ENHANCING A DEFENDANT'S SENTENCE BASED ON ACQUITTED CONDUCT IS AGAINST THE PRESUMPTION OF INNOCENCE AND SHOULD BE ABOLISHED

ABSTRACT

An individual who finds themselves at the defendant's table has likely committed a crime. However, just because a person committed one crime does not mean he committed other crimes. Sentencing that considers acquitted conduct contradicts that notion. Acquitted conduct has always given rise to constitutional issues, yet it has been in practice for the past seventy years. Judges have had broad sentencing discretion since the Federal Sentencing Guidelines ("Guidelines") became advisory. The U.S. Supreme Court has failed to outlaw this practice despite many critics, including judges, who oppose it. As a result, long-overdue reform is crucial to ensuring that courts have clear Guidelines for considering acquitted conduct during sentencing. The Sentencing Commission is currently reviewing the use of acquitted conduct and has introduced three reform bills in recent years. As a result, the U.S. Supreme Court declined to address this issue, stating it is improper for it to address the issue while potential revisions to the Guidelines are being considered. The Guidelines should be reformed to prohibit acquitted conduct from being considered at sentencing. Acquitted conduct violates a federal defendant's presumption of innocence, right to a jury trial, and due process rights under the Fifth and Sixth Amendments. If amended, the new Guidelines will take effect retroactively, enabling North Dakota practitioners to challenge the increased sentences of defendants affected by this unfair practice.

I. BACKGROUND

A. INTRODUCTION

The Federal Sentencing Guidelines ("Guidelines") do not specifically discuss acquitted conduct, aside from a brief mention in the parenthetical of a citation to *United States v. Watts*.[1] Nevertheless, the Guidelines permit a judge to consider acquitted conduct as "relevant conduct" under Section

1. U.S. SENT'G GUIDELINES MANUAL § 6A1.3 commentary (U.S. SENT'G COMM'N 2023) ("In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. *See* 18 U.S.C. § 3661; *see also United States v. Watts*, 519 U.S. 148, 154 (1997) [(per curiam)] (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct)").

1B1.3 following *Watts*.[2] Relevant conduct is considered when determining a defendant's sentence under the Guidelines.[3] It includes conduct found by a jury, admitted by a defendant, and acquitted by a jury.[4] A sentencing court may consider a defendant's acquitted conduct[5] if it was proven by a preponderance of the evidence.[6] The Guidelines assert that increasing a defendant's sentence based on acquitted conduct does not violate the U.S. Constitution's Double Jeopardy Clause.[7]

B. MCCLINTON V. UNITED STATES: HOPE FOR A CHANGE

In *McClinton v. United States*, the United States Supreme Court denied a writ of certiorari, challenging the consideration of acquitted conduct, because the Sentencing Commission is now reviewing the practice for possible amendment.[8] The defendant, Dayonta McClinton, was accused of murdering his friend over the stolen profits from a pharmacy robbery.[9] The jury unanimously acquitted McClinton of murdering his friend; however, during his sentencing of the robbery charge (of which he was found guilty), the prosecution raised the murder charge.[10] Despite his acquittal of the murder charge, the judge considered it as "relevant conduct" under the Guidelines and increased his prison sentence from five to nineteen years.[11] McClinton's case presented doubts about the fairness of considering acquitted conduct during sentencing since it conflicts with the jury's role of "limit[ing] the state's authority to punish."[12]

The main distinction between a trial and a sentencing hearing is the standard of proof.[13] At a sentencing hearing, a judge considers facts under a preponderance of evidence, whereas at trial, a jury must find guilt beyond a

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2. PROPOSED AMENDS. TO THE SENT'G COMM'N (PRELIMINARY) § 8 Acquitted Conduct (U.S. SENT'G COMM'N Jan. 12, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230112_prelim_RF.pdf [https://perma.cc/6V5R-V3QN] (summarizing current caselaw).

3. MICHAEL A. FOSTER, CONG. RSCH. SERV., LSB10191, JUDICIAL FACT-FINDING AND CRIMINAL SENTENCING: CURRENT PRACTICE AND POTENTIAL CHANGE 1-2 (2018).

4. *Id.*; 18 U.S.C. § 3661 ("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.").

5. "Acquitted conduct" will be used as a term for charges that the jury did not find the defendant guilty beyond a reasonable doubt in this Note.

6. *Watts*, 519 U.S. at 149.

7. *Id.* at 167 (Stevens, J., dissenting) (citing Witte v. United States, 515 U.S. 389, 399 (1995)).

8. 143 S. Ct. 2400, 2403 (2023) (mem.).

9. *Id.* at 2401.

10. *Id*.

11. *Id*.

12. *Id.*

13. *Id*. at 2402.

reasonable doubt.[14] Thus, the state essentially gets "a second bite at the apple" by presenting the defendant's acquitted conduct at sentencing in spite of the jury's findings.[15] *McClinton* raises questions about potential Double Jeopardy Clause and Sixth Amendment jury trial right violations.[16] In support of these concerns, seventeen former federal judges signed an amici curiae brief supporting McClinton's appeal.[17]

Today, considering acquitted conduct during sentencing is a contentious issue.[18] While the Supreme Court decided to delay reviewing McClinton's appeal for the Sentencing Commission to amend the Guidelines,[19] if the Commission fails to remedy the issue, the Supreme Court will likely address the constitutional issues at issue in *McClinton*.[20]

C. THE FEDERAL SENTENCING GUIDELINES

The United States Sentencing Commission is an independent agency that creates the federal sentencing guidelines to promote fairness through sentencing uniformity.[21] The guidelines provide detailed standards of appropriate sentences for federal offenses.[22] The Commission issued the Sentencing Reform Act ("Act") in 1984, which specified the categories of criminal conduct and characteristics of a defendant that can be considered by a judge at sentencing.[23] The judge must adhere to the technical steps specified in the Guidelines before deciding on the defendant's final sentence.[24]

