted conduct, *Watts* has put both on equal grounds at sentencing.

D. The Guidelines System Applied

The Sentencing Commission Guidelines Manual provides a Sentencing Table that is used to calculate an appropriate sentencing range for individualized conduct based on a period within the statutory sentencing range of the convicted conduct.⁵² The Table consists of a vertical and horizontal axis, which graphs a range according to the offense level of the conviction and the criminal history category, respectively.⁵³

Before a judge sentences a defendant, the probation department typically recommends a sentence to the judge based upon the mandates provided in the Sentencing Guidelines.⁵⁴ The Sentencing Guidelines table consists of forty-three offense levels and six criminal history categories, making up a table of 258 sentencing ranges.⁵⁵

The probation department then hands over a calculation to the

⁴⁸ See Barry L. Johnson, *If At First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 159-60 (1996); see U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(B) (2010) (stating that a defendant is to be held accountable for all criminal activity "whether or not charged as a conspiracy").

⁴⁹ See *id.* at 160.

⁵⁰ *Watts*, 519 U.S. at 157.

⁵¹ See Johnson, *supra* note 48, at 157.

⁵² U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2010).

⁵³ See *id.*

⁵⁴ See *id.* § 1B1.1 (2009).

⁵⁵ *Id.* ch. 5, pt. A.

sentencing judge who holds a hearing where both parties can argue the recommendation.⁵⁶ The judge ultimately determines the applicable range and typically sentences a defendant to a term within the formulated Sentencing Guidelines range.⁵⁷

E. The Justification and Purpose of Sentencing

The significance of punishment, in relation to our criminal justice system, has been justified in many different shades. Punishment has been said to enforce sovereign authority.⁵⁸ It has also been characterized as a specific deterrent.⁵⁹ One goal of punishment is rehabilitation.⁶⁰ Rehabilitation is the theory that punishment is the appropriate vehicle to transform a delinquent member of society into a law abiding citizen.⁶¹ While the pre-Guidelines approach allowed a judge to use unlimited discretion in sentencing, the Guidelines only allow the judge to consider factors of relevant conduct.⁶² For example, unlike the prior regime, a judge cannot consider certain personal information such as employment facts, psychological background, and family background under the Guidelines.⁶³ Therefore, the Guidelines effectively rejected rehabilitation as a goal of punishment because the judge is no longer considering the individual needs of the defendant in terms of rehabilitation.⁶⁴ The Commission was directed to ensure that “the guidelines reflect the *inappropriateness* of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant.”⁶⁵ However, the Guidelines seem to be more concerned with what the crime is worth rather than what methods would rehabilitate the individual defendant.⁶⁶ “[C]urrent practices

⁵⁶ Erica K. Beutler, *A Look At The Use Of Acquitted Conduct In Sentencing*, 88 J. CRIM. L. & CRIMINOLOGY 809, 813 (1998).

⁵⁷ *Id.* at 813-14.

⁵⁸ Elizabeth E. Joh, “*If it Suffices to Accuse*”: United States v. Watts and the Reassessment of Acquittals, 74 N.Y.U. L. REV. 887, 887 (1999).

⁵⁹ *Id.*

⁶⁰ *See id.* at 890.

⁶¹ *Id.* at 890-91.

⁶² *See* Beutler, *supra* note 56, at 810, 812-14.

⁶³ *See* 28 U.S.C.A. § 994(d) (West 2010) (effective Oct. 6, 2006).

⁶⁴ *See id.* § 994(k).

⁶⁵ *Id.* (emphasis added).

⁶⁶ Joh, *supra* note 58, at 900 (stating that “the Sentencing Guidelines and other contemporary penal practices indicate that while the offender must ‘pay for’ and be responsible for his

tend to treat offenders as equally situated, rational, responsible actors or aggregates of statistical information.”⁶⁷

For all purposes of punishment, the common thread is the message that the punishment will send to society. “Sensitive to shifts outside of the courtroom, and the prison, penal practices often reflect the dominant social themes of the moment.”⁶⁸ However, it seems to be less emphasized in the courts that punishment can also *create* social themes.⁶⁹

Moreover, “[p]unishment plays a powerful teaching function.”⁷⁰ The practice and policy of sentencing and punishment affects the way society reflects upon itself and its members’ actions.⁷¹ Therefore, “[i]f punishment both reflects and constitutes social knowledge, then practices of punishment ought to be interpreted as representations and reflections of social values.”⁷² It can be generally inferred that our society values the right to a trial by jury. Allowing the use of acquitted conduct at sentencing does not reflect the purpose and significance of that fundamental right.

III. THE FEDERAL RULE: *APPENDI, WATTS, BOOKER*, AND APPLICATION IN THE FEDERAL CIRCUIT COURTS

A. Background and Justification of *United States v. Watts*

In *United States v. Watts*, the Court decided that acquitted conduct can be used to enhance a sentence for a conviction on another charge as long as that evidence can be proved by preponderance of the evidence.⁷³ In *Watts*, the defendant was charged with possessing cocaine base with intent to distribute and using a firearm in relation to a drug offense.⁷⁴ Both charges were deemed to violate statutory

conduct, attempts at reforming the offender will be of secondary or of no importance”).

⁶⁷ *Id.* at 892.

⁶⁸ *Id.* at 888.

⁶⁹ *Id.* at 887-88.

⁷⁰ *Id.* at 902.

⁷¹ Joh, *supra* note 58, at 902.

⁷² *Id.* at 903.

⁷³ *Watts*, 519 U.S. at 157.

