NOTE

A Parade of Horribles: Uncharged Relevant Conduct, the Federal Prosecutorial Loophole, Tails Wagging Dogs in Federal Sentencing Law, and *United States* v. *Fitch*

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TABLE OF CONTENTS

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INTRODUCTION

One of the most impressive American judicial processes is the trial by jury.[1] Imagine, then, if a judge were to dissolve the jury and discretionarily find at sentencing that a defendant committed first-degree murder.[2] The consequences of such an action would appear to be the judge usurping the role of the jury.[3] An observer of the Ninth Circuit in the recent case of *United States v. Fitch*, though, would see something similar affirmed on appeal.[4]

Before *Fitch*, no criminal defendant in the Ninth Circuit had ever received a sentence for an uncharged first degree murder.[5] Given that *Fitch* resulted in federal prosecutors obtaining a sentence for a first degree murder that they did not have to prove beyond a reasonable doubt before a jury,[6] news of the case has quickly spread throughout

[1] *See* DIV. FOR PUB. EDUC., DIALOGUE ON THE AMERICAN JURY: WE THE PEOPLE IN ACTION, AM. BAR ASS'N 1 *available at* http://www.americanbar.org/content/dam/aba/migrated/jury/moreinfo/dialoguepart1.authcheckdam.pdf (describing Thomas Jefferson's praise of criminal jury trials as the means by which a government holds to the principles of its Constitution).

[2] *See, e.g.*, United States v. Fitch, 659 F.3d 788, 790 (9th Cir. 2011) (encapsulating this not-so-hypothetical scenario).

[3] *See* Brown v. Louisiana, 447 U.S. 323, 330 (1980) (affirming that the Sixth Amendment's Jury Trial Guarantee is an indispensable Constitutional protection); Williams v. Florida, 399 U.S. 78, 100 (1970) (noting that the purpose of a jury is to buffer the defendant from an overzealous prosecutor or a compliant, biased, or eccentric judge); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (describing how federal juries are designed to protect a defendant's life and liberty from the plenary powers of one judge or a group of judges).

[4] *Fitch*, 659 F.3d at 790 (relating how the sentencing court found by clear and convincing evidence that the defendant David Kent Fitch premeditatedly murdered his wife).

[5] *See id.* (finding that the Ninth Circuit has never had to address a scenario like *Fitch*'s). *But see, e.g.*, United States v. Vernier, 152 F. App'x 827, 829, 832 (11th Cir. 2005) (affirming double sentence where underlying offense was fraudulent withdrawal of money based on findings of uncharged relevant conduct, namely that the defendant murdered the missing victim); United States v. Rivalta, 892 F.2d 223, 226 (2d Cir. 1989) (increasing fivefold, based on an uncharged murder finding under preponderance of the evidence standard, sentences stemming from convictions of possession and transportation of stolen property).

[6] *See Fitch*, 659 F.3d at 790 (explaining that government prosecutors never charged Fitch with his wife's murder even though four-fifths of his sentence is based on that murder); *Ninth Circuit Affirms 262-Month Sentence Based on Uncharged Murder*, 125 HARV. L. REV. 1860, 1867, n.70 (2012) (citing to the oral argument in which the government admits to "get[ting]" Fitch "indirectly" on the murder charge); Pamela MacLean, *22 Years for Uncharged Murder of Vanished Wife*, TRIAL INSIDER (Oct. 4, 2011), http://www.trialinsider.com/?p=834 (declaring that even the majority in *Fitch* seemed wary to uphold such a significantly upward sentence departure).

the legal blogosphere, giving pause to practitioners and academics alike.[7]

The reason for *Fitch*'s controversy is the federal district court's significant upward sentencing departure based on uncharged relevant conduct. Uncharged relevant conduct constitutes criminal acts related to the offense *of* which a defendant is convicted (termed the "underlying offense" or "crime of conviction") and *for* which prosecutors did not obtain a conviction at trial.[8] Furthermore, *Fitch* confirms many of the concerns Justice Scalia noted when the Supreme Court reaffirmed Sixth Amendment rights of criminal defendants in a 2000 case.[9] In light of these same fears that other Justices have repeatedly expressed, Supreme Court review of Fitch's sentence would appear likely.[10] In particular, this Note seeks to use *Fitch* to illustrate

[7] *See* Douglas Berman, *Split Ninth Circuit Affirms Huge Upward Departure Based on Uncharged Murder*, SENTENCING L. & POL'Y BLOG (Sept. 23, 2011, 1:34 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2011/09/split-ninth-circuit-affirms-huge-upward-departure-based-on-uncharged-murder.html (calling *Fitch* a remarkable case and spawning a slew of vitriolic comments in the posts below); Steven Kalar, *Case o' the Week: The Sixth Glitch in Fitch — Upward Variances on Judge-Found Facts*, FED. DEFENDERS' NINTH CIR. BLOG (Oct. 2, 2011, 9:53 AM), http://circuit9.blogspot.com/2011/10/case-o-week-sixth-glitch-in-fitch.html (asking how a defendant gets twenty-one years for murder without any evidence and answering: a conviction for fraud in federal court); Shaun Martin, *United States v. Fitch*, CAL. APP. REP. (Sept. 23, 2011, 2:21 PM), http://calapp.blogspot.com/2011_09_01_archive.html (noting that *Fitch*'s outcome is unsound because Fitch received a sentence for killing his wife without any direct evidence, factual findings, or meaningful appellate review).

[8] *See* David Holman, *Death by a Thousand Cases: After* Booker, Rita, *and* Gall, *the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 269-70 (2008) (explaining uncharged relevant conduct and its effects on a sentence).

[9] *See* Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Scalia, J., concurring) (declaring that the Sixth Amendment's guarantee to a jury trial in a criminal prosecution is meaningless unless a jury — not a judge — finds all facts which subject a defendant to a legally prescribed punishment); *see also* Oregon v. Ice, 555 U.S. 160, 178 (2009) (Scalia, J., dissenting) (declaring that tripling a defendant's sentence based solely on judge-found facts violates the Sixth Amendment's Jury Trial Guarantee); Rita v. United States, 551 U.S. 338, 369-70 (2007) (Scalia, J., concurring) (citing and quoting Cunningham v. California, 549 U.S. 270, 297 (2007) (Alito, J., dissenting)) (chiding the majority for devising a sentencing scheme inconsistent with the Sixth Amendment under which only judge-found facts will permit substantial upward Guidelines' departures).

[10] *See* Kalar, *supra* note 7 (writing that the *Fitch* case cries out for Supreme Court review primarily because of its evisceration of the Sixth Amendment); *see also* Pepper v. United States, 131 S. Ct. 1229, 1243-44 (2011) (noting that an imposed sentence would not run afoul of the Sixth Amendment where jury-found facts established the applicable range of punishment); Jones v. United States, 526 U.S. 227, 243-44 (1999) (expressing worry that nonjury findings — judge-found facts at sentencing — might

and expose a related concern: the federal prosecutorial sentencing loophole.[11]

This loophole proceeds in three basic steps.[12] First, federal prosecutors may charge, try, and quickly convict a defendant of a superficially simple offense, or the defendant may plead to this seemingly simple offense.[13] Then, at the sentencing phase, prosecutors may argue for enhanced sentences based on uncharged relevant conduct.[14] Finally, a sentencing judge may find, under a lesser standard of proof, that the defendant committed this uncharged relevant conduct in the process of committing the underlying offense.[15] The judge then enhances the defendant's sentence accordingly.[16] One of these loophole enhancements on its own may

shrink the jury's role from making determinations of guilt to low-level gatekeeping).

[11] *See* Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 312 (1992) (describing what this Note terms the federal prosecutorial loophole as the government driving a sentence based on uncharged relevant criminal conduct); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 289 (2009) (noting that federal prosecutors can obtain an enhanced sentence through uncharged conduct subject to a lesser standard of proof at sentencing phase); David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 275 (2005) [hereinafter Yellen, *Misguided Approach*] (expressing distaste that current sentencing jurisprudence permits the government to bypass the trial or plea-bargaining process to obtain an enhanced sentence based on uncharged conduct); *see also infra* Parts I-IV (dubbing this sentencing wrinkle with the moniker "federal prosecutorial loophole").

[12] *See* Holman, *supra* note 8, at 269 (using a case-based hypothetical to illustrate the steps involved).

[13] *See id.* (illustrating the same step in a case-based hypothetical where the defendant pleads to charged tax fraud offenses). This is also known as the "underlying offense."

[14] *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2011) (stating all acts or omissions the defendant committed during a single offense affect the range of a sentence); Kevin Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 524 (1993) (stating that fact-finding at sentencing allows a judge to consider all uncharged crimes the defendant may have committed during one underlying offense); *see also* David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 403 (1993) (arguing that sentencing a defendant for alleged crimes related to the underlying offense is a controversial practice).

[15] *See, e.g.*, Reitz, *supra* note 14, at 524 (explaining how the traditional guilt phase standard of proof does not apply to judge-found facts at the sentencing phase).

[16] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2011) (providing that a judge may depart from the applicable Guidelines range in cases of aggravating or mitigating circumstances).

entail a longer sentence than the sentence for the actual underlying offense.[17]

I argue that the federal sentencing loophole and its application in *Fitch* (and by extension, cases like *Fitch*) are unconstitutional. Part I presents an overview of key points in federal sentencing law, exploring relevant constitutional provisions, statutes, case law, and the Federal Sentencing Guidelines ("the Guidelines").[18] Part II summarizes the facts, procedural posture, and the Ninth Circuit's holding in *Fitch*.[19] Part III sets forth this Note's relevant analyses and arguments concerning the federal prosecutorial loophole.[20]

First, I argue that *Fitch* robs criminal defendants of their Fifth Amendment due process rights.[21] Specifically, *Fitch* gives federal prosecutors a creative way to seize the sentencing tail and thus wag the dog of the substantive underlying offense.[22] The Supreme Court penned this colorful canine metaphor to denominate judge-found sentencing facts (tails) that punish defendants more severely (wag) than jury-found conviction offenses (dogs).[23] This metaphor encapsulates the federal prosecutorial loophole.[24] Second, this Note

[17] *See* Witte v. United States, 515 U.S. 389, 406 (1995) (upholding sentencing court's use of uncharged conduct to impose a sentence greater than that of the underlying offense alone); United States v. Fitch, 659 F.3d 788, 794 (9th Cir. 2011) (explaining that sentencing judges possess extraordinarily broad post-conviction powers to find facts that drive sentences); David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 NW. U. L. REV. 1434, 1436 (1997) [hereinafter Yellen, *Just Deserts*] (noting many defendants often receive substantially longer prison terms solely because a judge believes a defendant committed some other uncharged crime); *see also* Blakely v. Washington, 542 U.S. 296, 306-07 (2004) (exemplifying and deriding as a judicial absurdity how uncharged relevant conduct can give disproportionate punitive weight to the sentencing phase); American College of Lawyers, *Proposed Modifications to the Relevant Conduct Provision of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1463, 1464 (2001) (describing how prosecutors may take advantage of judicial discretion inherent in Guidelines to use uncharged conduct as the primary determinant of sentencing length); Frank O. Bowman, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL F. 149, 175 (2005) [hereinafter Bowman, *Band-Aids*] (describing the tail-wagging-the-dog metaphor as capturing this process and further demonstrating how it disturbs the Supreme Court and other penological experts).

[18] *See infra* Part I.

[19] *See infra* Part II.

[20] *See infra* Part III.

[21] *See infra* Part III.A.

[22] *See infra* Part III.A.

[23] *See* McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986) (writing that the statute at issue in that case was not a "sentencing tail" wagging the offense "dog").

[24] *Compare id.* (describing the nature of a tail wagging the dog), *with* Introduction

argues that *Fitch* oversteps the Sixth Amendment safeguard of jury trials.[25] *Fitch* does so through implicating an entirely separate scheme of criminal conduct not subject to the beyond reasonable doubt standard.[26] Such conduct may establish sentencing departures greater than the sentences imposed for the actual underlying offenses of which a defendant was convicted.[27] Third, this Note argues that the substantive reasonableness review that the Supreme Court uses in sentencing cases should preclude Fitch's tail-wagging-dog scenario.[28] These factors currently blend together and permit the prosecutorial loophole to flourish unchecked.[29]

Part III also provides several strategies to harmonize federal sentence departures based on uncharged conduct in light of *Fitch*.[30] These strategies operate within the existing Supreme Court sentencing framework and function as quick fixes to plug the prosecutorial loophole.[31] Ultimately, these strategies and advisements (it is hoped)

(describing the federal prosecutorial loophole).

[25] *See infra* Part III.B.

[26] *See infra* Part III.B.

[27] *See* United States v. Fitch, 659 F.3d 788, 790 (9th Cir. 2011) (affirming fivefold upward sentencing departure for fraud convictions by subsuming the separate crime of first-degree murder under the means used to effectuate the fraud offenses). *See generally* United States v. Booker, 543 U.S. 220 (2005) (applying the rule derived from the *Blakely* holding to federal sentences and the Guidelines); Blakely v. Washington, 542 U.S. 296, 305 (2004) (holding that a judge-found fact at sentencing phase which enhances a defendant's sentence without authorization from a jury verdict violates the Sixth Amendment).

[28] *See generally* Gall v. United States, 552 U.S. 38 (2007) (holding that an appellate court reviews any departure outside the Guidelines recommended range under a substantive reasonableness standard subject to certain restrictions); United States v. Watts, 519 U.S. 148, 166 (1997) (defining and denouncing this colorful canine metaphor as a judge-found fact at sentencing phase that exposes a defendant to greater punishment than his actual conviction).

