

I. INTRODUCTION

Historically there has always been great debate over what goals criminal sentencing should accomplish and what approaches should be followed in reaching those goals. Recently, as sentencing schemes have followed a trend from indeterminate to determinate sentencing, courts have struggled with what facts should be considered when sentencing. The consideration of uncharged conduct at sentencing has proven to be very controversial at both the federal and state level.¹ Sentencing courts consider facts surrounding the charged offenses, but also generally have broad discretion to consider the ‘real conduct’ of the offender, which may include pre-sentence reports, prior criminal history, previous acquittals, etc. It has been argued that consideration of such conduct should be prohibited because it is fundamentally unfair, violates the Fifth Amendment right to Due Process², the Sixth Amendment right to jury trial³, and the Fifth Amendment prohibition on Double Jeopardy⁴.

As consideration of uncharged conduct as a whole has been frequently litigated, the consideration of acquittals as a subcategory of uncharged conduct has also caused great debate. The issue was resolved federally when the case *United States v. Watts* was decided in 1997. This case held that a court may consider acquitted conduct in the sentencing process.⁵ The issue remains whether *Watts* is applicable to state sentencing guideline systems. Currently, Ohio courts are split on the issue, and a final decision is yet to be seen. This paper will argue that Ohio’s sentencing structure and Guidelines

vary significantly from the Federal Guidelines, and thus the federal practice of allowing consideration of acquitted conduct should not be followed in Ohio.

The first section of this paper will address the tension between considerations of the ‘real’ conduct of an offender and conduct relating only to the charges at hand. The impact of this decision has significant repercussions. Primarily, offenders may receive a much longer sentence under a real offense regime than similarly situated offenders under a charge system due to considerations of acquitted conduct.

The following two sections of this paper will discuss the basic framework of the Federal Sentencing Guidelines and the legal challenges the Guidelines have faced. The Federal Guidelines have served as a model that many states have followed, and thus, the decisions made at the federal level have influenced those made by the states. Section IV will discuss relevant case law that has expanded the power of sentencing courts to not only consider charge conduct, but uncharged conduct such as facts pertaining to acquittals.

The next two sections of this paper will address the creation of the Ohio Sentencing Guidelines and the legal challenges that have arisen which parallel those brought under federal law. Akin to federal sentencing courts, the power of many Ohio courts has expanded to allow consideration of certain uncharged conduct, including acquitted conduct in the sentencing process.

The final section of this paper argues that Ohio should disallow consideration of acquitted conduct in sentencing for two reasons: While modeled after the Federal Guidelines, the Ohio sentencing structure retains differing provisions from those contained in the Federal Guidelines and various other states have rejected the practice as

incompatible with their own state guideline systems or constitutional protections afforded to citizens.

II. REAL OFFENSE OR CHARGE OFFENSE CONDUCT?

In many sentencing systems, sentencing judges are provided the flexibility to consider information above and beyond that relevant to the charged conduct. Until the 1980s, most criminal systems in the United States operated under an indeterminate sentencing scheme. Under this system, Congress provided statutory maximums and allowed sentencing courts almost complete discretion in imposing a sentence. A sentencing judge might consider any relevant evidence, even if the information pertains to uncharged conduct. Such information might include pre-sentence investigation reports, victim statements, conduct while awaiting sentencing, acquitted charges, etc.⁶

The large amount of discretion afforded to sentencing courts invariably produced sentencing disparities among similarly situated offenders and offenses. Thereafter, criminal systems underwent drastic reform. Beginning with the passage of the Sentencing Reform Act of 1984, a majority of courts converted to a more determinate sentencing regime.⁷ By decreasing judicial discretion and implementing more rigid sentencing guidelines, it was thought that the sentencing process could not only fulfill the traditional goals of sentencing, but also could decrease disparity by imposing similar sentences for similar offenders.⁸

With the advent of structured systems, legislatures and courts were faced with the dilemma of how much and to what extent real offense conduct should play a role in sentencing. One school of thought suggests that similarly situated offenders will be treated similarly only by taking into account individual circumstances and characteristics.