⁷⁴ *See id.* at 149-50.

provisions.⁷⁵ At trial, Watts was convicted of the possession charge, but acquitted on the charge of using a firearm in relation to a drug offense.⁷⁶ At sentencing, the district court found, by a preponderance of the evidence, that Watts did in fact use a firearm in relation to the drug offense.⁷⁷ Upon the court's own interpretation of the facts, Watts' sentence was enhanced accordingly.⁷⁸ The court of appeals vacated the sentence and reasoned that the district court rejected the jury's determination of facts.⁷⁹ The Supreme Court granted certiorari and reversed the court of appeals' decision by reinstating the district court's enhanced sentence.⁸⁰

Initially, the Supreme Court turned to 18 U.S.C. § 3661 and the principle that courts should have broad discretion in what information is considered for the purpose of imposing a sentence.⁸¹ The Court also relied on the "encouragement" of the Sentencing Guidelines to factor in "all other related conduct, whether or not it resulted in a conviction."⁸² Finally, the Court relied on its decision in *Witte v. United States*.⁸³ In *Witte*, the Court held that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted."⁸⁴

As a result of this analysis, in a per curiam decision, the majority in *Watts* established the rule allowing consideration of conduct underlying an acquitted charge in sentencing if it is shown by a preponderance of the evidence.⁸⁵ The majority did not consider the role or importance of the jury in our criminal justice system, a defendant's

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 150.

⁷⁸ *Watts*, 519 U.S. at 150.

⁷⁹ *Id.*

⁸⁰ *Id.* at 157.

⁸¹ *Id.* at 151. See also 18 U.S.C.A. § 3661 (stating that "[n]o limitation shall be placed on the information concerning . . . conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence").

⁸² *Watts*, 519 U.S. at 154.

⁸³ *Id.* at 154-55. See *Witte v. United States*, 515 U.S. 389, 408 (1995).

⁸⁴ *Id.* at 401.

⁸⁵ *Watts*, 519 U.S. at 156 (reasoning that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof" (quoting *Dowling v. United States*, 493 U.S. 342, 349 (1990))).

Sixth Amendment rights under the Constitution, or the important distinction between an acquittal and the relevant conduct made mandatory for consideration by the Guidelines.⁸⁶ In a lengthy dissent, Justice Stevens expressed concern that the majority's opinion was repugnant to the doctrines inherent in our criminal justice system.⁸⁷

B. *Apprendi* and *Booker*: The Constitutional Analysis

In *Apprendi v. New Jersey*,⁸⁸ the Court held that jury protections are relevant to both conviction and sentencing.⁸⁹ The Court emphasized that any fact the judge might use in enhancing a defendant's sentence must be submitted to a jury and proved beyond a reasonable doubt.⁹⁰ The Court reasoned that justice requires that procedural safeguards apply equally to the acts singled out for punishment.⁹¹ "The *Apprendi* decision, while ruling only on conduct that extends a defendant's sentence beyond the statutory maximum, reflects the Court's deep concern with acquitted-conduct sentences based upon facts not submitted to and explicitly determined by a jury."⁹²

In *United States v. Booker*, which was decided in 2005, the Court extended *Apprendi* to the United States Sentencing Guidelines, holding that the defendant's enhanced sentence violated his Sixth Amendment guarantee of the right to a trial by jury.⁹³ At trial, defendant Booker was convicted by a jury on charges of possessing at least fifty grams of crack cocaine.⁹⁴ There was evidence admitted at trial that Booker possessed 92.5 grams.⁹⁵ The sentencing judge found that Booker possessed an additional 566 grams of crack by a prepon-

⁸⁶ See U.S. CONST. amend. VI.

⁸⁷ *Watts*, 519 U.S. at 170 (Stevens, J., dissenting).

⁸⁸ 530 U.S. 466 (2000).

⁸⁹ *Id.* at 484 (stating that "due process and associated jury protections extend . . . 'to the length of his sentence' " (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998))).

⁹⁰ *Id.* at 490.

⁹¹ *Id.* at 476.

⁹² Mark T. Doerr, *Not Guilty? Go To Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 242 (2009).

⁹³ *Booker*, 543 U.S. at 228-29.

⁹⁴ *Id.* at 221.

⁹⁵ *Id.*

derance of the evidence.⁹⁶ The jury never even heard such evidence.⁹⁷ In light of the judge's findings, Booker was sentenced ten years beyond the Guidelines' range for the charge of which he was convicted.⁹⁸ The Court held that the Sixth Amendment applies and "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."⁹⁹ On the merits, the Court relied on case law which provided the principle that every fact in a criminal trial must be a question for the jury and proved by the highest standard—beyond a reasonable doubt.¹⁰⁰

However, the Court did not want to render the Guidelines unconstitutional due to the great efforts and concerns addressed by the Sentencing Reform Act of 1984.¹⁰¹ In the remedial majority, the Court altered the language of 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3553(a).¹⁰² The Court made the Guidelines a mandatory consideration at sentencing, but re-fashioned the Guidelines as advisory in the imposition of sentencing.¹⁰³

The dual decision in *Booker* created uncertainty about the status and constitutionality of *Watts*. While *Apprendi*, coupled with *Booker*, seems to strengthen the argument that the use of acquitted conduct at sentencing violates the Sixth Amendment, the circuit courts have been reluctant to so declare.

C. Federal Cases Applying *Watts* and the *Booker* Conflict

In the circuit courts, *Booker's* declaration of the Guidelines being merely advisory has created some of the same uncertainty and

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Booker*, 543 U.S. at 221.

⁹⁹ *Id.* at 244.

¹⁰⁰ See *Apprendi*, 530 U.S. at 490 (stating that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); *Ring v. Arizona*, 536 U.S. 584, 586 (2002) ("[A] fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.").

¹⁰¹ See *Joh*, *supra* note 58, at 892.

¹⁰² See *Booker*, 543 U.S. at 259.