First, the judge must "determine the base offense level."[25] Then, to reach the final offense level, the base level is adjusted by the severity of the crime and the defendant's criminal history.[26] The judge refers to the Guidelines' sentencing table to find where the offense level and the criminal history score

14. *Id*.
15. *Id*.
16. *Id*. at 2403, 2405 (Alito, J., concurring in the denial of certiorari).
17. Brief of 17 Former Federal Judges as Amici Curiae in Support of Petitioner, *McClinton*, 143 S. Ct. 2400 (No. 21-1557).
18. *McClinton*, 143 S. Ct. at 2405 (Alito, J., concurring in the denial of certiorari).
19. *Id*. at 2403 (majority opinion).
20. *Id*.
21. U.S. SENT'G GUIDELINES MANUAL § 1A1.1 (U.S. SENT'G COMM'N 2023).
22. *Id.*
23. *Id.* § 1A1.2.
24. *Id*. § 1A1.4(h).
25. *Id*. § 1B1.1.
26. *Id*.

meet to determine the sentencing range.[27] From there, the defendant's sentencing range is computed.[28]

The Act previously required the sentencing court to choose a sentence from "within the guideline range."[29] However, following *United States v. Booker*, the Guidelines are advisory, not mandatory.[30] The judge may depart from the Guidelines and sentence the defendant above or below the range if extenuating or exacerbating factors exist.[31] In that case, the court must specify reasons for departure under 18 U.S.C. Section 3553(b).[32]

D. ACQUITTED CONDUCT

In both state and federal courts, sentencing judges have broad discretion to impose a sentence within statutory ranges without specifying the factors that influenced their decision.[33] Judges can consider facts that were not admissible during the trial and may enhance a defendant's sentence based on those facts despite not being subject to appellate review.[34]

In *Williams v. New York*, the U.S. Supreme Court upheld a judge's death penalty sentence for a defendant convicted of first-degree murder despite the jury's recommendation of life imprisonment.[35] The judge enhanced the defendant's sentence because he considered the defendant a "menace to society."[36] The defendant allegedly committed roughly thirty burglaries near where the murder occurred and had a probation report demonstrating his "morbid sexuality."[37] However, the defendant was never convicted of those alleged burglaries.[38]

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27. *Id*. § 1A1.4(h).

28. *See* Mark T. Doerr, Note, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 240 (2009).

29. U.S. SENT'G GUIDELINES MANUAL ch. 3, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2023).

30. 543 U.S. 220, 233-34 (2005).

31. *Id.*; U.S. SENT'G COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 3, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf [https://perma.cc/MXQ9-NK9H] (last visited Mar. 3, 2024).

32. U.S. SENT'G GUIDELINES MANUAL § 1A1.2 (U.S. SENT'G COMM'N 2023) ("[T]he sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure.").

33. Barry Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing*, *and What Can Be Done About It*, 49 SUFFOLK U. L. REV. 1, 4 (2016).

34. *Id*.

35. 337 U.S. 241, 242 (1949).

36. *Id*. at 244.

37. *Id*.

38. *Id*.

Following *Williams*, critics objected and demanded a complete reevaluation of the Guidelines' constitutionality.[39] Weighing in on that dispute in *United States v. Watts*, the Supreme Court held that the Double Jeopardy Clause is not violated when a court considers acquitted because the "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction."[40] Despite the jury's acquittal of the defendant's use of the firearm, the judge increased his sentence by adding "two points to his base offense level."[41] Thus, the *Watts* case rendered the practice of considering acquitted conduct during sentencing constitutional, at least concerning the Double Jeopardy Clause.[42]

Since the *Watts* Court concluded the Double Jeopardy Clause was not violated under the Guidelines, considering acquitted conduct was mandatory for a couple more years under *Williams*.[43]

i. Constitutional Concerns

Later, in *Apprendi v. New Jersey*, the constitutionality of sentence enhancements for acquitted conduct was raised again when a defendant's sentence was increased based on conduct that was not proven beyond a reasonable doubt at trial.[44] In *Apprendi*, the defendant opened gunfire on an African American family's house because they moved to a white neighborhood.[45] The defendant plead guilty to possession of a firearm for unlawful purposes.[46] Despite evidence indicating the defendant did not have a reputation for racial bias, the judge relied on a police officer's testimony that the crime was motivated by racial bias and enhanced the sentence.[47] The defendant argued that to comply with the Due Process Clause, each element of the racial bias offense must have been submitted to a jury and proven beyond a reasonable doubt.[48] The Supreme Court held that "any fact that increases the [sentence] for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[49] Thus, the Supreme Court held that enhancing the defendant's

39. Johnson, *supra* note 33, at 13-14.
40. *See* 519 U.S. 148, 154-55 (1997).
41. *Id.* at 150.
42. *Id*. at 154-55.
43. *See* Johnson, *supra* note 33, at 13.
44. 530 U.S. 466, 471 (2000).
45. *Id*. at 469.
46. *Id*. at 469-70.
47. *Id*. at 470-71.
48. *Id*. at 471 (citing *In re* Winship, 397 U.S. 368 (1970)).
49. *Id*. at 490.

sentence violated his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process.[50]

The *Apprendi* decision revolutionized the practice of considering acquitted conduct in sentencing by restricting judges' power to enhance defendants' sentences beyond statutory maximums based on acquitted conduct.[51] However, *Apprendi* did not resolve all constitutional issues in this area because the judges may still consider acquitted conduct in enhancing a sentence if they do not impose a sentence beyond the statutory maximum.[52]

ii. Federal Sentencing Guidelines Advisory Status

The *Apprendi* decision created a foundation for the Supreme Court to determine how to avoid the constitutional issues of the Guidelines.[53] Four years later, *Blakely v. Washington* signaled a shift away from the Guidelines' mandatory status.[54] In *Blakely*, the defendant kidnapped his wife to avoid divorce and halt trust procedures.[55] To decrease his first-degree kidnapping charge, the defendant agreed to plead guilty to second-degree kidnapping with a sentence guideline range of forty-nine to fifty-three months.[56] However, upon sentencing, the judge considered the manner in which the defendant committed the crime and increased the sentence to ninety months.[57] The Supreme Court reversed the sentence, holding that the judge could not increase the defendant's sentence because the facts disclosed in the defendant's guilty plea were not presented to the jury.[58] The holding in *Blakely* demonstrated that constitutional challenges remained regarding a judge's ability to enhance sentences.[59]