A well-known anecdote to support this proposition is that a man who steals bread to feed his family is not as culpable as a man who steals to satisfy his own greed. The alternative view reasons that the more individual circumstances are considered, the less similar sentences will be for the same charged offense.⁹

Both the Federal and Ohio Guidelines embrace a real offense conduct regime and allow consideration of facts unrelated to the charges before a court. Some states operate under a strictly determinate system in which a sentencing judge may only consider the allegations in the indictment and facts proven at trial. In many other structured systems, judges are given the flexibility to consider real conduct within limits determined by statute or common law.

The constitutional limits of real offense considerations in sentencing are still being tested. Under both federal and state systems, offenders have challenged their convictions as violative of various constitutional provisions, including Due Process, right to jury trial, and the Double Jeopardy Clause.

III. FEDERAL SENTENCING GUIDELINES

After decades of uncertainty and extreme disparity in sentencing, the United States Sentencing Commission implemented the Federal Sentencing Guidelines on November 1, 1987. The Guidelines were created with two goals in mind: to achieve uniformity in sentencing by narrowing the wide disparity in sentences for similar conduct by similar offenders, and to increase proportionality in sentencing through appropriate sentences. Offenders soon began bringing various challenges to the constitutionality of the Guidelines.¹⁰

In *United States v. Booker*,¹¹ the defendant was convicted by a jury of possession with intent to distribute fifty grams of cocaine. During a post-trial sentencing proceeding, the sentencing judge concluded by a preponderance of the evidence that Booker possessed an additional 566 grams of crack. These findings increased the defendant's base offense level and increased his sentence by approximately eight years. Booker challenged the finding by the judge on the ground that it violated his Sixth Amendment right to a jury trial.¹² The Supreme Court held that the Sixth Amendment was violated because the Guidelines required judicial fact-finding before imposition of a sentence. Thus, the Court held that any fact, other than a prior conviction, must be admitted by a defendant or proven beyond a reasonable doubt to a jury. To remedy the constitutional violation, a split majority of the court found it necessary to excise two portions of the Guidelines; the provision that required a sentence to be imposed within the Guidelines range and a provision which prohibited appeals courts from reviewing sentences imposed outside of Guidelines ranges.¹³ The ultimate effect of the decision was to make the Guidelines advisory rather than mandatory; judges are able to use their discretion in imposing a sentence, whether it is within the Guideline range or whether the sentence constitutes a departure.¹⁴ After *Booker*, a sentencing judge must still consider Guideline sentencing ranges and policy statements, but is not bound to impose a sentence within a Guideline range. Appellate review of a sentence imposed under the Guidelines is available for "unreasonable sentences", a term left undefined by the *Booker* court.¹⁵

The Guidelines are structured to take into account both the seriousness of the offense and the offender's criminal record. The Guidelines provide forty-three levels of offense seriousness.¹⁶ Each type of crime is assigned a base offense level which may

then be increased by certain offense specific factors. Adjustments are then made to the offense level based on various other factors, including role of offender, obstruction of justice, etc.¹⁷ The offender is then assigned a criminal history category based upon his/her prior record of criminal activity. Based upon where the criminal history category and base offense level meet, a judge is directed to an appropriate sentencing range. A judge then may upwardly or downwardly depart if there are any serious considerations not taken into account under the Guidelines.¹⁸ Any additional facts considered by the judge for sentencing purposes that increase the Guideline sentence must be proven at the sentencing hearing by a preponderance of the evidence.¹⁹

IV. FEDERAL SENTENCING CHALLENGED

Currently, many substantive and procedural rights guaranteed to an offender at trial are not provided at a sentencing hearing. Evidence that is otherwise inadmissible because of a procedural flaw is still allowed into evidence at sentencing. Offenders are subject to a lower burden of proof; facts need only be found by a judge by a preponderance of the evidence instead of beyond a reasonable doubt. The vast amount of information available to sentencing courts as a result of decreased constitutional protections has been strongly contested. The debate is not limited to challenges brought by defendants; the Supreme Court has not decided the issue unanimously. Justice Stevens, a proponent of extending procedural protections to sentencing, has stated,