¹⁰³ *Id.* at 259-60.

inconsistencies that the Guidelines were enacted to prevent.¹⁰⁴ Although the federal courts adhere to the principle that use of acquitted conduct is *permissible* at sentencing, selective interpretation ignores the merits of *Booker*.¹⁰⁵ “[Federal courts] have recognized that *Watts* is not controlling on the Sixth Amendment question, [but] they have nevertheless been influenced by the other courts that erroneously presumed the contrary.”¹⁰⁶ The need to adhere to the precedent established in *Booker*, and the nature of the conflicting dual opinion, has led to confusion among the federal courts. Both the Fourth Circuit and the D.C. Circuit have directly and expressly denounced the practice of considering acquitted conduct at sentencing, but have not declared it unconstitutional based on Supreme Court precedent.¹⁰⁷ These circuit court cases illustrate the need for a more concrete and solidified rule.

The Second Circuit has held firm to Supreme Court precedent as established in *Booker* and *Watts* and refused to deviate. However, before *Booker*, the court did so reluctantly when it dealt with whether acquitted conduct can be used to enhance a defendant’s sentence as seen in *United States v. Concepcion*.¹⁰⁸ In *Concepcion*, three members of a wholesale and retail narcotic organization appealed from judgments against them.¹⁰⁹ One of the defendants in that case, Frias, was convicted at trial for possessing an unregistered firearm and for

¹⁰⁴ See Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 676 (2006) (finding that *Booker* increased regional inconsistency in sentencing patterns).

¹⁰⁵ See Ngov, *supra* note 42, at 242.

¹⁰⁶ *People v. Rose*, 776 N.W.2d 888, 888 n.3 (Mich. 2010).

¹⁰⁷ See *United States v. Ibanga*, 271 F. App’x 298, 300 (4th Cir. 2008) (finding that the use of acquitted conduct at sentencing “makes the constitutional guarantee of a right to a jury trial quite hollow”) (internal quotations omitted). While the Fourth Circuit did not disagree or question the analysis of the lower court, it emphasized that it was bound by Supreme Court precedent that this conduct *may* be used. *Id.* at 301; see also *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008); *United States v. Baylor*, 97 F.3d 542, 549-50 (D.C. Cir. 1996) (“As a result [of the sentence enhancement], [the defendant’s] base offense level and his ultimate sentence were exactly the same as they would have been had the jury found him guilty, instead of acquitting him, on the [more serious charge]. There is something fundamentally wrong with such a result. . . . [T]o my mind the use of acquitted conduct in an identical fashion with convicted conduct in computing an offender’s sentence leaves such a jagged scar on our constitutional complexion that periodically its presence must be highlighted and reevaluated in the hopes that someone will eventually pay attention, either through a grant of certiorari to resolve the circuit split, or a revision of the guidelines by the Sentencing Commission, or a legislation to bar such a result . . .”).

¹⁰⁸ 983 F.2d 369 (2d Cir. 1992).

¹⁰⁹ *Id.* at 374-75.

possessing a firearm as a convicted felon.¹¹⁰ He was acquitted of two other narcotics charges.¹¹¹ The district court enhanced his sentence on the basis of the narcotics charges and Frias appealed.¹¹²

The Second Circuit acknowledged the federal rule allowing the consideration of acquitted conduct during the sentencing phase, but expressed concerns.¹¹³ The Presentence Report prepared during Frias' sentencing was calculated on the basis that his firearm convictions were in connection with the Organization's narcotics operation—the conduct of which the jury had acquitted him.¹¹⁴ The district court also suggested that the offense level should have been adjusted pursuant to Guidelines section 2D1.1(b)(1) to thirty-eight based on the ground that Frias was in possession of a firearm during the commission of a drug offense.¹¹⁵ On appeal, the Second Circuit noted that raising Frias' appropriate sentencing range from 12-18 months imprisonment to 210-262 months was not what the Sentencing Commission had intended in imposing the Federal Sentencing Guidelines.¹¹⁶ The Court agreed with the district court in that application of the Guidelines resulted in an enhanced sentence range for Frias, but expressed "doubt that, with respect to conduct of which the defendant was acquitted, the Commission intended so extreme an increase."¹¹⁷ The court vacated Frias' sentence and remanded the case to permit the lower court "to consider whether or not to depart from the offense level [determined under] strict application of the Guidelines."¹¹⁸ While this case was decided before *Booker*, subsequent cases in New York have set limitations on the scope of using acquitted conduct at sentencing, but have refused to address the constitutionality of *Watts*.¹¹⁹

¹¹⁰ *Id.* at 374.

¹¹¹ *See id.*

¹¹² *Id.* at 374-75.

¹¹³ *Concepcion*, 983 F.2d at 389.

¹¹⁴ *Id.* at 385.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 389.

¹¹⁷ *Id.*

¹¹⁸ *Concepcion*, 983 F.2d at 389.

¹¹⁹ *See United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005) (holding "[we] join the Seventh, Tenth, and Eleventh Circuits in rejecting a claim that, after *Booker*, district courts may no longer consider acquitted conduct when sentencing within the statutory range authorized by the jury's verdict"). The court in *Vaughn* further explained that:

[D]istrict courts may find facts relevant to sentencing by preponderance

In 2008, Roger Clayton White was brought to trial in the United States District Court for the Eastern District of Kentucky.¹²⁰ White was convicted of armed robbery and possession of a firearm with the serial number removed.¹²¹ White was acquitted on charges relating to the discharging of a firearm during the robbery and assault of a law enforcement officer.¹²² The district court disregarded the jury's findings on the acquitted charges and enhanced White's sentence based on that acquitted conduct.¹²³ Roger Clayton White appealed his sentence.¹²⁴ The Sixth Circuit affirmed the district court's ruling allowing the consideration of acquitted conduct at trial.¹²⁵