[29] *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 495 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)) (describing the same process); Benjamin J. Priester, *The Canine Metaphor and the Future of Sentencing Reforms: Dogs, Tails, and the Constitutional Law of Wagging*, 12 SMU L. REV. 201, 212 (2007) (qualifying the tail wags the dog problem as the most fundamental Constitutional issue in sentencing law post-*Apprendi*).

[30] *See infra* Part III.A-B.

[31] *See generally Booker*, 543 U.S. at 265 (writing that the ball is now in Congress's court to devise a long-term sentencing system compatible with the Constitution); Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 386-87 (2005) (recommending various ways to improve existing federal sentencing law using due process and the currently existing Sixth Amendment framework); Frank O. Bowman, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 472-

will aid the federal courts in improving the current approach to federal sentencing.[32]

I. BACKGROUND

This section traces the recent developments of the Guidelines, Fifth and Sixth Amendment jurisprudence, and substantive reasonableness appellate review of criminal sentences.[33] This section also briefly overviews key Supreme Court federal sentencing cases.[34] Finally, this section explores how these developments have culminated in the current federal sentencing system.[35]

A. From Indeterminate Sentencing to the Federal Sentencing Guidelines

The advent of the Guidelines in 1987 marked a watershed in federal sentencing law; legal scholars often write of sentencing before and after the Guidelines.[36] One might refer to the period before the Guidelines as the "Age of Indeterminate Sentencing."[37] During this period, once a jury found a defendant guilty or if a defendant pled

76 (2010) [hereinafter Bowman, *Debacle*] (stating that solutions to sentencing wrinkles such as the prosecutorial loophole should find themselves in Sixth Amendment jury safeguard and due process rights).

[32] *See* Douglas A. Berman, *Rita, Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7, 8 (2007) (noting that the current world of sentencing reform has become a puzzling blend of constitutional issues); Bowman, *Band-Aids*, *supra* note 17, at 215 (intimating a need for limiting the punitive effect of uncharged relevant conduct); Bowman, *Debacle*, *supra* note 31, at 472-76 (urging the Supreme Court to remember that sentencing involves both Fifth Amendment due process and Sixth Amendment jury trial guarantees).

[33] *See infra* Part I.

[34] *See infra* Part I (discussing the decisions in *Apprendi*, *Booker*, and *Gall*).

[35] *See infra* Part I (reviewing the significance of the key Supreme Court sentencing cases).

[36] *See* Koon v. United States, 518 U.S. 81, 96 (1996) (speaking of appellate review of a sentence in terms of before and after the Guidelines); Robert J. Anello, *Evolving Roles in Federal Sentencing: The Post* Booker*/Fanfan World*, 2005 FED. COURTS. L. REV. 9, 9, 12 (2005) (dividing the article into sections on sentencing before and after the Guidelines); Adam K. Miller, *A New System of Federal Sentencing: An Impact on Third Circuit Sentencing in the Wake of* Booker, 51 VILL. L. REV. 1107, 1107-08 (2005) (discussing sentencing before the 1984 Guidelines and the Guidelines' subsequent effects).

[37] *See, e.g.*, Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons From Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 425 (1999) [hereinafter Gertner, *Circumventing Juries*] (describing how federal judges in the early twentieth century often imposed individualized, unconstrained, and highly discretionary sentences).

guilty, the sentencing judge exercised almost plenary power over the sentence.[38] In fact, Congress gave judges almost unfettered discretion to decide how best to tailor punishments to fit specific defendants.[39] Ideally, a sentencing judge would have been familiar with the defendant's life story before imposing punishment.[40] However, this indeterminate model grew increasingly individualized, so much so that the ultimate result was disproportionality and lack of uniformity in federal sentencing throughout the country.[41] For example, two

[38] *See, e.g.*, Kate M. Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225-26 (1993) (describing how pre-Guidelines sentencing courts historically enjoyed wide sentencing discretion with little to no meaningful appellate review of the sentences they imposed); Ian Weinstein, *The Revenge of* Mullaney v. Wilbur*:* United States v. Booker *and the Reassertion of Judicial Limits on Legislative Powers to Define Crimes*, 84 OR. L. REV. 393, 398 (2005) (detailing how in the pre-Guidelines era of indeterminate sentencing each judge would employ a unique approach through which she aspired to rehabilitate a particular defendant); Deborah Young, *Fact-Finding at Federal Sentencing*, 79 CORNELL L. REV. 299, 305 (1994) (describing the effects of the vast discretion afforded sentencing judges in the pre-Guidelines indeterminate sentencing era).

[39] *See, e.g.*, Tapia v. United States, 131 S. Ct. 2382, 2386 (2011) (stating that for almost a century before the Sentence Reform Act in 1984, federal sentencing courts cast in criminal cases a broad, unchecked discretionary net); Dorszynski v. United States, 418 U.S. 424, 431 (1974) (finding the only effective constraint on a sentencing judge's discretion during this period was the range of punishment provided for in the statute of offense); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 571 (2005) [hereinafter Gertner, *Behaving Badly*] (analogizing the role of judges during this period to that of physicians, saying both needed the most information possible to exercise their clinical roles).

[40] *See, e.g.*, United States v. Grayson, 438 U.S. 41, 45 (1978) (citing and quoting Williams v. New York, 337 U.S. 241, 247 (1949)) (explaining the then-prevailing penological philosophy as the maxim that punishment should fit the offender and not merely the crime, thus achieving individual rehabilitation); Gertner, *Behaving Badly*, *supra* note 39, at 571 (comparing the role of a sentencing judge during the Age of Indeterminate Sentencing to the role of a physician); Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 17 (1899) (defining the precept of the then-emerging rehabilitative indeterminate sentencing model as detecting a criminal defendant's dangerousness to society and imprisoning him until it passed).

[41] *See, e.g.*, Steven Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988) (explaining that Congress sought to introduce uniformity into a sentencing system where punishment imposed for identical cases ranged from three to twenty years in prison); Sarah M. R. Cravens, *Judging Discretion: Context for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 960-61 (2010) (describing the inconsistent decision-making that arose as a result of the indeterminate model, which fostered too much sentencing discretion and comparatively little appellate review); *see also* 18 U.S.C. § 3553(a)(6) (Supp. IV 1986) (describing the need to avoid unwarranted sentencing disparities among defendants with similar records found guilty of similar conduct).

defendants each accused of the same crime under nearly identical facts could often face widely divergent sentences depending on the presiding judge.[42]

This mixed state of affairs led to Congress's passage of the Sentencing Reform Act of 1984, thereby creating the United States Sentencing Commission (the "Commission").[43] The Commission's purpose was to draft a set of guidelines that would infuse the sentencing process with uniformity and fairness.[44] To calculate and impose an appropriate Guidelines sentence, sentencing judges must first consider the factors set forth in 18 U.S.C. § 3553(a).[45] From there, a sentencing judge moves on to the grid-form Sentencing Table.[46] The sentencing judge selects the appropriate criminal history category (forming the horizontal axis) and the appropriate offense level (forming the vertical axis), and then applies the two to the convicted defendant.[47] The point where the two axes intersect lists the appropriate guidelines sentencing range.[48]

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[42] *See* Susan F. Mandiberg, *Why Sentencing by a Judge Satisfies the Right to a Jury Trial: A Comparative Law Look at* Blakely *and* Booker, 40 MCGEORGE L. REV. 107, 109 (2009) (describing how a judge in the Age of Indeterminate Sentencing had "total" discretion to set a sentence within a statutory range).

[43] *See* Sentencing Reform Act, 28 U.S.C. § 991 (2008) (outlining one of the key purposes of the Act as the need to provide fairness and certainty in sentencing while simultaneously curbing unwarranted disparities); Mistretta v. United States, 488 U.S. 361, 361 (1989) (citing and quoting S. REP. NO. 98-225 (1983)) (tracing the need for the Act and the Guidelines to the unjustified and shameful variation and uncertainty which indeterminate sentencing created); Breyer, *supra* note 41, at 5 (outlining the same catalysts of the Guidelines).

[44] *See Mistretta*, 488 U.S. at 366 (distinguishing these as the same objectives the Congress had in mind); Breyer, *supra* note 41, at 5 (describing the same needs for the Sentencing Reform Act and the Guidelines); *An Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM'N, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (last visited Dec. 29, 2011) (stating that Congress, after more than a decade of research, saw a need for the Commission to combat widespread disparity and uncertainty).

[45] *See Sentencing Guidelines*, 40 GEO. L.J. ANN. REV. CRIM. P. 711, 711-14 (2011) (listing and discussing the §3553(a) factors — the defendant's history, the kinds of sentences available, the need to provide restitution, etc. — a sentencing judge must first consider).

[46] *Id.*

[47] *See id.* at 714, 733 (discussing the "offense level" and "criminal history" categories).

[48] *See id.* at 741 ("The court arrives at the recommended sentence by identifying the range in the Guidelines' sentencing table that corresponds to the defendant's total offense level and criminal history category."); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5a (2011) (displaying the Sentencing Table).

Besides the §3553(a) factors and the post-Reform Act Sentencing Table, the other component that sentencing judges have relied on in imposing post-Reform Act sentences is the presentence report ("PSR").[49] In the PSR, probation officers are responsible for identifying the salient facts of a convicted defendant's case and the applicable guidelines and policy statements those facts trigger; compiling the convicted defendant's personal and criminal history; and assessing any other information relevant to the convicted defendant's case.[50] The convicted defendant may object to any information contained within the PSR.[51] The sentencing judge can use the PSR to adjust the appropriate sentence within the Guidelines' range or to depart from the range in extraordinary circumstances.[52]

In this way, the Guidelines and their distinctive Sentencing Table completely disposed of post-Reform Act cases following the guilt phase; sentencing judges, largely ministerial, merely calculated proper sentence ranges.[53] Despite some initial difficulties and constitutional challenges, the Supreme Court blessed the Guidelines and their mandatory sentencing regime.[54] In practice, the Guidelines removed much of the sentencing discretion that judges previously enjoyed and replaced the process with increased uniformity and fairness.[55]

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[49] *See id.* at 756-60 (describing the formation, contents, and uses of a PSR).

[50] *Id.*; *see also* FED R. CRIM. P. 32(c)-(d) (outlining PSR procedures and content).

[51] FED. R. CRIM. P. 32(f) (giving a convicted defendant fourteen days to object in writing to information contained in a PSR).

[52] *See Sentencing Guidelines*, *supra* note 45, at 746-56 (discussing departures); *see also* Koon v. United States, 518 U.S. 81, 92 (1996) (stating that "[a] district judge now must impose on a defendant a sentence falling within the range of the applicable Guideline, *if the case is an ordinary one*") (emphasis added).

[53] *See* Dillon v. United States, 130 S. Ct. 2683, 2687 (2010) (discussing how the Guidelines as enacted were binding and mandatory, preventing a sentencing judge from exercising discretion to depart from them except in limited circumstances); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1236-37 (2004) (highlighting judicial concerns with the Guidelines during this period, including excessive rigidity, focus on mechanical rules, and lack of recognition of offender characteristics); *see also* Ngov, *supra* note 11, at 245 (describing this same operation of the Guidelines at sentencing during the mandatory Guidelines era immediately following their publication and enactment).

[54] *See* United States v. Booker, 543 U.S. 220, 234 (2005) (stating that, after *Mistretta*, the Court has consistently held that the Guidelines have the force and effect of law); *Mistretta*, 488 U.S. at 412 (holding the Guidelines constitutional and rejecting the argument that Congress upset the balance of powers by delegating too much legislative power to the drafting Commission); Stith & Koh, *supra* note 38, at 281 (noting that the Federal Guidelines garnered much criticism and little praise).

[55] *See, e.g.*, Stinson v. United States, 508 U.S. 36, 38 (1993) (upholding even the commentary in the Guidelines as authoritative); *Mistretta*, 488 U.S. at 379 (describing

The Guidelines remained mandatory for nearly twenty years until the Supreme Court decided *United States v. Booker* in 2005.[56] There, the Supreme Court held that the Guidelines were merely advisory in light of the Sixth Amendment's guarantee of jury trials in criminal cases.[57] As a result of *Booker*, many sentencing decisions again rest in the hands of sentencing judges.[58] Sentencing judges now have increased discretion to depart from Guidelines' ranges using the information contained in a PSR.

Notwithstanding these changes, *Booker* also created two distinct safeguards in cases where a sentencing judge seeks to depart from the Guidelines' sentencing range.[59] The first of these is appellate review: federal appellate courts may now review district court sentences for their substantive reasonableness.[60] This abuse of discretion standard

how the promulgation of the Guidelines introduced greater sentencing proportionality); Edward G. Barber, *Judicial Discretion, Sentencing Guidelines, and Lessons from Medieval England*, *1066-1215*, 27 W. NEW ENG. L. REV. 1, 14 (2005) (describing the mandatory Guidelines as a significant limitation on primary judicial discretion by confining judges to a predetermined range of possible sentences).

[56] *See Booker*, 543 U.S. at 245 (holding that the Guidelines would likely be — and therefore are — merely advisory in light of *Booker's* construction of the Sixth Amendment jury trial guarantee); KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 95 (1998) (describing the pre-*Booker* Guidelines as administrative diktats); Gertner, *Behaving Badly*, *supra* note 39, at 578 (noting that sentencing judges mechanistically applied sentences according to the Guidelines until *Booker*).

[57] *See generally* U.S. SENTENCING GUIDELINES MANUAL (2005) (compelling sentencing courts to fix legally prescribed ranges of punishment); Gertner, *Behaving Badly*, *supra* note 39, at 578 (describing how the *Booker* decision transformed mandatory Guidelines into advisory Guidelines).