Following *Blakely*, the Supreme Court ruled that the Guidelines are advisory in order to avoid violating the Sixth Amendment.[60] In *United States v. Booker*, the jury found the defendant guilty of "possession with intent to distribute at least 50 grams of cocaine."[61] Considering the defendant's prior convictions and "facts prove[n] to the jury beyond a reasonable doubt," the

50. *Id*. at 476.
51. *See* Doerr, *supra* note 28, at 241-43.
52. *Id*.
53. *See id*.
54. 542 U.S. 296, 308 (2004).
55. *Id*. at 298.
56. *Id*. at 298-300.
57. *Id*.
58. *Id*. at 304, 314.
59. United States v. Booker, 543 U.S. 220, 233 (2005).
60. *Id*. at 226-27.
61. *Id.* at 227.

recommended sentence was twenty-one years and ten months in prison.[62] However, in a sentencing hearing, the judge determined by preponderance of evidence that the defendant possessed an additional 566 grams of cocaine and increased his sentence to thirty years.[63] However, those additional facts were never presented to the jury.[64] When the Guidelines were mandatory, a judge had to find additional facts not submitted to the jury to enhance the defendant's sentence, violating the Sixth Amendment right to a jury.[65] Therefore, the Court decided that if the Guidelines are advisory rather than mandatory, the Sixth Amendment concerns may be avoided.[66] As such, the Court invalidated subsection (b) of Section 3553, which had required judges to impose sentences under the Guidelines and to deviate only in extraordinary situations.[67] However, instead of abolishing the acquitted conduct practice, *Booker* extended judges' sentencing discretion because they were no longer bound by the Guidelines at all.[68]

iii. Futile Efforts to Settle the Constitutional Controversy

Before *Booker*, defendants could argue that enhancing sentences based on facts found by judges during sentencing violated the Sixth Amendment; however, the advisory approach of the Guidelines following the *Booker* decision defeated that argument.[69]

The *Booker* decision resulted in confusion about whether to apply or disregard the Guidelines during sentencing.[70] To illustrate, the district court in *United States v. Bryan* did not apply the Guidelines and rejected the enhancement of the defendant's sentence, reasoning that it did not have constitutional authority to do so after *Booker*.[71] However, the Eleventh Circuit Court of Appeals reversed the district court's judgment because the Supreme Court held in *Booker* that even though the Guidelines are advisory, the courts cannot ignore them entirely and must consider them in sentencing.[72] In *United States v. Gobbi*, the First Circuit Court of Appeals confirmed that the law had not changed since *Booker* and approved the use of acquitted conduct during sentencing as long as the facts had been proven

62. *Id*.
63. *Id*.
64. *Id.* at 235.
65. *Id*. at 245.
66. *Id*. at 233.
67. *Id*. at 233-34, 245.
68. Doerr, *supra* note 28, at 244.
69. *Id*.
70. United States v. Bryan, 136 F. App'x 257, 258 (11th Cir. 2005).
71. *Id*.
72. *Id*.

by a preponderance of evidence.[73] To enhance *Gobbi*'s holding, the Fourth Circuit Court of Appeals in *United States v. Ibanga* found that excluding the consideration of acquitted conduct at sentencing violates the Guidelines' procedural requirements because of the mandatory language of Section 3661 of Title 18 of the Guidelines which states, "[N]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[74]

At the same time, the decision in *United States v. White* further complicated the use of acquitted conduct when the Sixth Circuit Court of Appeals declared the Sixth Amendment is not violated under *Booker* unless the sentence exceeds the statutory maximum.[75] According to the Sixth Circuit, both the majority opinion and dissent failed to explain why enhancing the sentence under the advisory Guidelines survives Sixth Amendment scrutiny.[76]

In *United States v. Ameline*, the Nineth Circuit Court of Appeals ruled that even advisory Guidelines infringed the defendant's Sixth Amendment rights.[77] The defendant in *Ameline* pleaded guilty to conspiracy to distribute methamphetamine without specifying the amount of drugs distributed in the plea agreement.[78] During the sentencing hearing, the probation officer presented the presentence report, which specified the amount of methamphetamine the defendant intended to distribute.[79] Based on the facts in the presentence report, the district judge sentenced the defendant above the maximum statutory sentence under the Guidelines.[80] The court ruled that enhancing the defendant's sentence based on facts not admitted by him or proven beyond a reasonable doubt to a jury violated the defendant's Sixth Amendment rights.[81] Shortly thereafter, the Sixth Circuit Court of Appeals upheld *Ameline*'s interpretation of the advisory Guidelines in *United States v. Susewitt*.[82]

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73. 471 F.3d 302, 313-14 (1st Cir. 2006).
74. 271 F. App'x 298, 301 (4th Cir. 2008). *See also* 18 U.S.C. § 3661.
75. 551 F.3d 381, 385 (6th Cir. 2008).
76. *Id*.
77. 400 F.3d 646, 649 (9th Cir. 2005), *rev'd en banc*, 409 F.3d 1073 (9th Cir. 2005).
78. *Id*. at 650.
79. *Id*. at 650-51.
80. *Id*. at 653.
81. *Id*. at 653-54.
82. *See* 125 F. App'x 681, 683 (6th Cir. 2005). The defendant's Sixth Amendment privilege was violated under the advisory Guidelines based on facts not admitted by him and not proven beyond a reasonable doubt by the jury. *Id*.