[w]e should presume that Congress intended the new sentencing Guidelines that it authorized in 1984 to adhere to the longstanding procedural requirements enshrined in our constitutional jurisprudence. The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.²⁰

As justification for real offense considerations, many courts have cited the early case of *McDonald v. Commonwealth of Massachusetts*.²¹ In this case, the defendant was charged with forging an order for money and uttering. Due to an extensive prior record, he was sentenced under a repeat offender statute to a term of twenty-five years. The defendant attacked the sentence on the basis that the enhancement violated the protection against double jeopardy. The court upheld the conviction, stating that the enhancement was not a second punishment; it was a harsher punishment for the current offense because he was a habitual criminal.²² The habitual-criminal principle as enunciated in *McDonald* is explicitly provided for in the Federal Sentencing Guidelines.²³

The Supreme Court has consistently upheld the use of real offense conduct in sentencing. For example, in *Williams v. New York*,²⁴ a jury found the defendant guilty of murder and recommended life imprisonment, but the trial judge sentenced him to death. In imposing the higher sentence, the judge relied on information contained in a probation report that the defendant had been involved in thirty burglaries.²⁵ Williams challenged the death sentence, alleging that the sentence violated the due process clause of the Fourteenth Amendment. Williams claimed the sentence was based upon information supplied by persons he did not have the opportunity to confront or cross-examine.²⁶ The Supreme Court affirmed the judgment, recognizing the need to utilize all possible sources of information to be in accordance with the modern trend of individualizing punishment. The Court stated, “We must now recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.”²⁷

In *Witte v. United States*,²⁸ the defendant pleaded guilty to a federal marijuana charge. He was sentenced to a term which was within the legislatively authorized penalty, but was higher than it would have been if only the drugs involved in his conviction had been considered. The District Court increased the sentence after consideration of uncharged cocaine importation activities allegedly performed by the defendant. Witte then was indicted for importation of cocaine. He challenged the indictment on the ground that the charges were previously used as relevant conduct to increase the federal marijuana charge, so any additional punishment would violate the Double Jeopardy Clause's prohibition against multiple punishment.²⁹ The Supreme Court upheld the indictment, holding that the use of relevant conduct to increase the punishment for a charged offense does not punish the offender for the relevant conduct. The Court stated, "[e]nhanced punishment imposed for a later offense is viewed as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one."³⁰

The Supreme Court extended the reach of allowable sentencing considerations even further in *United States v. Watts*.³¹ In this case, a jury convicted the defendant of possessing cocaine base with intent to distribute and was acquitted of using a firearm in relation to the drug offense. Despite his acquittal of the gun offense, the District Court found by a preponderance of the evidence that Watts did use a firearm in connection with the gun offense, and used this finding to increase Watts' offense level under the Guidelines.³² The Court concluded an acquittal does not prove a defendant's innocence nor does it necessarily imply the jury rejected certain facts. Thus, an acquittal does not preclude a sentencing court from considering conduct underlying an acquitted charge so

long as it is proven by a preponderance of the evidence.³³ While the Court concluded neither the Guidelines nor the Constitution precluded a court from considering acquitted conduct, it did not decide the policy question of whether the Guidelines should limit this information.³⁴

The implementation of the Federal Sentencing Guidelines brought about sweeping reforms in the criminal justice system, with the effects still being felt today. Offenders seeking to restrict sentencing courts to consideration only of charge conduct have largely been unsuccessful, and federal decisions have continuously expanded the scope of allowable considerations in the sentencing process. As this paper will next discuss, the federal system has served as a model for the structure of many state guideline systems, including the Ohio Sentencing Guidelines. Consequently, the Ohio Guidelines have faced parallel challenges to those brought against the Federal Guidelines.