[58] *See* 18 U.S.C. § 3553(a) (2010) (listing factors which a sentencing court may consider with the added discretion to depart from a Guidelines sentence); Kimbrough v. United States, 552 U.S. 85, 101 (2007) (noting as a general matter that sentencing courts may now vary from the Guidelines based on their own policy considerations where before they could not); Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 YALE L.J. 137, 140-41 (2006) (arguing *Booker's* advisory Guidelines and reasonableness review do not mean construing the Guidelines as atomistic, but rather as flexible reflections of all § 3553(a) factors).

[59] *See Booker*, 543 U.S. at 260-61, 264-65 (outlining the substantive reasonableness review standard and the standard of deference sentencing courts ought to afford the Guidelines).

[60] *See id.* at 260-61 (excising former standard of review as inconsistent with Sixth Amendment requirements and inferring reasonableness review of a sentence from statutory language); *see also* Gall v. United States, 552 U.S. 38, 51 (2007) (tweaking and concreting *Booker*'s reasonableness requirement to entail an abuse-of-discretion standard for sentences both inside and outside the Guidelines range); Rita v. United States, 551 U.S. 338, 352 (2007) (presuming reasonableness for those sentences which fall within the Guidelines range for the offenses of conviction, even if judges find

limits appellate courts to determining whether sentences are reasonable under the totality of the circumstances.[61] The second of these mechanisms is the Guidelines themselves: sentencing judges must defer to the Guidelines and explain their reasoning when departing from them.[62] Such grounds include, for example, any death, whether intentional or otherwise, that occurs during the course of an offense.[63] Such rules ensure that judges consider the various sentencing factors that Congress outlined in the statutory scheme before imposing a sentence.[64]

B. Sentencing and the Fifth Amendment

The Fifth Amendment provides in pertinent part that no one will lose life or liberty without due process of law.[65] One of the major concerns of legal scholars is the diminished role due process

some facts which a jury does not). *But see* Carissa B. Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 15 (2008) (arguing the Supreme Court in *Gall* muddies the waters by conflating reasonableness and abuse-of-discretion as equivalent appellate review standards even though they are distinct standards).

[61] *See Gall*, 552 U.S. at 46 (stating the same rule without precisely explaining what reasonableness may entail in a given scenario).

[62] *See id.* at 50 (stating that a sentencing judge must adequately justify and explain his departure from Guidelines ranges for reasonable appellate review of the sentence imposed); *Booker*, 543 U.S. at 264-65 (explaining that sentencing judges must consult and take into account the advisory Guidelines); *see also* Patrick M. Hamilton, *Are the U.S. Sentencing Guidelines Dead?*, 52 BOS. B.J. 6, 6 (2008) (stating even though the Supreme Court intends the Guidelines as the starting point for determining a sentence, sentencing courts still have enormous discretion to depart).

[63] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.1 (2011) (providing sentencing courts with the discretion to depart from the maximum Guidelines range if death — intentional or otherwise — results from the underlying offense).

[64] *See* 18 U.S.C. § 3553(c)(1)-(2) (2010) (directing a sentencing court to state its reasons for imposing a sentence and, in greater departures, to record its particular reasons for such departures); *Rita*, 551 U.S. at 350 (noting that sentencing courts may depart from the Guidelines, but only after listing their reasons which the § 3553(a) factors will most likely embody); United States v. Carty, 520 F.3d 984, 991 (9th Cir. 2008) (holding in light of *Gall* and *Rita* that sentencing judges must consider the § 3553(a) factors). *See generally* 18 U.S.C. § 3553(a) (outlining the goals sentencing judges must keep in mind, including deterrence, rehabilitation, and retribution).

[65] U.S. CONST. amend V; *see also* Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (declaring that the source of due process is the Magna Carta's *per legem terrae* directive, protecting against executive tyranny); EDWARD COKE, THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 29 (Steve Sheppard ed., 2003) (1606), *available at* http://oll.libertyfund.org/ (equating the *lex terrae* phraseology with due process, meaning that no man should suffer imprisonment or taking without indictment of presentment in due manner).

protections play at the sentencing stage.[66] Specifically, those same scholars cite this relative lack of due process as one of the primary reasons for the prosecutorial loophole.[67] Therefore, this Note now turns to exploring due process protections in the criminal context and their relation to sentencing.[68]

During the twentieth century, the Supreme Court identified two separate aspects within due process: a substantive component of due process and a procedural component.[69] The substantive component prohibits arbitrary government interference of a defendant's fundamental rights rooted in American history and conscience.[70] The procedural component ensures sufficient notice and impartial adjudication.[71] In the context of criminal law, these due process components place restraints on the massive powers the government can bear upon an individual.[72]

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[66] *See* Bowman, *Debacle*, *supra* note 31, at 378-79 (explaining how diminished due process protections at the sentencing phase engender the tail-wags-the-dog problem); Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615, 1617 (1980) (explaining how relying on PSRs with few notice requirements offends due process); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 47 (2011) [hereinafter Hessick & Hessick, *Constitutional Rights*] (writing that courts have yet to grapple with due process concerns at sentencing); Young, *supra* note 38, at 335-36 (writing that all appellate courts have found due process requires only a preponderance of the evidence standard for judicial fact finding at sentencing).

[67] *See, e.g.*, Bowman, *Debacle*, *supra* note 31, at 378-79 (citing diminished due process protections at sentencing as the reason for the tail-wags-the-dog-problem).

[68] *See infra* Part I.B.

[69] *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (citing and quoting Mugler v. Kansas, 123 U.S. 623, 660-61 (1887)) (stating that, although it seems due process governs only those procedures through which the Government deprives others of liberty, it contains other certain inviolable protections); *see also* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (holding that due process stems from American ideals of fairness, thus equalizing the due process burdens incumbent upon both the states and the federal government); Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 14-16 (explaining the procedural protections in the criminal context).

[70] *See* Medina v. California, 505 U.S. 437, 445 (1992) (citing with approval this standard from Patterson v. New York, 432 U.S. 197, 201-02 (1977)); Kuckes, *supra* note 69, at 14-16.

[71] *See* Kuckes, *supra* note 69, at 14-16.

[72] *See* Chapman v. United States, 500 U.S. 453, 465 (1991) (stating that the government must first prove an individual's guilt at trial beyond reasonable doubt before depriving him of liberty); Bell v. Wolfish, 441 U.S. 520, 535 (1979) (stating that Fifth Amendment due process ensures that a defendant is not punished prior to an adjudication of guilt); Meachum v. Fano, 427 U.S. 215, 224 (1976) (stating that once the court has convicted a defendant, the court may impose whatever sentence it

Due process, substantively as well as procedurally, embodies fundamental notions of fairness, though the concept is not precise.[73] In the criminal context, due process at least guarantees that defendants enjoy the safeguard of government proof beyond a reasonable doubt.[74] The government must meet this burden *before* depriving defendants of their liberty; this guards against grievous error by the fact-finder.[75] Furthermore, the beyond reasonable doubt standard expresses a dominant normative maxim that has become almost a mantra of the American criminal justice system.[76] Indeed, it is one familiar to most Americans: better to let a multitude of guilty men go free than to convict a single innocent one.[77]

deems fit under the statute governing the offense).

[73] *See* Lassiter v. Dep't of Soc. Serv. of Durham Cty., 452 U.S. 18, 24 (1981) (stating that due process is a matter of finding fundamental fairness by individually assessing the several interests at stake in a given case); Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (holding fundamental fairness is the touchstone of due process); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) (noting that due process is not an inflexible standard, but rather a fluid one subject to the time, place, and circumstances of a given case); Lisenba v. California, 314 U.S. 219, 222 (1941) (defining due process as the relatively indeterminable fundamental fairness essential to the very concept of justice); Lara-Torres v. Ashcroft, 383 F.3d 968, 973 (9th Cir. 2004) (holding that a fundamentally unfair proceeding constitutes a due process violation in the context of an ineffective assistance of counsel claim); Saby Ghoshray, *Charting the Future of Online Dispute Resolution: An Analysis of the Jurisdictional and Constitutional Quandary*, 38 U. TOL. L. REV. 317, 337 (2006) (describing fundamental fairness in procedural due process includes at a minimum adequate notice of proceedings or charges and the right to a hearing); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 841 (2003) (citing and quoting Hurtado v. California, 110 U.S. 516, 532 (1884)) (stating that the substantive due process clause acts as a bulwark against arbitrary government action); Kathryn M. Zainey, *The Constitutional Infirmities of the Current Federal Sentencing System: How the Use of Uncharged and Acquitted Conduct to Enhance a Defendant's Sentence Violates Due Process*, 56 LOY. L. REV. 375, 377-78 (2010) (describing same minimal procedural safeguards).

[74] *See, e.g.*, Allen v. Illinois, 478 U.S. 364, 376-78 (1986) (illustrating due process protections given to criminal defendants); *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (holding proof beyond a reasonable doubt is the proper standard that fundamental due process fairness demands to mitigate error in depriving a criminal defendant of liberty); Coffin v. United States, 156 U.S. 432, 453 (1895) (explaining the same principles).

[75] *See In re Winship*, 397 U.S. at 372 (stating the fact-finder often fails to find the proper facts leading to the truth, but the reasonable doubt standard appropriately limits this error); *In re* Gault, 387 U.S. 1, 50 (1967) (stating that conveniently switching the names of procedures does not render inapplicable the core elements of due process); Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (stating the same principles).

[76] *See In re Winship*, 397 U.S. at 372; *Speiser*, 357 U.S. at 525-26.

[77] *See* SIR JOHN FORTESCUE, De Laudibus Legum Angliae 235 (Andrew Amos ed. &

Although the fundamental fairness inherent in due process mandates that the beyond reasonable doubt standard apply to criminal trials, the sentencing phase is "different."[78] Many scholars argue that the Supreme Court's approach to due process at the sentencing phase has been lax at best.[79] In fact, the most common standard of proof in judicial fact-finding is preponderance of the evidence.[80] With a diminished standard of proof, advisory Guidelines, and judicial sentencing discretion subject to deferential review, *Fitch* embodies this laxness carried to a logical extreme.[81] Most tellingly, federal courts

trans., Cambridge 1825) (c. 1470), *available at* http://archive.org/download/delaudibusleguma00fortuoft/delaudibusleguma00fortuoft.pdf ("Malem revera viginti facinorosos mortem pietate evadere quam justum unum injuste condemnari."); *see also In re Winship*, 397 U.S. at 372 (describing this as the primary animus which drives the assumptions of the beyond reasonable doubt standard in American criminal proceedings); *Speiser*, 357 U.S. at 525-26 (discussing the same notion).

[78] *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (differentiating between offense elements and sentence enhancements); United States v. Mobley, 956 F.2d 450, 455 (3d Cir. 1992) (explaining that defendants receive the full panoply of due process rights at trial but not at sentencing); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1208 (1993) (noting that courts, instead of engaging in meaningful Constitutional analyses, have merely relied upon the *ipse dixit* that sentencing is different from trial).

[79] *See* Williams v. New York, 337 U.S. 241, 245 (1949) (finding in death penalty cases that time-tested due process protections do not extend where the question is the proper punishment, not the adjudication of guilt); Townsend v. Burke, 334 U.S. 736, 741 (1948) (finding that a judgment, even though erroneous or based on incorrect information, if subject to a diligent search, possibly satisfies due process protections); Hessick & Hessick, *Constitutional Rights*, *supra* note 66, at 92 (arguing that the Supreme Court should begin to recognize rather than disregard constitutional limits, due process among them, at the sentencing phase); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1082 (2005) (explaining the Supreme Court for most of American history took a hands-off approach with regards to Constitutional processes affecting the results of criminal punishment decisions).

[80] *See McMillan*, 477 U.S. at 84 (stating the court has held in the past that preponderance of the evidence satisfies due process for judicial fact-finding at sentencing); Patterson v. New York, 432 U.S. 197, 214 (1977) (holding preponderance of the evidence standard sufficient to provide post-conviction due process); United States v. Treadwell, 593 F.3d 990, 999-1000 (9th Cir. 2010) (holding that preponderance of the evidence usually satisfies due process, but that due process may also require clear and convincing standard for uncharged relevant conduct); Young, *supra* note 38, at 335-36 (writing that all federal circuits have found preponderance of the evidence satisfies due process for judicial fact-finding).

[81] *See* United States v. Fitch, 659 F.3d 788, 795 (9th Cir. 2011) (calling the case a stark reminder of the post-*Apprendi* limited role of the jury and the post-*Booker* heightened discretionary powers of sentencing judge); Scott H. Greenfield, *The Murder That Wasn't*, N.Y. CRIM. DEF. BLOG (Sept. 24, 2011) (calling *Fitch* a logical extreme of prevailing sentencing doctrine); Kalar, *supra* note 7 (outlining how Supreme Court

sentence defendants under lower evidentiary standards for committing statutorily discrete crimes from the underlying offense.[82] All that current appellate review requires is that the sentencing judge meet the low threshold of stating the reasons for doing so.[83]

C. Sentencing and the Sixth Amendment

Because due process is such a dynamic concept, the *Fitch* decision and others like it most clearly implicate Sixth Amendment violations.[84] In pertinent part, the Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to a jury trial.[85] Complicating this rather straightforward proposition is the Supreme Court's line of decisions beginning in 2000 with *Apprendi v. New Jersey*.[86]

The *Apprendi* decision represents a new era in Sixth Amendment jurisprudence.[87] Defendant Charles Apprendi pled guilty in the state of

case law affected the outcome in *Fitch*).