Currently, the use of acquitted conduct can still be demonstrated in cases such as *United States v. Medley*, where the defendant argued that the court's enhancement of his sentence in light of his acquittal of using violated his Sixth Amendment rights.[83] Although the defendant admitted that using acquitted conduct is considered constitutional based on prior cases, he continued to challenge the practice.[84] An expert's testimony, an eyewitness's identification of the defendant, and the defendant's cellphone data all contributed to the court's finding by a preponderance of the evidence that the defendant used a firearm during a carjacking.[85] Therefore, the court did not deviate from the Supreme Court and Fourth Circuit precedents by holding that the sentence was enhanced correctly based on acquitted conduct because the use of a firearm was proven by the preponderance of evidence.[86]

Although circuit courts are applying acquitted conduct under established precedents,[87] the Sentencing Commission is considering amending the practice of acquitted conduct today.[88]

II. COURTS SPLIT ON USE OF ACQUITTED CONDUCT

The circuit courts and state supreme courts have different approaches in considering acquitted conduct at sentencing. A decade ago, the Third Circuit required clear and convincing evidence to increase sentences dramatically.[89] However, the *Booker* decision, which made the Guidelines advisory, overturned the requirement of a higher burden standard in the Third Circuit.[90] The Second Circuit maintains that considering acquitted conduct to increase a sentence is permissible if a jury found some elements of the charge were not proven, not because it found that all of the evidence used against the defendant was false.[91] In a recent case, *State v. Langston*, the defendant claimed the trial judge's use of an acquitted assault charge to increase his sentence violated his due process rights and his right to a jury trial under the Sixth and Fourteenth Amendments.[92] Nonetheless, the Connecticut Supreme Court upheld the trial court's ruling because the defendant's sentence was

83. 34 F.4th 326, 335 (4th Cir. 2022).
84. *Id*. at 336.
85. *Id*. at 337.
86. *Id*. at 335, 338.
87. United States v. Robinson, 62 F.4th 318, 320 (7th Cir. 2023). The defendant's enhanced sentence based on acquitted conduct was constitutional because it was found by the judge by a preponderance of the evidence. *Id.*
88. U.S. SENT'G COMM'N, *supra* note 2, at § 8 Acquitted Conduct.
89. United States v. Kikumura, 918 F.2d 1084, 1100-01 (3rd Cir. 1990).
90. United States v. Fisher, 502 F.3d 293, 305-07 (3d Cir. 2007).
91. United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972).
92. 294 A.3d 1002, 1008 (Conn. 2023).

increased based on evidence that appeared reliable and was within the statutory range of charges.[93]

While some courts frequently refer to the advisory Guidelines to enhance a defendant's sentence based on acquitted conduct during sentencing, others have abandoned or question its practice.[94] The Supreme Court of New Hampshire held that a judge could not consider the defendant's acquitted conduct because the presumption of innocence extends during the sentencing.[95] Furthermore, the North Carolina Supreme Court concluded that a trial court could not increase a defendant's second-degree murder charge to first-degree murder by using a preponderance of the evidence to find premeditation and deliberation elements if a juror acquitted the defendant on those elements.[96] Addressing the same issue, the Supreme Court of Michigan declared that its state rejected the *Booker* decision and held that enhancing a defendant's sentence based on conduct acquitted by a jury violates the defendant's Fourteenth Amendment rights.[97] The Michigan court reasoned that such practice is fundamentally incompatible with the notion of the presumption of innocence.[98] The New Jersey Supreme Court held that judicial fact-finding under a preponderance of evidence standard of acquitted conduct during sentencing is fundamentally unfair and renders the juror's role null.[99]

For decades, the Eighth Circuit has also implemented the Guidelines for sentencing.[100] The Eighth Circuit increases a defendant's sentence based on acquitted conduct as long as "[t]he facts underlying an acquittal . . . appear sufficiently reliable."[101] Enhancing a defendant's sentence based on acquitted conduct does not violate the Fifth and Sixth Amendments if the charge is established by a preponderance of evidence.[102] In determining whether evidence meets the preponderance of evidence standard, the "court is free to

93. *Id*. at 1023-24.

94. *Id*. *Contra* State v. Marley, 364 S.E.2d 133, 138 (N.C. 1988); *see* People v. Beck, 939 N.W.2d 213, 225 (Mich. 2019).

95. State v. Cote, 530 A.2d 775, 784-85 (N.H. 1987) (holding that the lower court judge abused his discretion when he increased the defendant's sentence on five charges, reasoning that they were not "isolated incidents," on which the jury acquitted him).

96. *Marley*, 364 S.E.2d at 138.

97. *Beck*, 939 N.W.2d at 225.

98. *Id*.

99. State v. Melvin, 258 A.3d 1075, 1092 (N.J. 2021).

100. *See* United States v. Galloway, 976 F.2d 414, 421-22 (8th Cir. 1992).

101. United States v. Olderbak, 961 F.2d 756, 765 (8th Cir. 1992) (citing United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989)).

102. United States v. LaRoche, 83 F.4th 682, 692 (8th Cir. 2023). The sentence enhancement was satisfied by the preponderance of evidence standard on acquitted assault and infliction of bodily injury charges when the chiropractor confirmed the officer's injuries. *Id.*

believe all, some, or none of the witness's testimony."[103] Even in cases where the fact-finding has "an extremely disproportionate impact on the defendant's advisory guidelines [sentencing] range," the Eighth Circuit has repeatedly found that "due process never requires applying more than a preponderance-of-the-evidence standard for finding sentencing facts."[104] The rationale for using acquitted conduct during sentencing is that the acquittal does not mean the defendant is innocent but that the government failed to prove his guilt beyond a reasonable doubt.[105]

Ultimately, circuit courts and state supreme courts vary in their view of the use of acquitted conduct at sentencing. Some courts consider acquitted conduct constitutional under the advisory Guidelines, while others conclude that the practice should be discontinued since it infringes on the rights of jurors and the defendant's presumption of innocence.