In *White*, the Sixth Circuit relied on the fact that *Booker* did not affect *Watts*.¹²⁶ While the court recognized that determining the sentencing range according to conduct underlying a defendant's acquittal might violate the Sixth Amendment post-*Booker*,¹²⁷ the court held that the district court could "rel[y] on acquitted conduct in applying an *advisory* guidelines system."¹²⁸ The court reasoned that because a criminal defendant can be found not guilty beyond a reasonable doubt, yet be found guilty in a civil proceeding by a lower standard, the use of acquitted conduct at sentencing by a preponderance of the evidence is justified.¹²⁹ However, in a criminal proceeding, a defendant faces the loss of his or her freedom. The court in *White* attempted to reconcile the counter argument by conceding that consideration of acquitted conduct can be perceived as unfair, but emphasized that it is not a mandatory consideration, instead it is

of the evidence, even where the jury acquitted the defendant of that conduct, as long as the judge does not impose (1) a sentence in the belief that the Guidelines are mandatory, (2) a sentence that exceeds the statutory maximum authorized by the jury verdict, or (3) a mandatory minimum sentence under § 841(b) not authorized by the verdict.

Id.

¹²⁰ United States v. White, 551 F.3d 381 (6th Cir. 2008).

¹²¹ *Id.* at 382.

¹²² *See id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *White*, 551 F.3d at 382.

¹²⁶ *See id.* at 392 (Merritt, J., dissenting).

¹²⁷ *Id.* at 384.

¹²⁸ *Id.*

¹²⁹ *Id.* at 385 (stating that "[I]aypersons have become familiar with the distinction from the pair of O.J. Simpson trials, in which one jury found the crime not proved beyond a reasonable doubt, but another jury found civil liability by a preponderance of the evidence").

merely discretionary.¹³⁰

Returning to the Seventh Circuit's decision in *Hurn* as discussed in the introduction of this Comment, the court in that case noted that the opinion in *Watts* itself acknowledged that there had been disagreement in the circuit courts about whether a sentence, based almost entirely on acquitted conduct, violates due process when the district court applies the preponderance of the evidence standard.¹³¹ The Seventh Circuit suggested that preponderance of the evidence does, in fact, violate due process.¹³² However, the court refrained from conducting an analysis of *Hurn*'s due process or Sixth Amendment rights and held that "[b]ecause clear and convincing evidence supported the district court's finding that *Hurn* possessed cocaine base with intent to distribute," despite the disregard for the jury's acquittal on that charge, his Sixth Amendment and due process rights were not violated.¹³³ The Seventh Circuit seemed to establish that while finding acquitted conduct at sentencing by a preponderance of the evidence is unconstitutional, when it is found by clear and convincing evidence it is permissible.¹³⁴ However, neither standard affords the defendant the "beyond a reasonable doubt" standard promised under the Constitution.¹³⁵

IV. THE ARGUMENT AGAINST THE FEDERAL RULE

The Supreme Court has not directly addressed the issue of whether the use of acquitted conduct at sentencing violates the Sixth Amendment of the United States Constitution; the federal circuit courts continue to permit the consideration of acquitted conduct despite *Booker*, rendering the Federal Sentencing Guidelines discretion-

¹³⁰ *White*, 551 F.3d at 386.

¹³¹ *Hurn*, 496 F.3d at 788. Compare *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) (requiring clear and convincing evidence where use of acquitted conduct results in a Guidelines range difference of seven levels), with *United States v. Ward*, 190 F.3d 483, 492 (6th Cir. 1999) (holding that the preponderance of the evidence standard of proof for acquitted conduct is sufficient).

¹³² *Hurn*, 496 F.3d at 789 (deciding that "[n]evertheless, the disagreement—which *Watts* did not resolve—is not relevant in this case, because the district court applied [a] higher standard of proof when determining that *Hurn* committed the conduct in question").

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *In re Winship*, 397 U.S. 358, 363 (1970).

ary.¹³⁶ New York courts, on the other hand, have recently begun to explicitly express concerns with the practice of allowing the use of acquitted conduct at sentencing.¹³⁷ In fact, New York courts have gone so far as to vacate sentences imposed where the sentencing court even considered conduct of which the defendant had been acquitted.¹³⁸

A. A Contradiction of Our Criminal Justice System

At the heart of our legal system rests a defendant's right to be judged by an impartial jury as guaranteed by the Sixth Amendment of the United States Constitution.¹³⁹ Not only is the jury's role as fact-finder undermined by the federal rule allowing the use of acquitted conduct at sentencing, but a defendant's right to the highest standard of proof becomes effectively diminished. Policy concerns have led to tremendous criticism of the federal rule.¹⁴⁰ Allowing a judge to discredit a jury's determination of the facts by using acquitted conduct as a factor in sentencing seriously challenges the integrity of our legal system. The jury is essential to our legal system because it provides a collection of impartial ears from the community to determine the guilt or innocence of the accused beyond a reasonable doubt. Moreover, the current federal rule gives the government an unfair advantage at trial, allowing it "the opportunity to take a 'second bite' [of the apple] after they have previously failed at trial to prove that the defendant committed the offense beyond a reasonable doubt."¹⁴¹ Therefore, a conviction means virtually nothing under the current rule, and a criminal defendant may be subject to punishment at the discretion of the judge by the lowest standard of proof.

Moreover, the federal rule conflicts with the purposes of sentencing as they are set forth in 18 U.S.C. § 3553(a).¹⁴² Among other

¹³⁶ The Court addressed the use of acquitted conduct, but did not address it in terms of the Sixth Amendment. *Booker*, 543 U.S. at 244.