[82] *See Fitch*, 659 F.3d at 798 (stating Congress is currently free to make drug quantities jury questions and the far more important question of murder as one for a judge alone); Herman, *supra* note 11, at 292 (explaining how bifurcated fact-finding permits judges to sentence defendants for uncharged conduct related to the underlying offense with fewer due process safeguards); Zainey, *supra* note 73, at 400 (describing how prosecutors use uncharged relevant conduct at sentencing to obtain so-called double convictions for separate crimes).

[83] *See* Almendarez-Torres v. United States, 523 U.S. 224, 240-41 (1998) (reaffirming that where facts cease to determine the elements of the charged crime and become enhancements, the beyond reasonable doubt standard does not necessarily apply); *McMillan*, 477 U.S. at 91 (finding judges' determinations and facts found at the sentencing phase satisfy due process when a preponderance of the evidence standard governs them); *see also Fitch*, 659 F.3d at 800 (Goodwin, J., dissenting) (citing and quoting *Treadwell*, 593 F.3d at 1000) (stating that the severity of the Guidelines departure in Fitch's case warrants a clear and convincing standard for a judicial finding of first-degree murder).

[84] *See Fitch*, 659 F.3d at 796 (questioning how much of the Sixth Amendment's substance *Fitch* preserves and citing Justice Scalia's concern that certain sentences may be reasonable only because of judge-found facts); Kalar, *supra* note 7 (stating that *Fitch* eviscerates the Sixth Amendment and the intent of *Apprendi*).

[85] US CONST. amend. VI (granting the same rights).

[86] *See* Apprendi v. New Jersey, 530 U.S. 466, 497 (2000).

[87] *See, e.g.*, Mark T. Doerr, *Not Guilty? Go to Jail: The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 241 (2009) (calling *Apprendi* a revolution in the field of Sixth Amendment sentencing jurisprudence, promising significant future impacts); FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING, U.S. SENTENCING COMM'N 9 (2006), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf (describing how the *Apprendi* decision affected the ability of federal judges to make findings of fact to calculate

New Jersey to several counts of possession of a firearm for unlawful purposes.[88] Apprendi used the firearm to shoot at a house that an African-American family occupied.[89] At the sentencing hearing, the judge found that the preponderance of the evidence supported the prosecution's theory that racial bias motivated Apprendi's offense.[90] Based on this finding, Apprendi suddenly faced fifty years behind bars instead of the original twenty-year maximum.[91]

In a five-to-four decision, the Supreme Court held that any fact that increases a defendant's sentence beyond the statutory maximum requires Sixth Amendment jury protections.[92] In Apprendi's case, for example, the applicable state statute governing the underlying offense at issue set a maximum of ten years.[93] The sentencing judge found by preponderance of the evidence that racial animus motivated Apprendi to shoot at the house.[94] This judicial fact-finding increased the maximum sentence for the offense to twelve years — two years beyond the statutory maximum.[95] The racial animus fact, therefore, would have to go before a jury for proof beyond a reasonable doubt.[96] However, the Court carved out an exception for prior convictions because facts leading to prior convictions have undergone jury scrutiny beyond reasonable doubt.[97]

Several years later, the Supreme Court refined the *Apprendi* rule in *Blakely v. Washington*.[98] In *Blakely*, the Court held that only juries could find or defendants could admit the facts establishing the limits

sentences).

[88] *Apprendi*, 530 U.S. at 468 (describing same counts).

[89] *Id.* at 468-69 (describing the racial implications of Apprendi's case and outlining the applicable New Jersey statutory punishments).

[90] *Id.* at 471 (describing the preponderance of the evidence standard as the permissible standard after adjudication of guilt).

[91] *Id.* at 470 (stating that *Apprendi*'s maximum sentence for the racially-animated count alone would top thirty years).

[92] *Id.* at 468, 490 (stating this rule and showing a scant 5-4 majority in the *Apprendi* court with every Justice writing a separate concurring or dissenting opinion).

[93] *Id.* at 469.

[94] *Id.*

[95] *Id.* at 471.

[96] *Id.* at 490.

[97] *See id.* (certifying the exception as constitutionally valid precisely because those facts leading to prior convictions already went before a jury under the beyond reasonable doubt standard).

[98] *See* Blakely v. Washington, 542 U.S. 296, 303 (2004) (holding the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose only from jury-found or admitted facts).

on judicial fact-finding.[99] More importantly for this Note's purposes, *United States v. Booker*, a case with facts similar to *Apprendi*, applied this ruling from *Blakely* to the Guidelines.[100]

In *Booker*, the Government charged Freddy Booker with intent to distribute at least fifty grams of crack cocaine.[101] A jury convicted Booker of the offense.[102] The sentencing judge found under a preponderance standard that Booker possessed an additional 566 grams of crack cocaine, significantly enhancing his Guidelines sentence.[103] Applying *Blakely*, the Supreme Court found that Booker's sentence violated the Sixth Amendment because a judge-found fact increased his punishment beyond the Guidelines maximum.[104]

The Guidelines, however, embrace a modified real-offense system.[105] This system requires sentencing judges to find sentence-enhancing facts to tailor a sentence to the particular way a particular defendant committed a particular crime.[106] *Booker*, therefore, invalidated the

[99] *See id. See generally* Bowman, *Band-Aids*, *supra* note 17, at 176 (analogizing the advent and import of the *Blakely* decision to the legal equivalent of a high and hard baseball pitch).

[100] *Compare* United States v. Booker, 543 U.S. 220, 227 (detailing a Guidelines 210–262 month sentence enhanced to 360 months to life based on judge-found fact under preponderance standard that Booker possessed 566 extra grams of cocaine base), *with Apprendi*, 530 U.S. at 468-90 (detailing how a judge-found fact of racial animus under the same standard more than doubled the Guidelines range of Apprendi's sentence). *See generally* Bowman, *Band-Aids*, *supra* note 17, at 176 (using the colorfully descriptive metaphor of a "knuckleball pitch that would make Phil Niekro jealous" to describe the juridical equivalent of the Court's *Booker* decision); Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 939 (2006) (denominating *Booker* a recent law-changing decision spawning a particularly significant transitional moment in federal sentencing law).

[101] *Booker*, 543 U.S. at 228.

[102] *Id.*

[103] *Id.* at 221.

[104] *See id.* at 239-41 (expressing disagreement with the Government's argument and giving stare decisis effect to the *Blakely* rule).

[105] *See* Breyer, *supra* note 41, at 8-12 (describing how the Sentencing Commission compromised to create a mixed sentencing system with charge offense elements and real offense elements).

[106] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2011) (outlining the Guidelines' basic approach to sentencing by granting judges fact-finding powers to achieve proportional punishments consistent with how particular offenders commit particular offenses); *Booker*, 543 U.S. at 245 (finding the Guidelines as mandatory to be unconstitutionally incompatible with the Sixth Amendment because they require judges — not juries — to find facts at sentencing); Breyer, *supra* note 41, at 11-12 (describing the Guidelines modified real-offense approach to sentencing, which requires judges to find certain facts on how a particular defendant particularly committed a particular offense).

mandatory Sentencing Guidelines scheme as unconstitutional.[107] Unwilling to hold the Guidelines incompatible with the Sixth Amendment, the Court devised a remedy, severing 18 U.S.C. §§ 3553(b)(1) and 3742(e).[108] Section 3553(b)(1) required sentencing judges to impose sentences within Guidelines' range, and 3742(e) mandated de novo appellate review of a sentence.[109] The remedy of severing these two particular statutory provisions likewise had two effects.[110] First, the Guidelines became advisory because, the Court reasoned, judges could then constitutionally depart from them where necessary, thereby saving the federal sentencing system.[111] Second, appellate courts may now review sentences for their reasonableness, largely deferring to a sentencing judge's findings under an abuse of discretion standard.[112]

D. Sentencing Reasonableness

Booker applied the *Blakely* rule to the federal system and held the Guidelines advisory.[113] However, *Booker* carefully emphasized that the Guidelines would still play an important role as the benchmark and initial guide for sentences actually imposed.[114] The Court then had to contend with a question *Booker* left largely unresolved: namely, how to determine whether sentences outside the Guidelines' ranges are

[107] *See Booker*, 543 U.S. at 225.

[108] *See id.* at 245-46 (severing and excising 18 U.S.C. § 3553(b)(1) and § 3742(e) because they were incompatible with *Booker's* substantive Sixth Amendment holding). *See generally* 18 U.S.C. § 3553(b)(1) (2000) (containing mandatory language to the effect that a court shall impose a sentence within the Guidelines range applicable post-trial and judicial fact-finding); 18 U.S.C. § 3742(e) (2000) (mandating appellate de novo standard of review for a sentence, thus limiting judicial discretion and augmenting the Guidelines mandatory nature).

[109] *See Booker*, 543 U.S. at 245-46.

[110] *See id.* at 245-46, 268.

[111] *See id.* at 268 (holding Guidelines as only advisory and subject to reasonableness review so that the upper range of a Guidelines sentence does not constitute *Apprendi's* statutory maximum). *See generally* Bowman, *Band-Aids*, *supra* note 17, at 181 (describing the fallout from the Booker opinion as stunned amazement at the selective excising of provisions in Congress's Sentencing Reform Act).

[112] *See Booker*, 543 U.S. at 268.

[113] *See supra* Part I.C.

[114] *See* Rita v. United States, 551 U.S. 338, 350 (2007) (stating judges may depart from the Guidelines range in imposing a sentence only after setting forth their reasons for doing so); *Booker*, 543 U.S. at 264 (holding that sentencing courts must still take the Guidelines into account when imposing a sentence); Bowman, *Band-Aids*, *supra* note 17, at 183-84 (explaining this same process as the reason why the Guidelines are still important benchmark considerations in imposing a sentence).

reasonable.[115] The answer to this unsettled *Booker* question came two years later in a series of reasonableness review cases, most notably in *Gall v. United States* in 2007.[116]

In *Gall*, Iowa University student Brian Gall joined an ecstasy distribution ring but shortly withdrew from the conspiracy and stopped both taking and distributing ecstasy.[117] The Government later approached Gall and questioned his involvement in the ecstasy conspiracy.[118] Prosecutors obtained an indictment charging Gall with conspiracy to distribute ecstasy.[119] The Government requested a Guidelines range sentence of thirty-five to thirty-seven months imprisonment, but the sentencing judge, finding Gall self-rehabilitated, instead imposed thirty-six months of probation.[120]

The Supreme Court held that Gall's sentence was reasonable under the circumstances.[121] The Supreme Court reasoned that an appellate court must review a sentence under an abuse of discretion standard.[122] This deference is necessary to ensure that sentencing judges have sufficient leeway to tailor a sentence to the factual nuances of a

[115] *See* Jelani J. Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of* Gall*, Kimbrough, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 125-26 (2008) (noting that after *Booker* and the later reasonableness-clarifying *Rita* case, there were still many questions left unanswered about the Guidelines role within the reasonableness review framework); Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 687 (2011) (explaining that the basic *Booker* holdings failed to resolve the question of how sentencing procedures and criteria should change to substantiate *Booker's* advisory-Guidelines-reasonableness-review remedy); Wes R. Porter, *The Pendulum in Federal Sentencing can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post-*Booker, 37 WM. MITCHELL L. REV. 469, 510 (noting that after *Booker*'s incongruous remedial effect on federal sentencing and the Guidelines, the new standard of reasonableness review took some time to formulate).

[116] *See* Gall v. United States, 552 U.S. 38, 49-50 (2007) (holding that post-*Booker* substantive reasonableness review dictates that imposed sentences — whether inside or outside the Guidelines range — meet an abuse of discretion standard); *see also* Kimbrough v. United States, 552 U.S. 85, 111 (2007) (holding that a sentencing court did not abuse its discretion where deferring to Congress's 18 U.S.C. § 3553(a) factors and linking them to the sentence imposed); *Rita*, 551 U.S. at 354 (holding that a presumption of reasonableness and comportment with the Sixth Amendment exist where a sentence falls within the applicable and appropriate Guidelines range).

[117] *See Gall*, 552 U.S. at 41.

[118] *Id.* at 42.

[119] *Id.*

[120] *Id.* at 43.

[121] *Id.* at 58.

[122] *See id.* at 49-51 (holding the same as the proper scope of reasonableness review).

particular case.[123] The Court further held that, although sentences within Guidelines range retain a presumption of reasonableness, sentences outside the range do not retain a presumption of unreasonableness.[124] The Court reasoned that this approach recognizes Congress's purpose (i.e., uniformity) in enacting the Guidelines while allowing a sentencing judge the discretion necessary to individualize sentences.[125]

II. *UNITED STATES V. FITCH*

Part I described the state of the law under which the Ninth Circuit decided *Fitch*.[126] First, a preponderance of the evidence standard is all that Fifth Amendment due process requires for judges to find facts at sentencing.[127] Second, under the Sixth Amendment and the now advisory Guidelines, these judge-found facts may increase a sentence beyond the upper limit of the Guidelines range.[128] Third, appellate courts, largely deferring to sentencing judges, will review these sentences only to ensure they are reasonably connected to judge-found facts and the circumstances.[129] At its core, *Fitch* illustrates the prosecutorial loophole that this current federal sentencing jurisprudence permits to flourish.[130] In this way federal prosecutors

[123] *See id.* at 51(citing and quoting Koon v. United States, 518 U.S. 81, 98 (1996)) (finding a uniform constancy has existed in the federal judicial tradition where a sentencing judge considers every convicted person and every case as unique); *see also* 18 U.S.C. § 3553(a) (2010) (establishing several individualizing, defendant-specific, and case-specific factors a sentencing court must consider in the course of devising a Guidelines sentence); United States v. Booker, 543 U.S. 220, 278 (2005) (arguing the Sixth Amendment Jury Trial Guarantee does not preclude per se a judge from considering relevant, uncharged, or untried conduct in a specific case).