III. PROPOSED AMENDMENTS FOR THE PRACTICE OF ACQUITTED CONDUCT

Every year, the Sentencing Commission proposes amendments to the Guidelines after collecting and analyzing public comments.[106] The Sentencing Commission sends the amendments to Congress for its approval.[107] Last year, the Commission offered three solutions to end the lingering controversy about acquitted conduct.[108]

The first part removes acquitted conduct from the relevant conduct in Section 1B1.3 that a judge considers determining the sentencing range.[109]

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103. United States v. Moore, 212 F.3d 441, 446 (8th Cir. 2000) (quoting United States v. Carter, 997 F.2d 459, 461 (8th Cir. 1993)).

104. United States v. Mustafa, 695 F.3d 860, 861 (8th Cir. 2012) (quoting United States v. Lee, 625 F.3d 1030, 1034-35 (8th Cir. 2010)). Based on the facts in the presentence report, the district court increased the defendant's sentence from 168 months to 210 months and overruled the defendant's objection that the facts had to be proven by clear and convincing evidence. *Id.*

105. United States v. Oakie, 993 F.3d 1051, 1053 (8th Cir. 2021). The defendant argued that his sentence should not have been increased based on the acquitted past sexual abuse charge; however, the judge held that sentence enhancement was appropriate because the government failed to prove the prior sexual abuse beyond reasonable doubt, which did not mean the defendant was innocent. *Id.*

106. Set For Sentencing*, Ep. 36: Presumed Guilty: Using Acquitted, Dismissed, and Uncharged Conduct to Increase Sentences*, YOUTUBE, at 12:23 (Jan. 30, 2023), https://www.youtube.com/watch?v=93dOQ76t7tw&t=4218s [https://perma.cc/ZRZ7-SUBR] (including speakers Mark Allenbaugh, co-founder of SentencingStats.com, Inc., a data analytics firm providing statistical analyses of U.S. Sentencing Commission, BOP, and BJS data; Douglas A. Berman, a professor at the Ohio State University Moritz College of Law; and Doug Passon, a criminal defense lawyer); *Public Comment*, U.S. SENT'G COMM'N, https://www.ussc.gov/policymaking/public-comment [https://perma.cc/8EWJ-GSE6] (last visited Apr. 5, 2024).

107. *Id*. at 13:57.

108. U.S. SENT'G COMM'N, *supra* note 2, at § 8 Acquitted Conduct.

109. *Id*.

The second part amends Section 1.B1.3 to state that if acquitted conduct is an element of the crime and its application disproportionately affects the sentence, a departure from the acquitted conduct may be justified.[110] The third part amends Section 6A1.3, the standard of proof necessary for a judge to consider the acquitted conduct–changing the standard from a preponderance of the evidence to clear and convincing evidence.[111]

Despite the widespread disagreement with using acquitted conduct during sentencing, a complete repeal of it is unlikely. A complete repeal would go against decades of sentencing practice and undermine judicial discretion, which has long been an integral part of criminal justice.[112] Therefore, as of the writing of this article, the Commission is considering allowing the continued use of acquitted conduct in sentencing decisions but limiting the circumstances in which its use is appropriate.

IV. ARGUMENTS FOR AND AGAINST AQUITTED CONDUCT

Advocates for sentence enhancement based on acquitted conduct justify the practice by relying on the historical use of acquitted conduct, judicial discretion at sentencing, and skepticism regarding the workability of reform.[113] At the same time, opponents of the use of acquitted conduct are optimistic that reformation would be feasible, and they believe the time has come to address the constitutional issues raised by sentence enhancements based on acquitted conduct.[114]

A. ADVOCATES

Although the practice of acquitted conduct has been around for a while, there are few advocates remaining for it. Caselaw suggest that the Supreme Court wants the Sentencing Commission to resolve this issue while the Sentencing Commission appears to pass the buck back to the Court. The primary justification for not prohibiting consideration of acquitted conduct is

110. *Id*.

111. *Id*.

112. Interview with Jonathan J. O'Konek, Assistant U.S. Att'y, D. N.D. (Dec. 18, 2023). Mr. O'Konek made this statement in his personal capacity, and it does not constitute the official policy or position of the Department of Justice or the United States Attorney's Office for the District of North Dakota.

113. Nate Raymond, *U.S. Justice Department Urges Panel Not to Limit 'Acquitted Conduct' Sentencings*, REUTERS (Feb. 24, 2023, 6:23 PM), https://www.reuters.com/legal/government/us-justice-department-urges-panel-not-limit-acquitted-conduct-sentencings-2023-02-25 (last visited Feb. 2, 2024). *See also* McClinton v. United States, 43 S. Ct. 2400, 2405 (2023) (mem.); Joshua M. Webber, *United States v. Brady: Should Sentencing Courts Reconsider Disputed Acquitted Conduct for Enhancement Purposes Under the Federal Sentencing Guidelines*, 46 ARK. L. REV. 457, 470-71 (1993).

114. Set For Sentencing, *supra* note 106, at 1:16:20.

that "[if] you kill acquitted conduct, the dominoes will fall" because federal courts have historically relied on it at sentencing.[115]

In her testimony before the Commission, Jessica Aber, the U.S. Attorney for the Eastern District of Virginia, stated, "Curtailing courts' discretion to consider conduct related to acquitted counts would be a significant departure from long-standing sentencing practice, Supreme Court precedent and the principles of our guidelines . . . ."[116]

The difficulty in distinguishing acquitted and uncharged conduct is another reason contributing to the Commission's reluctance to abolish acquitted conduct.[117] This means that if the Commission amends the practice of acquitted conduct by limiting a judge's ability to consider it in sentencing, it will also require amendments for relevant and uncharged conduct during the sentencing.[118]

Despite not advocating for acquitted conduct as policy, Justice Alito refuted arguments against its constitutionality in *McClinton*.[119]

> The fundamental argument advanced in support of the proposition that consideration of such conduct at sentencing violates the Sixth Amendment right to a jury trial relies on what, I submit, is a flawed understanding of the meaning of that right when the Amendment was adopted, namely, that a defendant's sentence may be based only on facts that a jury has found beyond a reasonable doubt. As scholars have noted, there is strong evidence that this was not the understanding of the jury-trial right in 1791.[120]

He clarified that during the time of the "First Congress," when the Sixth Amendment as framed and proposed, federal criminal statutes granted judges the authority to consider facts not found by a jury during the trial.[121] Judge Alito's argument suggests that the First Congress would not create the controversy between the Sixth Amendment and federal criminal statutes.[122] Additionally, he argued that constitutional arguments could not be based on speculation that, by acquitting the defendant, the jury would think that guilt

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115. Set For Sentencing, *Ep. 65: Acquitted Conduct Revisited: Mmmmm. . . Flavors of Evil*, YOUTUBE, at 23:20 (Aug. 21, 2023), https://www.youtube.com/watch?v=iRG6cbZ_YCY&t=231s [https://perma.cc/3EDM-LVVV].