¹³⁷ See, e.g., *Black*, 821 N.Y.S.2d at 597; *People v. Wilkonson*, 724 N.Y.S.2d 18, 20 (N.Y. App. Div. 2001); *Varlack*, 687 N.Y.S.2d at 96; *People v. Maula*, 558 N.Y.S.2d 42, 43 (N.Y. App. Div. 1990).

¹³⁸ See, e.g., *Black*, 821 N.Y.S.2d at 596.

¹³⁹ U.S. CONST. amend. VI.

¹⁴⁰ See Doerr, *supra* note 92, at 249-51 (citing Johnson, *supra* note 48, at 182-83).

¹⁴¹ Ngov, *supra* note 42, at 242.

¹⁴² See generally 18 U.S.C.A. § 3553(a) (West 2009) (effective Apr. 30, 2003).

things, the statute urges courts to impose a sentence that reflects “respect for the law” and promotes the limitation of disparities in sentences.¹⁴³ Allowing the court the discretion to tack on time based on evidence of acquitted conduct has the potential to create substantial disparities in sentencing for similar convictions.¹⁴⁴

Further, allowing sentencing judges to enhance sentences based on acquitted conduct undermines the role of the jury in our criminal justice system.¹⁴⁵ “The [United States] Constitution places the jury at the heart of the criminal justice system as the ‘fundamental guarantor of individual liberty.’ ”¹⁴⁶ If a sentencing court can effectively reject a jury’s determination, then what is the point of the trial?

Punishment in our system is communicative to, and reflective of, our society. Allowing the use of acquittal evidence at sentencing raises major concerns about the potential impact on society’s perception of our legal system, as well as its overall integrity. The federal rule tells the general public that a jury’s commitment and effort at trial are of very limited importance.¹⁴⁷

Moreover, equating uncharged and un-adjudicated conduct with acquitted conduct ignores the unique and special role of a jury verdict in our judicial system. An acquittal should be respected since it legitimizes criminal sentencing, and the integrity of our criminal justice system.¹⁴⁸ It is valid and true that an acquittal does not necessarily mean that a defendant is innocent.¹⁴⁹ However, it is inconsistent and illogical to assert that the consideration of acquitted conduct can be used to enhance a sentence for a defendant that has been convicted of another charge, but cannot be considered at all to punish a defendant who has been acquitted of all charges against him. Our system is dependent upon the standard of proof “beyond a reasonable doubt” precisely because of the substantial stake of imprisonment and the risk of stripping the innocent of their liberty.¹⁵⁰ Therefore, a de-

¹⁴³ *Id.* § 3553(a)(2)(A).

¹⁴⁴ *Apprendi*, 530 U.S. at 495.

¹⁴⁵ *See Johnson*, *supra* note 48, at 180.

¹⁴⁶ *See Elizabeth T. Lear, Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1185 (1993) (citation omitted).

¹⁴⁷ *See Johnson*, *supra* note 48, at 184.

¹⁴⁸ *See Lear*, *supra* note 146, at 1185 (arguing that conviction legitimizes incarceration).

¹⁴⁹ *Watts*, 519 U.S. at 155 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984)).

¹⁵⁰ *Winship*, 397 U.S. at 363.

fendant receiving more jail time based on conduct proven by a lower standard of proof conflicts with the foundation of our system. The Second Circuit has stated that “the public pronouncement [of an acquittal] serves to vindicate the defendant’s innocence and, at least to some extent, alleviate the damage done to his reputation.”¹⁵¹ It has been said that “if justice is not both seen and shown to be done, it is not and cannot be done at all.”¹⁵²

B. New York’s Call for Change

The American Law Institute and American Bar Association have joined the states in the chorus against the use of acquitted conduct at sentencing.¹⁵³ In *White*, the six dissenters were critical of the majority’s blind adherence to *Watts* as dispositive of the Sixth Amendment issue.¹⁵⁴ While the circuit courts have not yet declared the use of acquitted conduct unconstitutional, a few federal judges have recently conjured up the courage to express constitutional concerns.¹⁵⁵ Interestingly, many states do not allow the use of acquitted

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. . . . The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.

Id.

¹⁵¹ *United States v. Canady*, 126 F.3d 352, 363 (2d Cir. 1997). *See also* *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979).

A not guilty judgment is more than a presumption of innocence; it is a finding of innocence. And the courts of this state, including this Court, must give exonerative effect to a not guilty verdict if anyone is to respect and honor the judgments coming out of our criminal justices system.

Id.

¹⁵² *Joh*, *supra* note 58, at 911 (citing R.A. DUFF, TRIALS AND PUNISHMENTS 115 (1986)).

¹⁵³ *White*, 551 F.3d at 395 (Merritt, J., dissenting).

¹⁵⁴ *Id.* at 392.

¹⁵⁵ *Canania*, 532 F.3d at 777 (Bright, J., concurring) (“In my view, the Constitution forbids judges—Guidelines or no Guidelines—from using ‘acquitted conduct’ to enhance a defendant’s sentence because it violates his or her due process right to notice and usurps the jury’s Sixth Amendment fact-finding role.”). *See also* *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting) (“Reliance on acquitted conduct in sentencing diminishes the jury’s role and dramatically undermines the protections enshrined in the Sixth Amendment.”); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring) (“I strongly believe . . . that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of

conduct at sentencing.¹⁵⁶ Some have even gone so far as to declare the practice unconstitutional.¹⁵⁷

The New York Court of Appeals has not yet expressly declared that the use of acquitted conduct at sentencing is a violation of a defendant's constitutional rights. However, the New York Court of Appeals *has* said that if a court is going to consider uncharged crimes in sentencing, it must first "assure itself that the information upon which it bases the sentence is reliable and accurate."¹⁵⁸ Moreover, the trend among the courts in New York has been moving toward the exclusion of enhanced sentences based on acquitted conduct.¹⁵⁹

In *People v. Grant*,¹⁶⁰ the Appellate Division, Second Department held that the trial court erred in considering the charges for which the defendant was acquitted in sentencing.¹⁶¹ The Court reasoned that "[t]he prohibition against double jeopardy found in both the [United States] Constitution ([Fifth] Amendment), and the [New York] Constitution (article I, [section] 6) . . . require[d] resentencing."¹⁶²

the Fifth Amendment."); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass., 2005) ("To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense-as a matter of law or logic.").