V. OHIO SENTENCING GUIDELINES

Prior to 1996, Ohio, like many other states, was under an indeterminate sentencing system. Following the modern trend towards “truth in sentencing”, Ohio instituted a reformed set of guidelines.³⁵ The Ohio Criminal Sentencing Commission was created in 1990 by statute. It was responsible for reviewing sentencing statutes and making recommendations for change.³⁶ The passage of Senate Bill 2 in 1996 was a result of recommendations made by the Commission to the Ohio General Assembly, and instituted a new system of determinate/presumptive sentencing guidelines in Ohio.³⁷

Unlike the federal system, the Ohio sentencing system is not based around a matrix-style grid. The current system is a hybrid; the majority of the system operates under a determinate system, with aspects of indeterminate sentencing continuing for

certain offenses.³⁸ For most crimes, offenders are imprisoned under a determinate sentence chosen by the sentencing judge. The type of sentence and length of term are arrived at via various presumptions, factors, and required findings. For example, Ohio has a rebuttable presumption of imprisonment for first and second-degree felons; minimum sentences for offenders imprisoned for the first time; and avoidance of maximum term except for severe cases.³⁹ Presumptions of mandatory prison time for certain offenses are also present.⁴⁰

The sentencing range is based on the offense and the offender's prior record, but allows the judge to consider the goals of sentencing. These goals include protection of the public from future crime by the offender and punishment.⁴¹ To achieve these goals, the sentencing court is required to consider the need to incapacitate the offender, deterrence, rehabilitation, and restitution.⁴² According to the statute, a felony sentence "shall be reasonably calculated to achieve the two overriding purposes of felony sentencing" and be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."⁴³

Keeping the goals of sentencing in mind, judges are directed to look to various statutory factors in applying the statutory presumptions.⁴⁴ The factors do not control the court's discretion but must be considered.⁴⁵ Such factors include: the offense did not cause or threaten serious physical harm; the victim induced or facilitated the offense; the offender acted under strong provocation; the offense was the result of circumstances unlikely to recur, etc.⁴⁶ Judges must also consider various recidivism factors to determine whether a defendant is more or less likely to commit future crimes. Such

factors include: whether the defendant was already under control of the court; whether there are previous adjudicated delinquencies or criminal convictions; whether the defendant has not responded favorably to previous sanctions or rehabilitation, etc.⁴⁷ Based on the above-stated considerations, the sentencing judge picks the applicable sentencing range. Appellate review of a sentence is available, and is measured under an abuse of discretion standard. An abuse of discretion implies the decision is ‘unreasonable, arbitrary, or unconscionable.’⁴⁸

In the aftermath of *Booker*, many states were forced to reevaluate their sentencing systems, and secondary attacks to guidelines ensued. The Supreme Court of Ohio decided one such challenge in the case of *State v. Foster*. In *Foster*, the defendants were convicted of various criminal offenses, and received sentences including maximums within statutory ranges, consecutive sentences, repeat violent offender sentences, etc.⁴⁹ Defendants appealed, contending that the portions of the Ohio Guidelines which required judicial fact-finding before imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of a defendant were unconstitutional because they violated the Sixth Amendment right to trial by jury.⁵⁰ The Supreme Court agreed, and severed the portions of the Guidelines which mandated judicial fact-finding prior to imposition of various sentences.⁵¹ Thus, any fact that increases a sentence beyond the Guideline maximum must be submitted to a jury and found beyond a reasonable doubt.

VI. CHALLENGES TO OHIO SENTENCING GUIDELINES

As the Ohio Guidelines were largely patterned after the Federal Guidelines, the challenges brought against the Ohio Guidelines have paralleled those brought in the federal system. After the Supreme Court decision in *Watts*, much controversy exists

regarding the case's applicability to the Ohio Guidelines. Courts are split on the issue. As this section will discuss, Ohio courts have upheld considerations of many real offense facts in sentencing similar to federal courts, but have placed limits on the practice as well.