116. Raymond, *supra* note 113.

117. Set For Sentencing, *supra* note 115, at 54:00.

118. *Id*. at 57:00.

119. McClinton v. United States, 43 S. Ct. 2400, 2403-06 (2023) (mem.) (Alito, J., concurring in the denial of certiorari).

120. *Id*. at 2403.

121. *Id*. at 2403-04.

122. *Id*.

was not found by a preponderance of evidence.[123] Moreover, the jury cannot interfere with the sentencing because it is outside the scope of their roles.[124]

Justice Alito was also concerned that prohibiting a judge's ability to consider acquitted conduct would force the Court to overturn the workable precedent in *Watts* and require the Court to "assess whether [a new] rule will be workable."[125] He was afraid that a new rule might not be feasible for the following reasons: first, it would be hard to determine why the jury returned a not-guilty verdict; second, the prosecution would have to indict on counts on which the jury would struggle to reach a verdict; and third, it is unprecedented to send the jury back to deliberate on proven elements after they reached an acquittal because only one of the elements was not proven.[126]

B. OPPONENTS

More and more people are calling for the Sentencing Commission and the Supreme Court to prohibit the practice of considering acquitted conduct during sentencing because it violates a defendant's fundamental rights guaranteed by the Sixth Amendment and undermines public faith in the criminal justice system.[127] The use of acquitted conduct has been described as "repugnant, uniquely malevolent, and pernicious."[128] "[U]sing acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system."[129] Allowing acquitted conduct to influence sentencing leaves the jury powerless to protect a defendant from the government, leaving the decision solely in the sentencing judge's hands.[130] It essentially gives the prosecution a second chance to punish the defendant on the facts that were not found by the jury.[131] Frequently, jurors are surprised when they find out about the punishment imposed based on their verdict.[132] "A defendant should have fair notice to know the precise effect a jury's verdict will have on his punishment."[133]

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123. *Id*. at 2404.
124. *Id*. at 2405.
125. *Id*.
126. *Id*. 2405-06.
127. Brief of 17 Former Federal Judges as Amici Curiae in Support of Petitioner, *supra* note 17.
128. Orhun Hakan Yalincak, *Critical Analysis of acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 SANTA CLARA L. REV. 675, 679-80 (2014) (internal punctuation omitted).
129. United States v. Settles, 530 F.3d 920, 924 (D.C. Cir. 2008).
130. *Id*.; Johnson, *supra* note 33, at 25.
131. *See* Johnson, *supra* note 33, at 26.
132. Set For Sentencing, *supra* note 115, at 37:00.
133. United States v. Canania, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring).

The most significant issue with considering acquitted conduct is that it gives prosecutors more power.[134] Plea bargaining has an implicit coercive effect on defendants because trials are unpredictable, and defendants often do not know what to expect and may be terrified of the outcome.[135] Prosecutors also frequently file numerous charges in the indictment, meaning that even if the defense successfully disputes those charges because of a lack of proof beyond a reasonable doubt, the prosecution may still raise them sentencing.[136]

Moreover, the low standard of proof during presentencing hearings is another justification against considering acquitted conduct.[137] At trial, the prosecution must convince each of the twelve jurors that the defendant is guilty of a crime and is subject to the rules of evidence.[138] But at a sentencing hearing, the preponderance of the evidence standard governs, and the rules of evidence do not apply.[139] This is an even lesser burden for the prosecution than in civil trials because, in civil trials, the rules of evidence apply.[140]

Another inconsistent method of considering acquitted conduct is enhancing a defendant's "sentence because of the manner in which he committed the crime" rather than enhancing his sentence for an uncharged crime.[141] The *McClinton* case serves as an excellent example of why this rule applies inconsistently, as the defendant's sentence for robbing a store increased dramatically from five years to twenty years based on an acquitted murder charge.[142] The manner of robbing the store is entirely unrelated to the defendant's sentence because the defendant will spend nearly a quarter of his life in prison for the acquitted murder charge.[143]

C. ALTERNATIVE SOLUTIONS

Seventy years after *Williams*, it is time to revise sentence enhancements that substantially deviate from the jury's recommendation.[144] There are several suggested alternatives for amending the acquitted conduct practice.

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134. Set For Sentencing, supra note 106, at 21:40.
135. *Id*. at 7:20.
136. *Id*. at 7:50.
137. *Id*. at 31:19.
138. *Id*. at 32:00.
139. *Id*. at 32:20.
140. *Id*.
141. *See* United States v. Watts, 519 U.S. 148, 154-55 (1997) (per curiam) (citing Witte v. United States, 515 U.S. 389, 402-03 (1995)).
142. *See* discussion *supra* Section I.B.
143. Set For Sentencing, *supra* note 106, at 29:10.
144. *See* Williams v. New York, 337 U.S. 241, 242 (1949). The judge increased the defendant's punishment to the death penalty, even though the jury recommended life in prison for first-degree murder. *Id.*