¹⁵⁶ *White*, 551 F.3d at 394 (Merritt, J., dissenting).

¹⁵⁷ *State v. Marley*, 364 S.E.2d 133, 138 (N.C. 1988).

An acquittal is the "legal and formal certification of the innocence of a person who has been charged with a crime." Once a defendant has been acquitted of a crime he has been "set free or judicially discharged from an accusation; released from . . . a charge or *suspicion* of guilt." A jury in a criminal case may acquit simply because the state has failed to prove a defendant's guilt beyond a reasonable doubt. However, we cannot enter the inner sanctum of the jury to determine whether it *might* have convicted a defendant had the burden of proof been lower.

Id. (internal citations omitted). See also *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987) (holding that the constitutional right of due process of law is denied "when a sentencing court may have used charges that have resulted in acquittals to punish the defendant"); *Rose*, 776 N.W.2d at 891 (holding that while Michigan law allows consideration of acquitted conduct, the court granted the defendants leave to appeal to re-consider the constitutionality of the use of acquitted conduct at sentencing as a general matter "to consider developments in constitutional jurisprudence . . . the widespread criticism of the practice, and the split among state courts on the issue").

¹⁵⁸ *People v. Outley*, 610 N.E.2d 356, 360 (N.Y. 1993).

¹⁵⁹ See *Black*, 821 N.Y.S.2d at 596 ("This Court has repeatedly held that a sentencing court may not base its sentence on crimes [for] which the defendant was acquitted.").

¹⁶⁰ 595 N.Y.S.2d 38 (N.Y. App. Div. 1993).

¹⁶¹ *Id.* at 39.

¹⁶² *Id.* See U.S. CONST. amend V; N.Y. CONST. art. 1, § 6.

In *Black*, the Appellate Division, Third Department refused to apply the *Watts* rationale to a case where a justification defense was offered.¹⁶³ The court in *Black* remanded the case for re-sentencing, reasoning that the trial court “erroneously relied on the counts of which defendant was acquitted in making its sentencing determination.”¹⁶⁴

In *People v. Rogers*,¹⁶⁵ the Appellate Division, Third Department did not review the defendant’s contention that his verdict was inconsistent due to the use of acquitted conduct at sentencing because he failed to raise the issue before the jury was discharged.¹⁶⁶ However, the court ultimately vacated the sentence as being vindictive and raised concern that the use of acquitted conduct promotes unfounded enhancement of sentencing.¹⁶⁷ “[A]lthough defendant was acquitted of the murder count, the court stated at sentencing that it ‘felt constrained to impose the sentence because a death was involved.’”¹⁶⁸

Moreover, in *People v. Reeder*,¹⁶⁹ the Appellate Division, Second Department remanded the case for resentencing before a different Justice because the lower court’s “remarks demonstrated that it improperly considered crimes of which the defendant was acquitted as a basis for sentencing.”¹⁷⁰ It is rare to see the court use such harsh and critical language towards a “brother of the bench.” This type of remand is illustrative of the strong argument against the use of acquitted conduct at sentencing.

In the more recent case of *People v. Durand*,¹⁷¹ the Appellate Division, Fourth Department vacated the defendant’s sentence.¹⁷² In *Durand*, the defendant was convicted of three counts of criminal trespass in the third degree and acquitted of three counts of burglary in the third degree.¹⁷³ Both offenses were considered during the sen-

¹⁶³ *Black*, 821 N.Y.S.2d at 597.

¹⁶⁴ *Id.* at 595.

¹⁶⁵ 867 N.Y.S.2d 812 (N.Y. App. Div. 2008).

¹⁶⁶ *Id.* at 813.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ 748 N.Y.S.2d 275 (N.Y. App. Div. 2002).

¹⁷⁰ *Id.* at 276. See also *People v. Calderon*, 884 N.Y.S.2d 29, 35 (N.Y. App. Div. 2009) (“With respect to defendant’s sentence, the record does not establish that it was based on the crimes of which he was acquitted or any other *improper* criteria . . .”) (emphasis added).

¹⁷¹ 880 N.Y.S.2d 409 (N.Y. App. Div. 2009).

¹⁷² *Id.* at 412.

¹⁷³ *Id.* at 410.

tencing phase of the defendant's trial.¹⁷⁴ The Appellate Division, Fourth Department held that despite the fact that the defendant "failed to preserve" the contention, similar to the situation in *Rogers*, the lower court erred in considering the counts of burglary for which he was acquitted.¹⁷⁵ In view of this matter, the judge declared, "we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice."¹⁷⁶ The court in *Durand*, without being required to address the issue, took it upon itself to express the injustice of considering acquitted conduct at sentencing.¹⁷⁷

V. A CONSTITUTIONAL ANALYSIS

The Supreme Court in *Watts* was quick to declare that the act of overriding a jury's determination of not guilty after deliberation does not violate a defendant's constitutional rights.¹⁷⁸ Still, the Supreme Court has yet to directly address whether the use of acquitted conduct at sentencing violates the Sixth Amendment of the United States Constitution.¹⁷⁹ Federal circuit courts permit the use of acquitted conduct at sentencing, while the states, including New York, have expressly declared such use to be in violation of a criminal defendant's constitutional rights.