In *State v. Hawthorne*,⁵² for example, the defendant was convicted of vandalism and sentenced to a maximum term of incarceration. The defendant challenged the sentence on the basis that the trial court improperly considered uncharged conduct of other offenses. The court of appeals held that a trial court may consider a defendant's uncharged conduct when determining a sentence so long as it is not the sole basis for the sentence.⁵³

In *State v. Epley*,⁵⁴ the defendant was found not guilty of aggravated robbery and kidnapping, but guilty of motor vehicle theft. The jury found that the defendant did not have a firearm on his person, but displayed or brandished it during commission of the crime. The sentencing court imposed the maximum allowable sentence.⁵⁵ Epley appealed, contending that the trial court erred in sentencing by considering evidence that a firearm was used, when he was acquitted of aggravated robbery. The court specifically cited to *Watts* when holding it was not error to consider facts related to the acquitted charge.⁵⁶

In *State v. Wiles*,⁵⁷ the defendant was convicted in state court of aggravated murder and aggravated burglary. The third count of burglary was dismissed by the court, and defendant was sentenced to death. In one assignment of error, the defendant alleged that while the third count was dismissed, evidence relevant to the charge was impermissibly considered in sentencing. The Supreme Court of Ohio rejected this contention, holding that a sentencing judge may take into account facts introduced at trial

relating to other charges, including ones of which the defendant was acquitted. The Court explained that federal decisions allowing consideration of acquittals were persuasive and should be followed in Ohio.⁵⁸

However, various other Ohio courts have refused to apply *Watts* to the state guidelines. In *State v. Henley*,⁵⁹ the defendant pled guilty to attempted possession of marijuana. The judge sentenced the defendant to a term above the presumptive minimum term after finding that the defendant was acting for hire for organized crime, showed no remorse, was not amenable to community control, and was trafficking in drugs. Henley appealed, contending that facts related to trafficking were improperly considered, as she was neither charged nor convicted of trafficking.⁶⁰ The court acknowledged the federal practice of consideration of acquittals pursuant to *Watts*, but determined that Ohio sentencing statutes contained different provisions than the Federal Guidelines. Further, the court determined that *Watts* only overruled Ohio case law with respect to federal constitutional issues, not interpretation of Ohio law.⁶¹ The court held that the trial court erred in considering that appellant engaged in drug trafficking.⁶²

In *State v. Goodman*,⁶³ the defendant pled guilty to one count of carrying a concealed weapon. Pursuant to a pre-sentence investigation report, the sentencing court made various findings, including that the defendant possessed various drug paraphernalia. Based on these findings, the court found the defendant engaged in conduct deemed to constitute a continuing threat to the public, and imposed a sentence of six months in prison. Goodman appealed, alleging it was an abuse of discretion for the trial court to consider facts in the pre-sentence investigation report relating to events for which he was never charged. The court held that while a trial court enjoys relatively broad discretion, it

was an abuse of discretion to consider the additional facts since appellant was never charged with any drug-related offense.⁶⁴ The court reasoned that no Ohio statutory provision permits consideration of a crime neither charged nor proven.⁶⁵

Despite the expressed intention of the Ohio Sentencing Commission to retain vast flexibility in sentencing, Ohio has specifically rejected various factors for consideration in sentencing. It has been held that a trial court's belief that a defendant lied during trial cannot be considered in the sentencing process;⁶⁶ failure of a defendant to plead guilty may not be considered;⁶⁷ and a trial judge's personal investigation of an uncharged crime may not be considered.⁶⁸ As Ohio courts have previously been willing to set limits on what information may be considered in the sentencing process, limits may be set in the future. Thus, it is within the power of Ohio courts to refuse to allow consideration of acquittals in the sentencing process and decline to follow the federal precedent.

VII. INAPPLICABILITY OF WATTS TO OHIO SENTENCING GUIDELINES

A. Ohio Sentencing Guideline Provisions are Different from the Federal Guidelines

While courts in Ohio are divided over the issue, the more sound approach is to find *Watts* inapplicable to Ohio guidelines. The statutory language at issue in *Watts* differs from the statutory language used in Ohio, and as such, has no compulsory effect.