One option is drawing a clear line between relevant conduct and acquitted conduct.[145] Since the Guidelines permit consideration of acquitted conduct as part of the definition of relevant conduct in Section 1B1.3, distinguishing and prohibiting consideration of acquitted conduct will not require the overhaul of the entire Guidelines.[146] The second option is a "special verdict," where the prosecutor may seek a sentence enhancement based on facts not initially found by the jury.[147] In that situation, the prosecutor must submit interrogatories to the jury after the jury returns verdicts of guilty on some counts and acquittals on others.[148] For instance, if the defendant was found guilty of robbery but not of armed robbery, the prosecutor may submit interrogatories to the jury to determine whether the defendant had a firearm with him when he committed the robbery.[149] If the jury answers that interrogatory in the affirmative, the prosecution can request a sentence enhancement.[150]

Some scholars argue that the Sentencing Commission should terminate the practice of considering acquitted conduct during sentencing, and Congress should approve that amendment.[151] Unfortunately, according to 18 U.S.C. Section 3661, the Sentencing Commission cannot do so independently without Congress's approval.[152] Although the advisory nature of Guidelines does not impose on judges a requirement to enhance a defendant's sentence, the discretion available to judges prevents abandonment of acquitted conduct as a blanket rule.[153]

Today, opponents of acquitted conduct are enthusiastic to observe what happens if acquitted conduct is eliminated and whether it would decrease plea bargains.[154] They propose that relevant or uncharged conduct can be used to enhance the defendant's sentence if it is presented beyond a reasonable doubt

145. Doerr, *supra* note 28, at 265.
146. *Id*.
147. *Id*. at 267.
148. *Id*.
149. *Id*.
150. *Id*.
151. Farnaz Farkish, Note, *Docking the Tail that Wags the Dog: Why Congress Should Abolish the Use of Acquitted Conduct at Sentencing and How Courts Should Treat Acquitted Conduct After United States v. Booker*, 200 REGENT U. L. REV. 101, 121 (2007).
152. *Id*. at 122; *see also* 18 U.S.C. § 3661 ("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.").
153. Johnson, *supra* note 33, at 44.
154. Set For Sentencing, *supra* note 106, at 1:16:20.

burden of proof.[155] However, acquitted conduct cannot be used during sentencing because that burden was already not satisfied during the trial.[156]

V. THE SOLUTION: TERMINATE THE PRACTICE OF ACQUITTED CONDUCT

Even though considering acquitted conduct during sentencing has existed since the Guidelines were adopted, the number of people who oppose them has grown over time.[157] Federal judges have repeatedly acknowledged that the Due Process Clause of the Fifth Amendment and the defendant's rights under the Sixth Amendment are violated when a judge makes factual findings that deviate from or reject the jury's verdict and then uses those findings to raise the defendant's sentence.[158]

Enhancing a defendant's sentence based on acquitted conduct perplexes the "public's understanding of a defendant's right to a jury trial that could undermine public confidence in the criminal justice system."[159] However, advocates of the practice maintain that a jury's duty is limited to determining a defendant's guilt and does not include sentencing decisions.[160] Furthermore, advocates argue that "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt."[161] As a result, proponents argue that because the jury did not find the defendant's innocence, the judge can use his discretion to increase the defendant's sentence while avoiding Sixth Amendment issues.[162]

Although increasing a defendant's sentence based on facts not submitted to the jury raises Sixth Amendment concerns, the Sixth Amendment does not limit a judge's power unless it "infringes on the province of the jury."[163] As an illustration, if a burglary statute allows for sentences between ten and forty years, the judge has full discretion in imposing a sentence within that range.[164] However, if the punishment for the burglary is ten years with an additional thirty years if a firearm was used, the judge cannot increase the

155. Set For Sentencing, *supra* note 115, at 1:10:10.

156. *Id*.

157. United States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring).

158. *Id*.

159. Doerr, *supra* note 28, at 252. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

160. *Id.* at 258.

161. United States v. Watts, 519 U.S. 148, 155 (1997) (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984)).

162. Doerr, *supra* note 28, at 261.

163. Blakely v. Washington, 542 U.S. 296, 308 (2004).

164. *Id*. at 309.

defendant's sentence without possession of the firearm being presented to the jury.[165] While advocates believe that leaving sentencing decisions to judges rather than juries will improve the efficiency and fairness of justice, the *Apprendi* Court concluded that the facts enhancing a sentence beyond the statutory maximum must be presented to the jury to avoid a Sixth Amendment violation.[166]

In the U.S. Supreme Court's denial of certiorari in *McClinton*, Justice Sotomayor noted that the jury's historical role is to protect the defendant from arbitrary governmental punishment.[167] According to Justice Sotomayor's statement accompanying the opinion, one juror expressed disappointment upon learning about the consideration of acquitted conduct and claimed that the jurors' contributions were in vain and were not afforded the appropriate weight.[168] Judicial consideration of the acquitted charges during sentencing deprives the jury of their historical role in determining the defendant's fate.[169]

A good start towards abandoning the practice of acquitted conduct appears to be the removal of acquitted conduct from relevant conduct under Section 1B1.3. This gradual approach will alleviate the concerns of those who think that the newly suggested rule may not be workable. Also, it would not be "a significant departure from long-standing sentencing practice . . . and the principles of our Guidelines."[170] However, not considering acquitted conduct unless it is an element of the crime that disproportionately enhances the defendant's sentence does not seem like a solution. The federal courts may start applying the new rule inconsistently, which will be similar to the consequences ensured by *Apprendi* and *Booker*.[171] Additionally, because the acquitted conduct violates the defendant's rights under the Fifth and Sixth Amendments, considering it under clear and convincing evidence before sentencing—rather than preponderance of the evidence—will leave constitutional arguments about the jury's role unresolved because the use will still consider charges for which the jury returned a not guilty verdict. Moreover, evidence used during sentencing is not subject to the rules of evidence. It will be hard to determine what rules or facts judges are relied on to reach an ultimate sentence. As a result, the outcome will differ based on the judge's discretion because they can easily assume that the defendant is still guilty of the acquitted charge.