A. Due Process

The Supreme Court has held that acquitted conduct may be considered at sentencing if it is proven by a preponderance of the evidence.¹⁸⁰ A problem with due process arises when a defendant can be acquitted of his guilt at trial, but may still have to face punishment for the same particular conduct.¹⁸¹ The Supreme Court has held that a criminal defendant has the constitutional right to have the protec-

¹⁷⁴ *Id.* at 412.

¹⁷⁵ *Id.*

¹⁷⁶ *Durand*, 880 N.Y.S.2d at 412. *See also* N.Y. CRIM. PROC. LAW § 470.15(6)(a) (McKinney 2010).

¹⁷⁷ *Durand*, 880 N.Y.S.2d at 412.

¹⁷⁸ *Watts*, 519 U.S. at 157.

¹⁷⁹ The Court addressed the use of acquitted conduct, but did not address it in terms of the Sixth Amendment. *Booker*, 543 U.S. at 244.

¹⁸⁰ *See Watts*, 519 U.S. at 157; *McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1986).

¹⁸¹ *See, e.g., Winship*, 397 U.S. at 363-64.

tion of the highest standard of proof in all stages of the criminal justice system.¹⁸² The Supreme Court also has recognized that the beyond a reasonable doubt standard *must* be recognized and appreciated and is vital to promote and maintain confidence in our criminal justice system, as well as to protect a defendant's fundamental right to a fair trial under the Fifth Amendment.¹⁸³ To find a criminal defendant "effectively guilty," by imposing responsibility for certain actions despite an acquittal, devalues our criminal justice system and violates the criminal defendant's right to fundamental fairness.

It may be true that due process is satisfied when a court considers un-adjudicated "other act" conduct that has been proven by a preponderance of the evidence at sentencing;¹⁸⁴ however, acquittals should not fall under the scope of that principle. A judge should not have the power to disregard a jury verdict, especially by lowering the standard of proof.¹⁸⁵

Despite the disapproving language in numerous circuit court decisions considering the effect of *Booker* on the constitutionality of *Watts*,¹⁸⁶ federal courts continue to allow consideration of conduct underlying an acquitted charge. In *White*, as discussed above, the court acknowledged that after *Booker*, using evidence of conduct in which a defendant was acquitted might very well violate the Sixth Amendment.¹⁸⁷ However, contrary to that principle, the court held that a district court may use acquitted conduct in applying the Guidelines because they are advisory and no longer mandatory.¹⁸⁸ The court reasoned that because a criminal defendant can be found not guilty by a jury, but be held accountable in a civil proceeding by a preponderance of the evidence, the use of such evidence at sentencing is constitutional.¹⁸⁹ However, in a civil proceeding, an injury is calculated in damages, whereas a defendant in a criminal proceeding

¹⁸² *Id.* at 364 (holding "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

¹⁸³ *Id.*

¹⁸⁴ *See Watts*, 519 U.S. at 157.

¹⁸⁵ *See Johnson*, *supra* note 48, at 183.

¹⁸⁶ *See, e.g., United States v. Magallanez*, 408 F.3d 672, 683 (10th Cir. 2005) (stating that "[a]t first blush, there might seem to be force to [defendant's] argument").

¹⁸⁷ *White*, 551 F.3d at 384.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 385.

faces the loss of his freedom, life, reputation, and liberty. The court recognizes the need for a higher standard of proof in the criminal context, yet allows the use of the preponderance of the evidence standard merely because it is not mandated.¹⁹⁰ Considering evidence of acquitted conduct at sentencing violates due process, and therefore, should not be *permitted* at all.

Due process is about fairness.¹⁹¹ Fairness, by definition, cannot incorporate the enhancement of sentences based on acquitted conduct.¹⁹² *Booker* provides little comfort in the constitutional analysis that was missing in *Watts* because, after all, *Watts* remains virtually unaffected. *Watts* contradicts the principle of fairness embodied in our Constitution.

B. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment has been said to “protect[] against a second prosecution for the same offense after acquittal[,] . . . protect[] against a second prosecution for the same offense after conviction[,] [a]nd . . . protect[] against multiple punishments for the same offense.”¹⁹³ *Watts* cannot be reconciled with “the most fundamental rule in the history of double jeopardy jurisprudence,”¹⁹⁴ that a defendant cannot be retried for a criminal charge. While the sentencing phase is not a rehearing on the merits, the determination that acquitted conduct occurred during the sentencing phase, plain and simple, is a reconsideration of adjudicated facts; the concept rings very close to the protections of the Double Jeopardy Clause described by the Supreme Court.¹⁹⁵ It cannot rationally be accepted that where a defendant is charged with murder and possession of an illegal firearm, upon a conviction of the weapon charge and acquittal of the murder charge, the sentencing judge could use evidence of both to punish the defendant.¹⁹⁶ This is the exact principle that the

¹⁹⁰ *Id.* at 386.

¹⁹¹ *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) (explaining that “the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial”).

¹⁹² *See Winship*, 397 U.S. at 363-64.

¹⁹³ *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (citations omitted).

¹⁹⁴ *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

¹⁹⁵ *Id.* at 568-69.