The *Watts* opinion is premised upon the use of U.S.C. § 3661 which states,

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

USSG §1B1.4 of the Federal Guidelines reflects this policy, and states,

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without

limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661.

USSG §1B1.3, in turn, broadly describes the conduct that a sentencing court may consider, which includes:

- (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
 - (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
 - (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
 - (4) any other information specified in the applicable guideline.

Significantly, the commentary to this section specifically states that conduct which is not formally charged or resulted in a conviction may be considered. Thus, the *Watts* Court found that use of acquittals was permitted in USSG §1B1.4 via reference to 18 U.S.C. §3661, and permitted in USSG §1B1.3 because of the reference to “any other information” and consideration of the commentary. The Commentary states, “[r]elying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach...”

The pertinent Ohio provisions do not contain such broadly inclusive language like the Federal Guidelines. A sentencing court, pursuant to O.R.C. §2929.12(A) is given discretion to determine the most effective way to comply with the purposes of sentencing. In exercising this discretion, the court is directed to weigh various enumerated factors related to the seriousness of the conduct and likelihood of recidivism.⁶⁹ “Any other factors that are relevant to achieving those purposes and principles of sentencing” may be considered. However, this language is limited by the “Sentencing hearing” provision which states as follows,

(A) At the hearing, the offender, the prosecuting attorney, the victim or the victim’s representative in accordance with section [2930.14](#) of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case...

(B)(1) At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to section [2951.03](#) of the Revised Code or Criminal Rule 32.2, and any victim impact statement made pursuant to section [2947.051](#) of the Revised Code.⁷⁰

Thus, the information a judge is directed to consider in imposing a sentence and at the sentencing hearing is not framed by “without limitation” language, but is explicitly provided for in O.R.C. §2929.12, and limited by O.R.C. §2929.19. Unlike the Federal Guidelines, no catch-all phraseology can serve as a basis for finding that additional information may be considered.

In the dissenting opinion in *Watts*, Justice Stevens articulated the view that the broad language of 18 U.S.C. §3661 which is incorporated into USSG §1B1.4, does not illuminate the procedure to be followed for purposes of USSG §1B1.3. He concurs that in exercising discretion pursuant to USSG §1B1.4 in imposing a particular sentence within a guideline range, a sentencing judge may consider otherwise inadmissible

evidence, including evidence adduced at trial pertaining to an acquittal. However, since the broadly inclusive language is not also present in USSG §1B1.3, any acquitted conduct at earlier stages of the sentencing process cannot be considered.⁷¹ Stevens asserts that it is only in the provision in which the judge retains discretion that such broad language is used.

This view better supports the principles of statutory construction and preservation of legislative intent. It is a well-founded principle of statutory construction that “[t]he meaning of the statute must, in the first, instance, be sought in the language in which the act is framed, and if that is plain...the sole function of the courts is to enforce it according to its terms.”⁷² Thus, it is presumed that what appears on the face of legislation is indeed what was intended to be said. Applying this principle to the Ohio Guidelines, the omission of the broadly inclusive language in O.R.C. §2929.19 which sets forth the type of information a sentencing court may consider should be viewed as purposeful, as the General Assembly purposefully placed the disputed language in O.R.C. §2929.12.

However, the broad language of O.R.C. §2929.12(A) to consider offender conduct is thereafter limited by subsequent provisions. Discretion is given to a sentencing judge in O.R.C. §2929.12 to consider any factor relevant to punishment of the offender and protection of the public. To accomplish these goals, O.R.C. §2929.12(D)(1) explicitly allows a court to consider, among various other factors, “[t]he offender has a history of criminal convictions.” Therefore, the power to consider any other relevant factor in §2929.12(A) should apply without limitation only to the later-mentioned recidivism and punishment factors; under which no mention is made of any criminal conduct other than a conviction.