[124] *See Gall*, 552 U.S. at 47 (rejecting a mathematical proportionality test for determining reasonableness as coming too close to an impermissible presumption of unreasonableness for sentences outside the Guidelines range).

[125] *See id.* at 51, 70.

[126] *See supra* Part I.

[127] *See supra* Part I.B.

[128] *See supra* Part I.C.

[129] *See supra* Part I.D.

[130] *Cf.* Gertner, *Behaving Badly*, *supra* note 39, at 579 (speculating that the post-*Booker* advisory Guidelines would allow judges to err when imposing sentences); Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 14 (2005) (lamenting the widely expansive and manipulable rules of relevant, uncharged conduct that federal sentencing law now permits); Yellen, *Misguided Approach*, *supra* note 11, at 275-76 (noting problems of transparency with the current sentencing regime and that fairness would dictate not sentencing a defendant for conduct that could form the basis of a separate criminal charge).

may charge Offense X and then seek an enhanced sentence for uncharged relevant conduct at the sentencing phase.[131] Prosecutors may then prove this uncharged relevant conduct under a lower standard of proof, thereby obtaining a bootstrapped sentencing benefit.[132] It is of no concern that Offenses X and Y are separate criminal charges; they only have to be related, which in turn means that they constitute acts or omissions bundled up in the same criminal transaction.[133] Advisory Sentencing Guidelines and deferential substantive reasonableness review ensure that appellate courts will most likely affirm the sentence imposed.[134] With that larger context in mind, this Note now turns to consider *Fitch*.[135]

In 2004, the Government indicted David Kent Fitch on sixteen counts of various fraud offenses — and only fraud offenses — against his missing wife, Maria Bozi.[136] Bozi had vanished four years earlier under suspicious circumstances.[137] During that time, federal investigators observed Fitch withdrawing money from Bozi's bank account while wearing a fake mustache.[138] Fitch sold Bozi's clothes, used her health insurance account to schedule hernia surgeries, and attempted to use her credit card to purchase synthetic emeralds online.[139]

In 2007, a federal jury convicted Fitch of all sixteen fraud counts.[140] Fitch also had a prior conviction for unlawful possession of a firearm.[141] Given this criminal history and the offense level of each fraud count, the Guidelines' recommended range was forty-one to

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[131] *See supra* Part I.A.

[132] *See supra* Part I.B.

[133] *See supra* Part I.A-B. *See also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (defining relevant conduct as "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant").

[134] *See supra* Part I.D.

[135] *See infra* Part II.

[136] *See* United States v. Fitch, 659 F.3d 788, 788-95 (9th Cir. 2011) (listing nine counts of bank fraud, two counts of fraudulent use of an access device, two attempt counts of the same, two counts of laundering monetary instruments, and one money-laundering count).

[137] *See id.* at 791-93 (noting grimly that Maria Bozi suddenly stopped returning calls, money began disappearing from her bank accounts, and Fitch lied concerning her whereabouts).

[138] *Id.*

[139] *Id.*

[140] *Id.* at 793 (stating the same).

[141] *Id.*

fifty-two months.[142] During sentencing, the government proposed an upward departure, arguing that Fitch murdered Bozi to accomplish the fraud offenses he committed against her.[143] Based on the record, the sentencing judge agreed and increased the sentence fivefold to 262 months.[144]

On appeal, the Ninth Circuit affirmed Fitch's sentence, citing the holdings from *Apprendi* and *Booker*.[145] The Ninth Circuit also referenced the lax substantive reasonableness requirements of *Gall* in support of its affirmance of Fitch's sentence.[146] The Ninth Circuit reasoned that Fitch's sentence did not violate the *Apprendi* rule as refined in *Blakely* and applied to the federal system in *Booker*.[147] The Ninth Circuit reached this conclusion because Fitch's 262-month sentence fell below the statutory maximum Fitch could have faced for the fraud convictions alone.[148] Post-*Booker* advisory Guidelines set substantive reasonableness as the sole restraint on departure.[149] The Ninth Circuit held that the sentencing judge's murder finding was reasonable given the facts contained in the PSR, facts to which Fitch did not object.[150] Therefore, the Ninth Circuit affirmed the district

[142] *Id.* at 790 (stating the applicable Guidelines range as 41–52 months); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2011) (instructing a court to find the base offense level, determine the defendant's criminal history category, and then converge both axes to obtain the range).

[143] *Fitch*, 659 F.3d at 791-93.

[144] *Id.* at 791-94 (describing these as the considerations which led the district sentencing court to increase Fitch's sentence range from 41-52 months to 210-262 months).

[145] *See id.* at 795-96 (citing and quoting United States v. Booker, 543 U.S. 220, 233 (2005) and Apprendi v. New Jersey, 530 U.S. 466, 489 (2000)) (stating the Supreme Court relegated the jury's role to determining any fact that increases the statutory maximum penalty and increased judicial discretion through advisory Guidelines).

[146] *See id.* at 796 (citing and quoting Rita v. United States, 551 U.S. 338, 341 (2007)) (finding the only restrictions on sentencing are freedom from procedural error and substantive reasonableness).

[147] *Id.* (wondering aloud how much of *Apprendi*'s Sixth Amendment substance extended to Fitch's case).

[148] *See id.* (expressing the same Sixth Amendment doubts vis-à-vis the 360-year statutory maximum sentence Fitch could have faced); *see also* 18 U.S.C. § 1344(2) (2011) (providing a maximum fine of $1,000,000 and a maximum thirty-year term of imprisonment for one count of bank fraud).

[149] *See Fitch*, 659 F.3d at 798 (finding the only post-*Booker* sentencing restraint to be the substantive reasonableness standard set forth in the *Booker*, *Rita*, *Gall*, and *Carty* cases); *see also* Jonathan S. Masur, Booker *Reconsidered*, 77 U. CHI. L. REV. 1091, 1100-01 (2010) (writing that the Supreme Court established the lone substantive reasonableness bulwark to avoid reinvesting the Guidelines with unconstitutional mandatory authority).

[150] *See Fitch*, 659 F.3d at 790-91 (stating that Fitch did not dispute the PSR facts

court's 262-month sentence despite the Guidelines' recommended forty-one to fifty-two month sentence.[151]

III. ANALYSIS

Having reviewed the current state of federal sentencing laws and *Fitch*, this Note now analyzes why the Ninth Circuit erred in affirming Fitch's sentence.[152] First, the Ninth Circuit did not consider that the Government could have charged Fitch with the most liberty-restricting conduct (i.e., murder).[153] Second, a more nuanced reading of the Court's holding in *Booker* shows why Fitch's sentence violates the Sixth Amendment.[154] Finally, Fitch's sentence was substantively unreasonable because uncharged conduct imposed higher penalties than charged conduct.[155]

A. Fifth Amendment Due Process Concerns: Using Uncharged Relevant Conduct to Drive Fitch's Sentence

Due process under the Fifth Amendment, at its most intrinsic level, protects a defendant's right to substantive and procedural fairness.[156] Due process at sentencing requires only a preponderance of the evidence standard for judicial fact-finding with no other evidentiary safeguards.[157] In this context, due process's basic fairness dictates that

described in the Court's opinion and so used them to affirm his sentence departure); *see also* United States v. Keller, 902 F.2d 1391, 1393-94 (9th Cir. 1990) (stating the general rule for the Ninth Circuit that a defendant's failure to object to facts contained in a PSR constitutes admission of those facts and a waiver of the right to attack their accuracy).

[151] *See id.* at 798-99 (writing that the court based its sentence on the § 3553(a) factors and factually-proven atypical murder, thus finding that the sentence was thus reasonable).

[152] *See supra* Parts I-II; *infra* Part III.

[153] *See infra* Part III.A.

[154] *See infra* Part III.B.

[155] *See infra* Part III.C.

[156] *See* Dist. Atty's Office v. Osborne, 557 U.S. 52, 67 (2009) (citing and quoting Jones v. Flowers, 547 U.S. 220, 226-39 (2006)) (holding due process ensures procedural limitations on the government's power to strip away protected entitlements, such as liberty interests); Medina v. California, 505 U.S. 437, 446 (1992) (citing and quoting Patterson v. New York, 432 U.S. 197, 202 (1977)) (stating that due process in the criminal context requires adherence to fundamental principles of justice rooted in American traditions and conscience).

[157] *See* McMillan v. Pennsylvania, 477 U.S. 79, 80, 91-92 (1986) (holding that the preponderance standard is sufficient to satisfy due process in the context of judge-found facts where historically no standard at *all* was required); Williams v. New York, 337 U.S. 241, 251 (1949) (refusing to find that due process prevents voiding a

a sentencing court impose punishment for the acts that defendants commit.[158] However, these minimal sentencing safeguards may not sufficiently fulfill due process as that notion of basic fairness would dictate.[159]

Fitch demonstrates that current federal sentencing law allows the government to obtain significant sentencing benefits through uncharged, untried conduct.[160] All the government need do is charge a defendant with the offenses it may most easily prove beyond a reasonable doubt at the guilt phase.[161] This tactic has the effect of increasing the maximum punishment a court may impose.[162] Once the

sentence merely because a judge obtains out-of-court information to assist him in imposing it); Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion; Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 6 (1997) (discussing extreme deference appellate courts afforded sentencing judges, reviewing only for abuse of discretion such as the consideration of erroneous information).

[158] *See, e.g.*, *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (explaining the constitutional necessity of error mitigation in criminal proceedings).

[159] *See* Bowman, *Debacle*, *supra* note 31, at 368-69 (discussing how the Court should adopt a more coherent sentencing regime that does not give short shrift to due process); *see also Williams*, 337 U.S. at 251 n.18 (citing Townsend v. Burke, 334 U.S. 736 (1948)) (emphasizing even in the midst of the unbridled judicial discretion of the indeterminate sentencing era that the sentencing procedure was not immune from due process).

[160] *See* United States v. Fitch, 659 F.3d 788, 790 (9th Cir. 2011) (stating that federal prosecutors never charged Fitch with his wife's murder); *see also* United States v. Mayle, 334 F.3d 552, 565, 567-68 (6th Cir. 2003) (affirming a twenty-three level upward Guidelines departure based on uncharged murders where the charged offenses were identity theft); United States v. Vernier, 335 F. Supp. 2d 1374, 1376-77 (S.D. Fla. 2004) (departing from the Guidelines fifteen levels upward based on an uncharged murder where the charged offense was access device fraud), *aff'd*, 152 Fed. App'x 827 (11th Cir. 2011) (basing affirmance rationale on the usual suspects, namely, *Apprendi*, *Booker*, and *Gall*).

[161] *Compare* Benjamin J. Priester, Apprendi *Land Becomes Bizarro World: "Policy Nullification" and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 SANTA CLARA L. REV. 1, 36 (2011) (observing that the Supreme Court has lost sight of the roles prosecutors play in federal sentencing, since a sentence's scope depends upon the prosecution's charges filed), *and* Benjamin J. Priester, *Structuring Sentencing:* Apprendi*, the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 893 (2004) (observing that, depending on the sentencing scheme in place, the prosecutor's charging decision may have comparatively greater importance in determining the defendant's ultimate punishment), *with* United States v. Booker, 543 U.S. 220 (2005) (severing and excising the mandatory nature of the Guidelines, which effectively would have served as *Apprendi*'s statutory maximum line of judge-jury demarcation), *and* Apprendi v. New Jersey, 530 U.S. 446 (2000) (setting the statutory maximum of a sentence as the line of demarcation between a judge and a jury).

[162] *See* U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1(a)(1)-(4), §§ 3D1.1(a)(1)-(3) (2011) (instructing a sentencing judge to apply baseline offense levels with

government has proven those offenses beyond a reasonable doubt, it may then introduce a more nuanced case theory at the sentencing phase.[163] As *Fitch* demonstrates, that theory may implicate related offenses that the government would have greater difficulty proving beyond a reasonable doubt at the guilt phase.[164] In turn, this implication increases the sentencing court's ability to find facts under a relaxed standard of proof and thus depart from the Guidelines range.[165] *Fitch*, then, is a stark reminder that judge-found sentencing facts can promise greater punishment than would flow from the actual underlying offense of which a jury convicted the defendant.[166] Thus,

appropriate adjustments for each underlying offense and then aggregate the various offense levels); Oregon v. Ice, 555 U.S. 160, 164 (2009) (holding the Sixth Amendment as construed in *Apprendi* and *Blakely* does not preclude judicial fact-finding necessary to impose consecutive sentences for multiple offense counts); *see also Booker*, 543 U.S. at 233 (holding the *Blakely* rule equally applies to federal sentencing law).

[163] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) (2011) (stating a sentencing judge may consider, given sufficient indicia of reliability, relevant information without regard to its admissibility under federal evidence rules); *Fitch*, 659 F.3d at 793 (stating the Government proposed their first-degree murder theory at sentencing for Fitch's fraud offenses without charging first-degree murder in its complaint); United States v. Wiant, 314 F.3d 826, 832 (6th Cir. 2003) (observing the Guidelines set a low bar for the kinds of evidence sentencing judges may rely on to decide factual issues at sentencing).