¹⁹⁶ *See Watts*, 519 U.S. at 157.

court in *Watts* is permitting.¹⁹⁷ Regardless of any of the pronounced limitations on the rule, the entire theory of the rule is unconstitutional.¹⁹⁸

Federal courts have asserted that the federal rule is not effectively punishing a defendant for an adjudicated crime because there is a difference “between a sentence and a sentence enhancement.”¹⁹⁹ However, if a defendant is acquitted on a single charge, he cannot be sentenced for that charge.²⁰⁰ Under the federal rule, if a defendant is convicted of a charge and acquitted of a related charge, the defendant’s sentence can be “enhanced.”²⁰¹ While there is a distinction in the way the court phrases the punishment, both a sentence and a sentence enhancement result in jail time, and the latter results in punishing a defendant for conduct in which the trial found him not guilty.²⁰²

Although a trial and sentencing hearing are fundamentally different, a conviction triggers sentencing while an acquittal does not.²⁰³ A conviction serves as a legal guilt and, therefore, validates the government’s authority to punish a criminal defendant and take away his rights as a “free” person.²⁰⁴

In the New York case, *People v. Grant*, the court declared that double jeopardy requires that sentences, which rely on consideration of acquitted conduct, be vacated.²⁰⁵ Without any further explanation, the court was satisfied that the principles of the Double Jeopardy Clause in the Fifth Amendment of the United States Constitution and article I, section 6 of the New York Constitution speak for themselves on the issue.²⁰⁶ It is now time for the federal courts to follow.

VI. CONCLUSION

In *Watts*, the majority decision was based primarily on the

¹⁹⁷ *Id.*

¹⁹⁸ See Beutler, *supra* note 56, at 842-43.

¹⁹⁹ See *id.* at 841 (internal quotation marks omitted).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 841-42.

²⁰³ See Lear, *supra* note 146, at 1202.

²⁰⁴ *Id.* at 1222.

²⁰⁵ *Grant*, 595 N.Y.S.2d at 39.

²⁰⁶ *Id.*

Sentencing Guidelines and case law.²⁰⁷ The Court determined that “acquitted conduct” was permissible evidence in sentencing under the “relevant conduct” provision in the Guidelines.²⁰⁸ It held that the practice of using “acquitted conduct” at the sentencing phase is congruent to the common law principle that a sentencing judge should possess a great amount of discretion in imposing a punishment upon a defendant.²⁰⁹ Subsequently, federal courts have erroneously equated uncharged and un-adjudicated conduct with acquitted conduct.²¹⁰ The Supreme Court in *Watts* failed to properly acknowledge the importance of the acquittal in our criminal justice system despite emphasizing the vital nature of an acquittal in so many other contexts arising out of constitutional issues.²¹¹

A criminal defendant is afforded constitutional protections at trial, but the *Watts* rule strips the right to a fair trial by an impartial jury of any meaning. In fact, at sentencing, a criminal defendant is afforded “at best a shadow of the usual procedural protections.”²¹² For example, “the Confrontation Clause does not apply at sentencing” and relevant conduct is not subject to the same restrictions that the Federal Rules of Evidence provide at trial.²¹³ Furthermore, so long as the government can prove conduct by a preponderance of the evidence, acquitted conduct is relevant at sentencing.²¹⁴

The reason a criminal defendant is afforded more protection than a civil defendant is because the criminal defendant has substantially more to lose. The justification for permitting the use of acquitted conduct at sentencing, if shown by a preponderance of the evidence when a criminal defendant wins at the criminal proceeding and loses at the civil proceeding, is, on its face, contradicting to the principles that have been established throughout our criminal justice system’s history.

“Even though Congress, by the sentencing guidelines, has declared that relevant conduct analysis only requires the use of the pre-

²⁰⁷ *Watts*, 519 U.S. 148.

²⁰⁸ *Id.* at 154.

²⁰⁹ *Id.* at 151-52.

²¹⁰ See *Williams v. New York*, 337 U.S. 241 (1949) (relying on the fact that acquitted conduct is legally inseparable from uncharged crimes).

²¹¹ *Watts*, 519 U.S. at 156-57.

²¹² *United States v. Lombard*, 72 F.3d 170, 177 (1st Cir. 1995).

²¹³ *United States v. Moncivais*, 492 F.3d 652, 658-59 (6th Cir. 2007).

²¹⁴ *Watts*, 519 U.S. at 157 (emphasis added).

ponderance-of-the-evidence standard, the Constitution requires more.”²¹⁵ The justifications for declaring the practice of enhancing sentences based on acquitted conduct are unpersuasive. In fact, “[permitting] sentence enhancement for acquitted conduct is tantamount to permitting the judge to enter, for sentencing purposes, a judgment of guilt notwithstanding the verdict on the counts of acquittal, an action which is barred as inconsistent with the Sixth Amendment right to trial by jury.”²¹⁶

While the federal circuits have not been so blind as to ignore the constitutional violation of the *Watts* principle, a ruling has not been made to the contrary. Many states, on the other hand, have declared the use of acquitted conduct as a violation of their state constitutions.²¹⁷ While the New York Court of Appeals has not been as blunt as other states on the issue, the trial courts have vacated numerous sentences that were enhanced based on evidence underlying a defendant’s acquittal.²¹⁸

The condemnation of the federal rule from circuit judges, state judges, and legal scholars has been growing rapidly.²¹⁹ Still, the Supreme Court refused to grant certiorari for Mark Hurn’s appeal.²²⁰ He, like many other criminal defendants who were not afforded their constitutional rights, will sit behind bars for a crime in which he was acquitted. It is now time for the circuit courts to magnify the constitutional concerns and for the legal community to push the *Watts* rule back up the steps of the Supreme Court and give back the promise of the United States Constitution to all citizens who undergo trial in the criminal justice system.

²¹⁵ Boyce F. Martin, Jr., *The Cornerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirements of Due Process*, 3 SETON HALL CONST. L.J. 25, 53 (1993).

²¹⁶ See Johnson, *supra* note 48, at 183.

²¹⁷ See Marley, 364 S.E.2d at 138; Cote, 530 A.2d at 785; Rose, 776 N.W.2d at 891-92.

²¹⁸ See Black, 821 N.Y.S.2d at 595-96 (“This Court has repeatedly held that a sentencing court may not base its sentence on crimes of which the defendant was acquitted.”).

²¹⁹ See Tirschwell & Eisenkraft, *supra* note 17.

²²⁰ See Hurn, 552 U.S. 1295.