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165. *Id*.
166. *Id*. at 312-13.
167. McClinton v. United States, 43 S. Ct. 2400, 2401 (2023) (mem.).
168. *Id*. at 2403.
169. *Id*. at 2401-02.
170. Raymond, *supra* note 113.
171. *See* discussion *supra* Section I.D.i, ii.

However, in the anticipated amendments to the Guidelines, considering the manner in which the crime was committed should remain to enhance the sentence. Nonetheless, the Sentencing Commission must clarify in its Guidelines that a judge can consider the manner of only convicted crimes, not the acquitted ones. Suppose two defendants are found guilty of killing a victim during a heist. One defendant shot the victim, while another brutally murdered the victim by dismantling the body after death. Because the second defendant's offense was more violent and malicious and because he poses a threat to society, it would be unfair to sentence them both to the same length of time. That is an example of when the second defendant's sentence should be enhanced compared to the first defendant based on the manner in which the crime was committed.

Another alternative to sentence enhancement is sending the jury back to deliberate on unproven elements. Justice Alito made compelling arguments as to why this option may not be viable.[172] Incorporating the jury into the sentencing process is likely ill-advised because jurors are usually more punitive than judges.[173] Also, the Guidelines' provisions are complex, and understanding how the sentencing range is established requires experience and knowledge.[174] It is doubtful that the government will be able to ensure that each of the twelve jurors comprehends the sentencing Guidelines and reaches a unanimous decision. Therefore, the court's resources will be exhausted if the jurors are involved in the sentencing process, and no judge wants the sentencing procedure to last for weeks.[175]

After analyzing proposed solutions, the best course of action to resolve all constitutional issues over considering acquitted conduct during the sentencing is to separate it from the relevant conduct and terminate consideration of a defendant's acquitted charges during the sentencing. While terminating consideration of acquitted conduct during sentencing will require abandoning long-standing precedents, doing so will halt the defendant's unfair sentence enhancements and safeguard the public's confidence in the criminal justice system.[176] The proposed amendments will clarify the area of law that has been subject to contentious debates since it was established.[177] Hopefully, it will gradually resolve the consideration of uncharged conduct to enhance a defendant's sentence in the future as well.

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172. *See* discussion *supra* Section IV.A.

173. Set For Sentencing, *supra* note 115, at 34:10.

174. *See supra* note 128 and accompanying text.

175. Set For Sentencing, *supra* note 115, at 01:11:03.

176. *See* United States v. Watts, 519 U.S. 148, 149-50 (1997); *see also* United States v. Settles, 530 F.3d 920, 923-24 (D.C. Cir. 2008).

177. *See* U.S. SENT'G COMM'N, *supra* note 2.

VI. IMPACT IN NORTH DAKOTA

The Sentencing Commission is currently working to eliminate the long-standing consideration of acquitted conduct in an effort to stop abusing the notion of the defendant's presumption of innocence.[178] The proposed amendments will change the practice of enhancing federal defendants' sentences based on acquitted conduct in North Dakota's federal courts. If implemented, the anticipated changes will apply retroactively, and defendants will be able to appeal unfairly enhanced sentences based on acquitted conduct.[179] The significance of this potential outcome extends to how defense counsel educates clients on what to expect after trial and what prosecutors can bring during sentencing hearings.[180] In addition, knowing that acquitted charges will not be considered, defendants may feel more confident in their decision not to enter a guilty plea to charges that they believe the government will be unable to prove at trial.[181]

VII. CONCLUSION

McClinton v. United States raised again the constitutionality of the practice of increasing a defendant's sentence based on acquitted conduct.[182] In 1997, the United States Supreme Court in *Watts* affirmed the constitutionality of considering an offense for which a defendant was acquitted based on a preponderance of the evidence when imposing a sentence.[183] Since then, defendants whose sentences were increased because of their acquitted conduct have contested the practice as a violation of the Double Jeopardy Clause and their Fifth and Sixth Amendment rights.

To address constitutional concerns, the Supreme Court made the Guidelines advisory.[184] However, this expanded federal judges' sentencing discretion and has led to inconsistent implementation of the Guidelines.[185]

As of the writing of this Note, the Sentencing Commission is considering proposed solutions for acquitted conduct.[186] The primary question is whether

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178. Set For Sentencing, *supra* note 115, at 39:00.

179. U.S. SENT'G COMM'N, *supra* note 2, at ii.

180. Set For Sentencing, *supra* note 106, at 9:27.

181. *Id.* at 7:40.

182. 143 S. Ct. 2400, 2403, 2405 (2023) (mem.).

183. United States v. Watts, 519 U.S. 148, 152-55, 157 (1997).

184. United States v. Booker, 543 U.S. 220, 226 (2005); Apprendi v. New Jersey, 530 U.S. 466, 491-92 (2000).

185. Doerr, *supra* note 28, at 244; *see also* United States v. Fisher, 502 F.3d 293, 305-07 (3d Cir. 2007); State v. Marley, 364 S.E.2d 133, 138 (N.C. 1988); People v. Beck, 939 N.W.2d 213, 225 (Mich. 2019).

186. U.S. SENT'G COMM'N, *supra* note 2.

to terminate consideration of acquitted conduct at sentencing by separating it from relevant conduct or consider it under a higher standard of proof.[187]

The amended Guidelines will impact the Eighth Circuit and the federal courts in North Dakota, regardless of the Sentencing Commission's final decision. The significant upside of the Guidelines' amendments is that they will apply retroactively, allowing defendants to appeal their increased sentences based on acquitted conduct.[188] This will enable North Dakota practitioners to prevent the charges the government may bring up again during the sentencing hearing and predict a defendant's potential sentence term. Consequently, the coercive impact of plea bargaining will be reduced as the defendant will not be concerned that any unproven charges may be brought up again at sentencing and safeguard the defendant's presumption of innocence.[189]

Nargiz Aghayeva∗

187. *Id.*

188. *Id.* at ii.

189. Set For Sentencing, *supra* note 106, at 7:20; *see also* State v. Cote, 530 A.2d 775, 784 (N.H. 1987).

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