[164] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.1 (2011) (empowering sentencing judges to use intended or knowingly-risked deaths as grounds for upward departures); *Fitch*, 659 F.3d at 800 (Goodwin, J., dissenting) (citing a general lack of facts in the record to support a finding of intent and citing the absence of evidence surrounding Bozi's supposed murder); Gertner, *Circumventing Juries*, *supra* note 37, at 434-35 (describing a not-so-unusual Guidelines scenario where a federal prosecutor tries to slip in additional uncharged facts at sentencing because she cannot prove them at trial).

[165] *See* McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (declaring the Court had little difficulty in holding that a preponderance of the evidence standard satisfies due process); Gertner, *Circumventing Juries*, *supra* note 37 at 434-35 (describing the aforementioned overzealous prosecutor scenario); J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentence Reform Act of 1984*, 45 U. RICH. L. REV. 693, 718-19 (2011) (asking Sara — the anthropomorphized Act — if she knows who assumes power over sentencing under real-offense Guidelines and answering the prosecutor does).

[166] *See Fitch*, 659 F.3d at 799 (noticing the unusual weightiness of the uncharged murder on Fitch's sentence). *Compare* 18 U.S.C. § 1111(b) (2011) (setting life imprisonment as the maximum punishment for one count of first degree murder), *with* 18 U.S.C. § 1344(2) (2011) (setting thirty years imprisonment plus a $1 million fine as the maximum punishment for one count of bank fraud).

Fitch and other similar cases are prime examples of this tail-wags-the-dog due process issue the Court should seek to limit.[167]

Balancing judicial discretion necessary under the advisory Guidelines with Congress's concurrent aim for sentencing uniformity may provide some solutions to these due process wrinkles.[168] The Guidelines intend to limit judicial sentencing discretion in the name of increased sentencing uniformity.[169] At the same time, the Guidelines seek allowance for a judge to impose a sentence that fits the particular circumstances of an offense.[170]

Looking to these goals and due process, the punitive effect of uncharged relevant conduct found at sentencing should not exceed that effect for underlying offenses.[171] If the punitive effect of the

[167] *See* United States v. Watts, 519 U.S. 148, 163-64 (1997) (Stevens, J., dissenting) (denouncing, as perverse and unsupported in prior cases, a sentence enhanced six months beyond the upper Guidelines range); Bowman, *Debacle*, *supra* note 31, at 378 (stating the tail-wags-the-dog phenomenon, where judge-found facts rival or exceed the punitive effect of the elements of the conviction offense, is perhaps illegitimate); Herman, *supra* note 11, at 307-10 (stating there is little reason where procedural protections are concerned to spare the prosecution from proving the facts that will drive the sentence).

[168] *See* 28 U.S.C. § 991(b)(1)(B) (2011) (stating the purposes of the Guidelines are to provide certainty and fairness while also allowing for flexibility and individualized sentences); United States v. Booker, 543 U.S. 220, 252 (2005) (lamenting that if the Guidelines proved to be unconstitutionally incompatible with the Sixth Amendment, their absence would destroy Congress's sentencing statutes); Bowman, *Debacle*, *supra* note 31, at 367 (stating that solutions to current sentencing predicaments should implicate both Sixth Amendment jury trial considerations and Fifth Amendment due process considerations); Breyer, *supra* note 41, at 2 (writing that Congress intended the Sentencing Commission and the Guidelines to manage practical administrative goals and the competing goals of the criminal justice system).

[169] *See, e.g.*, Breyer, *supra* note 41, at 4 (stating that Congress through the Guidelines sought to mitigate unjustifiably wide sentencing disparities for similar offenses).

[170] *See, e.g.*, *id.* (noting that the Guidelines needed real-offense elements, but not so many that sentencing would become unwieldy or procedurally unfair).

[171] *See* Apprendi v. New Jersey, 530 U.S. 466, 484-85 (2000) (citing and quoting Almendarez-Torres v. United States, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)) (stating the Court has made clear beyond peradventure that *Winship* due process and associated jury protections to some degree apply to sentence length); McMillan v. Pennsylvania, 477 U.S. 79, 96 (1986) (Stevens, J., dissenting) (declaring due process requires the Government to prove beyond a reasonable doubt components of a prohibited transaction that give rise to special stigma and punishment); Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (finding the government cannot circumvent its *Winship* burdens by recharacterizing different crimes as factors governing only the extent of punishment); *In re Winship*, 397 U.S. 358, 364 (1970) (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)) ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the fact-

uncharged conduct at sentencing exceeds that of the conviction offenses, the government exploits the prosecutorial loophole.[172] For example, in *Fitch*, the Government theorized that Fitch had murdered Bozi *after* convicting Fitch of fraud offenses; the uncharged murder, then, drove his sentence.[173] Fitch had a significantly greater interest in disputing, under the beyond-reasonable-doubt standard, the uncharged murder than the fraud, because the murder entailed greater consequences on his liberty.[174] However, it seems that the defense was not even aware that the prosecution would introduce the murder theory until they were already at the sentencing phase.[175] Therefore, the Government should have charged murder, presenting the fraud offenses, if not at trial, then at the sentencing phase as factors warranting Guidelines departure.[176] This result would be closer in keeping with the notice requirements of due process.[177]

This proposition, whereby the Government breaks up a given defendant's criminal conduct and formally charges the most liberty-restricting of that conduct, allows for increased notice and gives a defendant a fuller opportunity to litigate under a heightened

finder of his guilt."); Yellen, *Misguided Approach*, *supra* note 11, at 275 (arguing a sounder, fairer Guidelines policy would not permit prosecutors to bypass the trial or plea bargaining process to obtain a sentencing benefit); *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding American ideals of fairness equalize Fifth Amendment federal due process burdens and Fourteenth Amendment state due process burdens).

[172] *See, e.g.*, Gertner, *Circumventing Juries*, *supra* note 37, at 434-35 (describing an overzealous prosecutor exploiting uncharged conduct at sentencing with diminished procedural safeguards); Hessick & Hessick, *Constitutional Rights*, *supra* note 66, at 92 (expounding on lack of Constitutional and procedural safeguards at federal sentencing phases); Yellen, *Just Deserts*, *supra* note 17, at 1434-35 (criticizing slyly the prosecutorial practice of using uncharged conduct at sentencing to win harsher sentences).

[173] *See* United States v. Fitch, 659 F.3d 788, 790 (9th Cir. 2011) (imposing a murder sentence over 200 months in excess of Fitch's fraud sentences).

[174] *See id.* (discussing the first degree murder's sentence-enhancing effect); *see also* Dist. Atty's Office v. Osborne, 557 U.S. 52, 67 (2009) (stating the first step in a due process analysis is to examine the asserted liberty at stake); Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 571-72 (1972) (stating that one must examine whether liberty, property, good name, reputation, honor, and integrity are at stake to determine due process).

[175] *See Fitch*, 659 F.3d at 793 (stating that the government sought its upward departure on the uncharged murder theory at sentencing and not before); *see also Ninth Circuit Affirms 262-Month Sentence*, *supra* note 6, at 1867 (calling Fitch's murder conviction an "indirect" one).

[176] *See supra* text accompanying note 171 (stating key due process principles and their respective authorities).

[177] *See supra* text accompanying note 171 (stating key due process principles and their respective authorities).

evidentiary standard the facts that will most impinge upon his liberty interests.[178] After all, the opportunity for a meaningful hearing and the opportunity to litigate the issues most germane to a defendant's interests are the cornerstones of due process notice.[179] Further, this approach harmonizes Congressional intent with respect to the Guidelines.[180] The sentencing court is still free to depart from the Guidelines and tailor a given sentence for the individual defendant.[181] Too, this argument would ensure that the most liberty restricting conduct fall under jury-based beyond reasonable doubt scrutiny with its heightened safeguards.[182]

Others would counter-argue that Fitch had sufficient notice and opportunity to contest the facts in the PSR that led to the judge-found

[178] *See* Dusenberry v. United States, 534 U.S. 161, 167 (2002) (holding the *Mullane* reasonable notice test and the *Matthews* reasonable notice test will apply in due process claims); Burns v. United States, 501 U.S. 129, 138 (1991) (citing failure to give a defendant advance notice of facts that result in a higher sentence may raise due process concerns); Smith v. Goguen, 415 U.S. 566, 572 n.8 (1974) (stating due process requires a defendant have adequate notice when life, liberty, or property are at stake); Mullane v. Cent. Hanover Bank, 339 U.S. 306, 314 (1950) (stating an elemental and fundamental requirement of due process in any proceeding is reasonable notice under the circumstances); Hessick & Hessick, *Constitutional Rights*, *supra* note 66, at 56 (noting the growing importance of recognizing more procedural protections at sentencing since the majority of defendants plead).

[179] *See* Irizarry v. United States, 553 U.S. 708, 715-16 (2008) (stating prejudicial surprise stemming from a particular sentence imposed on the underlying offense's factual basis violates due process); Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (noting the fundamental requirement of due process is a meaningful time and manner to litigate a claim); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (discussing the same fundamental requirements).

[180] *See supra* text accompanying note 171 (citing due process principles and authorities, which still permit judicial discretion to obtain uniformity and fairness at sentencing).

[181] *See supra* text accompanying note 171 (standing for the proposition that federal prosecutors charge, in particular cases, the most liberty-restricting offenses, leaving lesser ones for judicial sentencing phase discretion). *See generally* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2011) (stating the need for sentencing judges to use the Guidelines to account for context-specific permutations of a convicted offense); Blakely v. Washington, 542 U.S. 296, 303 (2004) (writing that, as an alternative to *Apprendi*, legislatures may establish legally essential sentencing factors which may cross impermissible limits where they are tails-wagging-dogs); McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986) (finding that the sentencing statute was not a tail-wagging-dog scenario because it did not expose defendants to greater punishment than the conviction offense).

[182] *Cf. Blakely*, 542 U.S. at 313-14 (observing facetiously the government should have suffered the modest trouble of submitting their accusation to a jury trial rather than to a lone state employee).

first-degree murder.[183] To guide a judge's sentence, probation officers compile the PSR by investigating the history of the defendant and the circumstances of the offense.[184] Fitch objected to only a portion of his PSR.[185] Moreover, Fitch did not request a hearing based on his objections.[186] Therefore, he received reasonable notice sufficient to satisfy due process.[187]

This argument still does not trump a defendant's due process rights to *reasonable* notice nor a meaningful hearing *under the circumstances*.[188] For all Fitch knew, the Government had charged him with fraud and money laundering.[189] From Fitch's point of view, the Government would most likely use the PSR facts with an eye towards *those* offenses rather than murder.[190] For those reasons, this counterargument fails to consider the due process notice and hearing implications of uncharged sentence enhancements.[191] Significantly, it

[183] *See* United States v. Fitch, 659 F.3d 788, 790-91 (9th Cir. 2011) (noting Fitch did not object to the sentencing court's reliance on undisputed portions of the PSR which detailed the facts of Bozi's disappearance); *see also* Simmons v. South Carolina, 512 U.S. 154, 164-65 (1994) (explaining PSRs implicate due process violations when defendant cannot obtain them with an opportunity to rebut, deny, or explain the facts they contain).

[184] *See* U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 (2011) (stating that probation officers must compile and submit PSRs); FED. R. CRIM. P. 32(c)-(d) (outlining the investigatory procedures and objectives for PSRs).

[185] *See Fitch*, 659 F.3d at 790-91 (stating that Fitch was aware of the PSR and the facts contained in it).

[186] *See id.* at n.2 (stating that Fitch did not seek a hearing after objecting to portions of his PSR); *see also* FED. R. CRIM. P. 32(e)-(f) (providing that probation officers disclose PSRs to defendants so that defendants may review them and object to them in writing, if necessary).

[187] *See, e.g.*, Mullane v. Cent. Hanover Bank, 339 U.S. 306, 315 (1950) (stating that notice reasonable under the circumstances satisfies due process in any proceeding).

[188] *Compare* Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citing and quoting California v. Trombetta, 467 U.S. 479, 484 (1984)) (stating that the Constitution provides criminal defendants with a meaningful opportunity to present a complete defense), *with Mullane*, 339 U.S. at 315 (stating due process's reasonable notice requirement).

[189] *See Fitch*, 659 F.3d at 790 (listing these as the offenses of conviction).

[190] *See* FED. R. CRIM. P. 32(c)(1)(A) (stating a defendant has the right to a PSR consultation following an underlying offense); Burns v. United States, 501 U.S. 129, 135-39 (1991) (holding a PSR disclose potential departure-warranting facts to comport with due process); *Mullane*, 339 U.S. at 315 (stating reasonable notice under the circumstances as satisfying due process); *Fitch*, 659 F.3d at 790 (listing fraud offenses as the offenses of conviction and not mentioning first degree murder until describing Fitch's sentencing phase).

[191] *Compare* Simmons v. South Carolina, 512 U.S. 154, 164-65 (1994) (mentioning notice but not addressing the sentencing tail-wagging-dog-phenomenon), *with*

does not address Fitch's lack of notice to the actual import of the facts to the impact on his liberty, and it does not address Fitch's inability to present those facts to a jury subject to the beyond reasonable doubt standard.[192] Therefore, despite Fitch's failure to object, the PSR did not give reasonable notice or a meaningful hearing opportunity under the circumstances.[193]

B. Sixth Amendment Jury Trial Implications: A Closer Reading of Booker Sets the Guidelines Range as the Limit on the Use of Uncharged Relevant Conduct

In the past decade, the Supreme Court has closely scrutinized the Sixth Amendment's jury trial guarantee and its relation to federal sentencing.[194] Most saliently, *Apprendi* requires the prosecution to present a jury with any fact that increases a defendant's sentence beyond the statutory maximum.[195] The Court exempted prior convictions from this rule.[196] *Blakely* and *Booker* reaffirmed the *Apprendi* holding, refined it further, and applied it to the new advisory status of the Guidelines.[197]

Uncharged conduct resulting in significant upward Guidelines departures generates similarly significant Sixth Amendment jury trial concerns.[198] As this Note has explained, a federal prosecutor may

Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (prohibiting the government from circumventing its *Winship* duties by characterizing certain facts as tail-wagging-dog sentencing elements), *and Fitch*, 659 F.3d at 790 (outlining the circumstances of Fitch's PSR notice).

[192] *See Fitch*, 659 F.3d at 790 (comparing the sentencing impact of the fraud offenses and the murder offense).

[193] *See* Dusenberry v. United States, 534 U.S. 161, 167-68 (2002) (stating a preference for *Mullane*'s due process test in cases where the method of giving notice is at issue); *Mullane*, 339 U.S. at 315 (stating the applicable standard as notice reasonable under the circumstances).

[194] *See, e.g.*, United States v. Booker, 543 U.S. 220 (2005) (holding only defendant-admitted or jury-scrutinized facts can drive a sentence with maximum sentences being based solely upon defendant-admitted or jury-scrutinized facts); Apprendi v. New Jersey, 530 U.S. 466 (2000) (determining whether a judge-found racial bias beyond the maximum statutory offense range usurped Apprendi's constitutional right to a jury trial on the issue); Jones v. United States, 526 U.S. 227 (1999) (determining whether facts in carjacking case constituted jury-protected offense elements or judge-findable sentencing factors).

[195] *See Apprendi*, 530 U.S. at 466 (holding the same rule).

[196] *Id.*

[197] *See supra* Part II.

[198] *See, e.g.*, Gall v. United States, 552 U.S. 38, 60 (2007) (Scalia, J., concurring) (writing that he is content the Court did not preclude as-applied Sixth Amendment

exploit high *Apprendi* statutory maximums by charging a defendant with a lesser, more easily proven offense during the guilt phase.[199] At the sentencing phase, the prosecutor may then allege uncharged relevant conduct as the basis for imposing more punishment than the punishment garnered through the underlying offense of which a jury convicted the defendant beyond a reasonable doubt.[200] This backdoor loophole exploitation of high *Apprendi* statutory maximums is the principal issue and flaw in the sentencing regime that the Ninth Circuit exposed in *Fitch*.[201]

Under *Booker*, a sentence must stem from those facts established in a guilty plea or jury verdict.[202] The Ninth Circuit's expansive interpretation of this rule in *Fitch* extended to any fact that Fitch admitted.[203] Because Fitch did not contest the disappearance or the circumstances surrounding the disappearance of his wife, the Ninth Circuit felt constrained to affirm his sentence.[204] Given that Fitch effectively admitted those facts, the Ninth Circuit affirmed Fitch's sentence by reasoning that the same facts did not implicate the Sixth Amendment.[205] Moreover, under the high level of deference built into substantive reasonableness review, the court had to affirm the upward sentence.[206]

challenges to sentences reasonable only because of judge-found facts); *Booker*, 543 U.S. at 290-91, n.11 (Stevens, J., dissenting in part) (stating that prosecutors proving enhancing facts at sentencing under a preponderance burden have more power and engender greater sentencing disparity than the majority contemplates); Zainey, *supra* note 73, at 402 (citing cases and stating some courts have held that juries must find all relevant sentencing conduct beyond a reasonable doubt).

[199] *See generally supra* Part I.C (explaining the same).

[200] *See also* Blakely v. Washington, 542 U.S. 296, 313-14 (2004) (holding a statutory maximum is a sentence based solely on jury-scrutinized facts); Yellen, *Misguided Approach*, *supra* note 11, at 275-76 (describing how a federal prosecutor may bypass a jury by increasing a given statutory maximum and then sneaking difficult-to-prove uncharged sentence-enhancing conduct at sentencing); *cf.* Cunningham v. California, 549 U.S. 270, 288-89 (2007) (holding that California's Determinate Sentencing Law violated the Sixth Amendment by allowing judicial facts under a preponderance standard to increase punishment beyond its statutory maximum).

[201] *See generally* United States v. Fitch, 659 F.3d 788, 788 (9th Cir. 2011) (examining the impact of uncharged conduct on Fitch's case).

[202] *See supra* Part I.C.

[203] *See Fitch*, 659 F.3d at 790-91 (explaining the court's treatment of Fitch's PSR and noting that Fitch did not object to the facts contained in the PSR).

[204] *See id.* (discussing the same).

[205] *See id.* (explaining the same reasoning).

[206] *See id.* at 796 (citing cases such as *Gall* and *Rita*).

A more nuanced reading of the Court's Sixth Amendment jurisprudence resolves this flawed reasoning which permits the sentencing tail to wag the offense dog.[207] Consider *Booker* — a defendant must admit guilt to, or a jury must find beyond a reasonable doubt, the facts upon which a sentence's maximum range is established.[208] Such facts and attendant conditions are prerequisites for enhancing a sentence.[209] One may read the facts surrounding only the charged offense as establishing the sentence's maximum range.[210]

Because the Guidelines are still an important sentencing consideration, it is possible to further refine this reading.[211] Given the deference that courts afford the Guidelines, the maximum sentence should be twice the upper limit of the Guidelines range for the underlying charged offense.[212] Such a reading means sentencing courts should consider aggravating or mitigating uncharged conduct as constituting sentence-enhancing facts where that conduct bears on the charged offense.[213] Expanding the maximum sentence in this way also prevents uncharged relevant conduct enhancements from driving the sentence for the charged offense, since enhancements would then not be able to exceed the maximum length of punishment recommended by the Guidelines. Where prosecutors fail to include aggravating uncharged conduct in charged offenses, and the uncharged conduct comprises discrete chargeable offenses that harbor greater punishment than the underlying charged offenses, that uncharged conduct should go before juries.[214] Such conduct should not function as enhancements at the sentencing phase.[215]

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[207] *See infra* Part III.B.

[208] *See supra* Part I.C (discussing how the Court in *Booker* arrived at this same rule).

[209] *See* United States v. Booker, 543 U.S. 220, 249 (2005) (formulating the *Booker* rule based on the earlier *Apprendi* and *Blakely* rules).

[210] *See id.* (placing emphasis on the verdict and admission language, insinuating a more intimate connection between the verdict, the admission, and the offense charged).

[211] *See, e.g.*, *id.* at 264 (stating that sentencing judges must still consult the Guidelines when imposing a sentence).

[212] *See, e.g.*, Gall v. United States, 552 U.S. 38, 49-50 (2007) (explaining the relevance and deference the Guidelines should reasonably carry at the sentencing phase).

[213] *Compare id.* (establishing the degree of departure from the Guidelines for the offenses of conviction as a reasonableness factor for review), *with Booker* 543 U.S. at 249 (homing the focus of a Sixth Amendment analysis on those facts a jury verdict or a defendant's plea authorize).

[214] *See* Rita v. United States, 551 U.S. 338, 374 (2007) (Scalia, J., concurring) (fearing future Sixth Amendment violations in a system where sentences are

In effect, this reading closes the prosecutorial loophole in *Fitch*.[216] This interpretation of *Booker* precludes the prosecution from charging gateway offenses and then bootstrapping at sentencing greater punishment for uncharged conduct than for charged conduct.[217] It further strengthens the jury trial guarantee by ensuring that the government charge the most liberty-restricting offenses contained within a criminal factual scenario.[218] Furthermore, this reading still allows sentencing courts to enjoy discretion permitted in the advisory Guidelines.[219] Sentencing courts are still free to tweak sentences by finding facts in given offenses that do not restrict defendants' liberty to the extent of convictions for underlying offenses themselves.[220]

reasonable *only* because of judge-found facts); Blakely v. Washington, 542 U.S. 296, 305 n.8 (2004) (reaffirming that a jury's verdict based on the underlying offense alone should authorize a sentence); Bowman, *Debacle*, *supra* note 31, at 460 (stating the Court's Sixth Amendment jurisprudence may have been a success if it had reasserted the jury's role and increased the number of jury trials); Gertner, *Circumventing Juries*, *supra* note 37, at 427-28 (writing that nowhere in the Sentencing Reform Act's legislative history did Congress appreciate the implications of allowing judges to find uncharged conduct).

[215] *See Blakely*, 542 U.S. at 313 (citing Apprendi v. New Jersey, 530 U.S. 466, 497 (2000)) (writing that a defendant has the unwavering right to insist a prosecutor prove before a jury all facts legally essential to the punishment); Berman, *supra* note 7 (showing comments from sentencing scholars discussing why *Blakely* should require that prosecutors charge statutorily discrete uncharged conduct in cases like *Fitch*); Herman, *supra* note 11, at 356 (concluding that due process, like the Sixth Amendment, cuts in favor of jury trials rather than judicial fact-finding for significant uncharged conduct); Yellen, *Misguided Approach*, *supra* note 11, at 275 (concluding that a sounder Sixth Amendment policy vis-à-vis the Guidelines would prevent statutorily discrete, chargeable conduct from enhancing sentences beyond Guidelines ranges).

[216] *See supra* Part III.B (concluding prosecutors would have to charge relevant conduct imposing greater punishment than the underlying offense rather than attempting to prove that conduct at sentencing).

[217] *See Booker*, 543 U.S. at 230 (citing and quoting Jones v. United States, 526 U.S. 227, 230 (1999)) (describing the importance of ensuring that the jury's role does not devolve to one of low-level gate keeping, leaving the more important determinations up to a judge); *supra* Part III.B (demonstrating how prosecutors would have to charge relevant conduct instead of attempting to prove the conduct at sentencing under a lower standard of proof).

[218] *See Booker*, 543 U.S. at 230 (insinuating the Sixth Amendment requires juries rather than judges to make the most germane determinations of facts that will most affect a defendant's liberty).

[219] *See supra* Part III.B (discussing how the Guidelines real-offense system provides judges with fact-finding, sentence-tweaking discretion).

[220] *See supra* Part III.B (explaining how this Note's proposed interpretation of the *Booker* rule accomplishes this objective and others).

Some argue that the foregoing approach, resembling what many sentencing scholars refer to as "*Blakely*-ization," creates too many practical problems.[221] The most pressing of these is that trials would become hopelessly complicated and unmanageably long, sacrificing administrative efficiency.[222] However, this Note's proposed approach is a modified form of *Blakely*-ization. It does not require that the government charge a defendant with and place every conceivable issue in front of a jury.[223] Rather, it proposes only that the government avoid Sixth Amendment violations by alleging in the indictment the facts that are most germane to the defendant.[224] Moreover, this reading still allows for judicial sentencing discretion within the Guidelines ranges for each separate offense.[225] In other words, it preserves the Guidelines' real offense system while still remaining true to the Sixth Amendment.[226] Requiring that the government enhance the specificity

[221] *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 346-47 (2004) (Breyer, J., dissenting) (wondering how juries will ever cope with the complex, nuanced Guidelines considerations meant for a sophisticated judge); John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 289 (2006) (outlining administrative issues with a *Blakely*-ized system, such as higher costs for more involved trials or procedures); Stephanie Watson, *Fixing California Sentencing Law: The Problem With Piecemeal Reform*, 39 MCGEORGE L. REV. 585, 593-94 (2008) (describing *Blakely*-ization and its drawbacks).

[222] *See, e.g.*, *Blakely*, 542 U.S. at 336 (Breyer, J., dissenting) (suggesting a jury trial for traditionally run-of-the-mill sentencing enhancements would be too costly); Watson, *supra* note 221, at 593-94 (describing *Blakely*-ization's negative impact on administrative efficiency).

[223] *See supra* Part III.B (explaining that federal prosecutors should charge the conduct that will most penalize a defendant's liberty instead of reserving that determination for sentencing phase).

[224] *See supra* Part III.B (proposing a solution to the federal sentencing loophole where prosecutors charge the conduct most germane to the sought-after sentence).

[225] *See* United States v. Booker, 543 U.S. 220, 264 (2005) (stating that sentencing judges must still defer to the Guidelines); Breyer, *supra* note 41, at 11-12 (describing how the Sentencing Commission recognized discretionary judicial fact-finding as the key to achieving Congress' goals); *supra* Part III.B (requiring prosecutors to charge only relevant conduct that would drive a sentence, thereby leaving judges free to find lesser sentence-enhancing facts).

[226] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.4 (2011) (explaining the key role judicial fact-finding plays in achieving Congress' sentencing goals); Apprendi v. New Jersey, 530 U.S. 466, 494-95 (2000) (citing and quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1972) and *In re* Winship, 397 U.S. 358, 362-63 (1970)) (stating that the Sixth Amendment is concerned with the degree of criminal culpability that will attach to a defendant); Breyer, *supra* note 41, at 11-12 (noting that judges must find some sentence-enhancing facts to tailor a punishment to a given defendant).

of its indictments is a small price to pay to entirely avoid Sixth Amendment questions.[227]

C. Substantive Reasonableness Review Needs Bright Line Rules To Be Meaningful

In *Booker* and *Gall*, the Supreme Court held that reasonableness is the controlling standard of appellate review where a sentence departs from the Guidelines.[228] An appellate court's determination of what a reasonable sentence may be is subject to a wide array of factors and considerations.[229] A sentence's reasonableness will necessarily vary on a case-by-case basis.[230] Whether a given sentence is substantively reasonable, then, is a fluid standard for which it is difficult to craft bright line rules.[231]

The fluidity of the substantive reasonableness standard, however, clashes with due process and a criminal defendant's right to a jury trial.[232] Although the Guidelines require flexibility, *Fitch* shows that appellate courts stretch that flexibility to its logical extreme.[233] The

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[227] *See Booker*, 543 U.S. at 288-89 (Stevens, J., dissenting) (citing and quoting *Blakely*, 542 U.S. at 313-14) (declaring the Constitution does not permit efficiency as a primary concern and that we have always trusted juries to sort complex issues).

[228] *See* Gall v. United States, 552 U.S. 38, 51 (2007) (holding substantive reasonableness subject to an abuse-of-discretion standard is the controlling appellate review of a sentence); *Booker*, 543 U.S. at 260-62 (establishing reasonableness review of sentence after severing and excising 18 U.S.C. § 3742(e)); *supra* Part I.D.

[229] *See Gall*, 552 U.S. at 51 (stating substantive reasonableness review eschews formalistic mathematical formulae in favor of a totality-of-the-circumstances approach); Rita v. United States, 551 U.S. 338, 368-370 (2007) (Scalia, J., concurring in part) (lamenting that the Court did not give any substance or concrete meaning to substantive reasonableness review); *supra* Part I.D (explaining the same principles).

[230] *See Gall*, 552 U.S. at 51-52 (describing the fluidity of substantive reasonableness review).

[231] *See id.*; *Rita*, 551 U.S. at 368-70 (Scalia, J., concurring in part) (chiding the court for not supplying substantive reasonableness review with more rigid rules); *supra* Part I.D and accompanying text (explaining the same principles).

[232] *Compare Gall*, 552 U.S. at 47 (describing the fluidity of substantive reasonableness review), *with Rita*, 551 U.S. at 368-69 (Scalia, J., concurring in part) (stating that the Court failed to explain how substantive reasonableness review addresses sentences that are reasonable only because of judge-found facts), *and supra* Part III.A (explaining how sentences that are reasonable only because of judge-found facts are not necessarily reasonably calculated to give notice, thus violating *Mullane* due process).

[233] *See* United States v. Fitch, 659 F.3d 788, 795-96 (9th Cir. 2011) (stating under current Sixth Amendment jurisprudence, a jury must decide heroin quantities in drug cases, but a judge may decide the more serious question of murder); *see, e.g.*, United States v. Brika, 487 F.3d 450, 459, 465 (6th Cir. 2007) (affirming a sentence based on

Booker court intended to divest the prosecution of much of the discretion and authority it had in the days of mandatory Guidelines.[234] Some bright line rules may rein in these logical extremities.[235]

The overarching purpose of the Guidelines themselves is to institute greater uniformity in sentencing.[236] Though the Guidelines require sentencing judges to individualize a sentence for a unique offense, judges should not abandon uniformity.[237] The Sentencing Commission recognized procedural unfairness inherent in giving sentencing judges the fact finding discretion necessary to make this system a reality.[238] *Fitch* and similar cases are the culmination of a portion of the unfairness that the Sentencing Commission recognized.[239]

acquitted relevant conduct); United States v. Mayle, 334 F.3d 552, 565-68 (6th Cir. 2003) (upholding a twenty-three level departure from a Guidelines range sentence based on the defendant's uncharged murder of the identity-theft victim).

[234] *See* United States v. Booker, 543 U.S. 220, 256-57 (2005) (reinvesting sentencing judges with significantly more discretion than in the mandatory Guidelines era, when prosecutors' charged offenses alone dictated sentences); Robert J. Anello & Jodi Misher Peikin, *Evolving Roles in Federal Sentencing: The Post* Booker/Fanfan *World*, 1 FED. CTS. L. REV. 1, 3 (2006) (stating that *Booker* encouraged more balanced participation in sentencing on the part of prosecutors); Doug Berman & Frank O. Bowman, *What's the Future of Federal Sentencing?*, LEG. AFFAIRS DEBATE CLUB (Jan. 16, 2006), http://legalaffairs.org/webexclusive/debateclub_sentencing0106.msp (noting that *Booker* affected both judicial and prosecutorial sentencing practices).

[235] *See Rita*, 551 U.S. at 370 (Scalia, J., concurring in part) (maligning the Court's jerry-rigged scheme of substantive reasonableness); Bowman, *Debacle*, *supra* note 31, at 368-69 (arguing that the Court's sentencing jurisprudence is an insoluble logical knot because the Court failed to identify constitutional limits on sentencing actors); *supra* Introduction (explaining how this Note's solutions may act as a quick fix to the prosecutorial loophole and accompanying tail-wag-dog problems).

[236] *See* 28 U.S.C. § 991(b) (2008) (setting forth the overarching goals of the sentencing guidelines, including certainty, fairness, and eliminating unwarranted disparities); Breyer, *supra* note 41, at 4-5 (stating that Congress intended the Guidelines to usher greater transparency into sentencing law); *supra* Part I.A (explaining the history of the Guidelines and the aims behind their enactment).

[237] *See* 28 U.S.C. § 991(b)(1)(B) (stating that sentencing should reflect fairness *and* certainty); *Booker*, 543 U.S. at 264-65 (noting the need to accommodate both uniformity and proportionality in Guidelines sentencing); Breyer, *supra* note 41, at 13 (stating that the Sentencing Commission had to compromise on the goals of proportionality and uniformity).

[238] *See* Breyer, *supra* note 41, at 10-11 (explaining how a real-offense system lacks procedural safeguards in determining sentencing enhancements); Michael Tonry, *The Functions of Sentencing and Sentence Reform*, 58 STAN. L. REV. 37, 47 (2005) (describing how real-offense policies can skew the goals of consistency, evenhandedness, and fairness); Weisberg & Miller, *supra* note 130, at 7 (describing how the Guidelines competing aims often pulled judges either to sentence more harshly than they thought necessary or more leniently than they thought necessary).

[239] *Compare* United States v. Fitch, 659 F.3d 788, 796 (9th Cir. 2011) (explaining

A judicial fact that increases a sentence beyond the statutory maximum is unconstitutional under the Sixth Amendment.[240] Such a fact *must* go before a jury for proof beyond a reasonable doubt.[241] A similar bright line rule incorporating this rule from *Apprendi*, *Booker*, and due process may therefore succeed in closing the prosecutorial loophole.[242]

In future federal prosecutions, the Government should charge any conduct that results in twice the amount of punishment the upper Guidelines range recommends.[243] This proposed bright line rule for determining substantive reasonableness in certain cases is consistent with both Guidelines policy and the Fifth and Sixth Amendments.[244] The rule ensures that defendants like Fitch receive increased notice and jury trials on those issues that will most impact their liberty interests.[245] Though *Gall* recognized a totality of the circumstances approach, the Court must ultimately balance judicial discretion with jury function.[246] The Court should not lose sight of the principle that

how lax sentencing procedures and review allow judges rather than juries to find first-degree murder post-trial), *and* United States v. Mayle, 334 F.3d 552, 565-68 (6th Cir. 2003) (arriving at a holding identical to *Fitch*'s), *with* Breyer, *supra* note 41, at 10-11 (overviewing real-offense systems' minimization of procedural safeguards).

[240] *See Booker*, 543 U.S. at 226 (applying the *Blakely* holding to the federal sentencing system); Blakely v. Washington, 542 U.S. 296, 303-04 (2004) (holding the *Apprendi* statutory maximum consists solely of facts the jury returns in its verdict or the defendant admits); *supra* Part III.B (explaining the *Booker* Jury Trial Guarantee rule).

[241] *See Blakely*, 542 U.S. at 303-04 (stating the same Sixth Amendment rule).

[242] *See* Bowman, *Debacle*, *supra* note 31, at 472-73 (detailing how caps on sentencing discretion with flexible due process protections may improve the federal sentencing system); *supra* Part III.A (detailing how *Mullane* due process notice requirements may close the prosecutorial loophole); *supra* Part III.B (detailing how a more nuanced construction of *Booker* may similarly close the loophole).

[243] *See* Gall v. United States, 552 U.S. 38, 60 (2007) (Scalia, J., concurring) (stating wearily that he still disagrees with substantive reasonableness review as it stands); Bowman, *Debacle*, *supra* note 31, at 472-73 (detailing the need for caps on sentencing discretion); *supra* Part III.A (discussing how sentencing tails wagging offense dogs are suspect per due process).

[244] *See* 28 U.S.C. § 991(b)(1)(B) (2005) (detailing Congress's directives in enacting sentencing reform); *Booker*, 553 U.S. at 264 (describing how courts must still defer to the Guidelines); *supra* Parts III.A-B. (detailing due process concerns relating to notice and liberty interests and the *Booker* rule on the Sixth Amendment Jury Trial Guarantee).

[245] *See* 28 U.S.C. § 991(b)(1)(B) (describing the need for fairness and transparency in sentencing); Mullane v. Cent. Hanover Bank, 339 U.S. 306, 315 (1950) (describing due process notice tests); *supra* Part III.A-B (discussing the same issues).

[246] *See Gall*, 552 U.S. at 47 (shying away from bright line rules for departures because they establish impermissible presumptions of unreasonableness); *see also* Rita

the jury trial guarantee turns upon the penal consequences attached to facts themselves.[247]

As Justice Scalia lamented, appellate courts will affirm some sentences as substantively reasonable only because certain judge-found facts make them so.[248] Fitch's sentence falls into this category that Justice Scalia contemplated.[249] Although federal law permitted Fitch's sentence, the sentence would be unreasonable without the sentencing judge's finding of first-degree murder.[250]

One of the primary goals of the Guidelines was to implement an overall uniform sentencing regime.[251] A bright line rule that requires the government to charge any fact that more than doubles the upper Guidelines range helps to achieve these goals.[252] First, judges would still be free to find certain relevant facts at the sentencing phase, allowing for a certain degree of real offense tailoring.[253] This freedom achieves the goal of individualizing sentences, a goal that is also tremendously important to Congress.[254] Ideally, incorporating this rule

v. United States, 551 U.S. 338, 369 (2007) (Scalia, J., concurring) (appearing dismayed that the Court did not use the opportunity to flesh out reasonableness review); Bowman, *Debacle*, *supra* note 31, at 472 (setting out a list of more brightly-lined rules that the Court should adopt to fix its mangled sentencing regime).

[247] *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 472-73 (2000) (reaffirming concern with judges finding sentence-enhancements under a preponderance standard); Almendarez-Torres v. United States, 523 U.S. 224 (1998) (finding that there was no impermissible burden shifting calling for a separate penalty for a separate offense); Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (finding that the government cannot circumvent its *Winship* burdens by recharacterizing different offenses with real penal effect as factors governing only the extent of punishment).

[248] *See Gall*, 543 U.S. at 60 (Scalia, J., concurring) (expressing distaste for substantive reasonableness review and explaining the same concerns).

[249] *See* Kalar, *supra* note 7 (stating that *Fitch* requires an as-applied Sixth Amendment challenge because his sentence would not have been reasonable without the judicially-found first degree murder).

[250] *See* United States v. Fitch, 659 F.3d 788, 790 (stating a statutory maximum of 360 years for the fraud offenses alone, and affirming the reasonableness of Fitch's 260-month sentence based on judge-found murder).

[251] *See supra* Part I.A (describing the history and rationale behind Congress enacting the Guidelines).

[252] *See supra* Introduction (discussing how sentence tails should not wag offense dogs); *supra* Part III.A (discussing how the tail-wagging-the-dog and the prosecutorial loophole may violate due process); *supra* Part III.B (discussing how the Sixth Amendment may require prosecutors to charge sentence-driving conduct that enhances punishment beyond the upper Guidelines range).

[253] *See* Breyer, *supra* note 41, at 10-12 (describing the need to preserve judicial fact-finding at sentencing).

[254] *See id.* at 13 (describing the need for balancing uniformity with proportionality).

into substantive reasonableness review will help to close the prosecutorial loophole.[255] Lastly, prosecutors will not risk an appellate court overturning a sentence where uncharged conduct imposes greater punishment than the conviction offense.

CONCLUSION

This Note sought to present a legal issue which the Ninth Circuit case *United States v. Fitch* made apparent: the federal prosecutorial sentencing loophole.[256] I explored how this loophole violates due process, the Sixth Amendment, and the standard of substantive reasonableness review.[257] Further, I used *Fitch* as an illustration to propose cures based on the due process and jury trial rights of criminal defendants.[258] These quick solutions should close off the loophole until Congress introduces new federal sentencing legislation or the Supreme Court reevaluates its sentencing jurisprudence.[259] As Justice Breyer remarked in *Booker*, the ball is now in Congress's court to update federal sentencing law by ensuring that criminal defendants receive the greatest portion of the punishment they deserve through the front door of the jury rather than backdoor exploitation of high statutory maximums.[260]

[255] *Compare supra* Part III.C (proposing a bright-line rule for substantive reasonableness review so that uncharged conduct may not carry more punitive weight than the offense conviction), *with supra* Part III.B (discussing how conduct driving sentences must go before juries), *and supra* Part III.A (discussing how due process notice may preclude sentencing tails from wagging offense dogs).

[256] *See supra* Introduction (describing how *Fitch* illustrates the effects of the prosecutorial loophole).

[257] *See supra* Parts I-II (outlining the history, case law, and the sentencing-context concerns behind *Fitch*, due process, the Sixth Amendment's jury trial guarantee, and substantive reasonableness).

[258] *See supra* Part III.A-C (outlining constitutional concerns behind the prosecutorial loophole and quick-fixes to close it).

[259] *See supra* Part III.A-C (noting that these fixes are meant to hold only until either Congress or the Court overhaul federal sentencing law).

[260] *See* United States v. Booker, 543 U.S. 220, 265 (2005) (insinuating by this remark that Congress should overhaul its constitutionally defective Guidelines sentencing regime while the Court's advisory quick-fix holds).