Further, no forceful legislative history exists to imply that consideration of acquittals was intended by the Ohio legislature. “Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”⁷³ The Federal Sentencing Commission clearly intended to allow consideration of acquittals when it said as much in the commentary to the Guidelines.⁷⁴ After the *Watts* decision, the Federal Guidelines were amended to explicitly include the principle that acquitted conduct was an allowable consideration in sentencing. The Guidelines were amended in 2000 to include the new provision entitled “Dismissed and Uncharged Conduct (Policy Statement)”. It states,

The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.⁷⁵

Thus, the Sentencing Commission made clear its intention to allow such considerations in the federal sentencing process.⁷⁶

Unlike the Federal Guidelines, the Ohio Guidelines have not been amended since the decision in *Watts* to explicitly announce the intention to allow consideration of acquittals in Ohio sentencing courts. As changes to Ohio provisions have occurred as recently as 2009, the omission of any such amendment should be viewed as purposeful. Without such a forceful legislative directive, Ohio courts can and should prohibit the practice of consideration of acquittals as incompatible with state statutory law.

1. Ohio Retains Aspects of Indeterminate Sentencing

Additionally, Ohio differs from the Federal Guidelines and many other state systems because it retains aspects of indeterminate sentencing. The modern trend

towards determinate sentencing began as a way to address increasing disparity in sentences and offenders. By diminishing judicial discretion and imposing standard ranges of imprisonment terms, offenders committing the same crime are given relatively the same sentences. In an attempt to retain as much judicial discretion as possible, sentencing courts have permitted considerations of uncharged and acquitted conduct. Through the practice, judges are given some decision-making power to impose varying sentences within the guideline ranges. Proponents rationalize that without consideration of additional uncharged/acquitted facts, it is impossible to know the true nature of the offender or crime, and disparity will continue.

However, under Ohio Guidelines, indefinite sentences are still available for certain sexually violent offenses.⁷⁷ Sentencing judges are given an extreme amount of discretion to impose a term ranging from thirty years to life imprisonment. Offenders convicted for the same crime in Ohio may receive greatly differing sentences. Reducing sentence disparity through uniformity in sentencing is not one of the enumerated goals of sentencing in Ohio as it is in the federal system.⁷⁸ The United States Sentencing Commission unequivocally stated in the USSG Policy Statement that one of three basic objectives of the Sentencing Reform Act was “[u]niformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.” This goal can only be accomplished by allowing a sentencing court access to as much information as possible, including acquitted conduct. The only mention of disparity in any Ohio statutory provision states,

A sentence imposed for a felony shall be...commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.⁷⁹

Thus, while consideration of such real offense conduct is justified under the Federal Guidelines as a means to achieve the goal of reducing disparity, there is no such justification under Ohio law.

B. *Watts* Found Inapplicable to Other State Sentencing Systems

Consideration of acquitted conduct at sentencing in state systems is not an undisputed proposition.⁸⁰ Many states prohibit the practice. For example, in *State v. Marley*,⁸¹ the Supreme Court of North Carolina held that the trial court was precluded from aggravating the defendant's second-degree murder sentence with the element of premeditation which distinguished first-degree murder after the jury had acquitted the defendant of that charge.⁸² The court reasoned that implicit in the right to due process is the presumption that a defendant is innocent until proven guilty. It stated,

To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself.⁸³

In *Devier v. State*⁸⁴ the Supreme Court of Georgia held that a prior crime may be proven in aggravation despite the lack of a conviction, so long as there has not been a previous acquittal.⁸⁵ In *Royer v. State*⁸⁶ a Florida Court of Appeals held that the court could not use the defendant's arrest on charges for which he was later acquitted as a basis for departing from sentencing guidelines.⁸⁷ In *State v. Cote*⁸⁸ the New Hampshire Supreme Court disallowed consideration of acquittals, stating "the law requires proof beyond a reasonable doubt in criminal cases as the standard of proof commensurate with the presumption of innocence; a presumption not to be forgotten after the acquitting jury has left and sentencing has begun."⁸⁹ The court distinguished an acquittal from pending

charges or charges that have fallen short of conviction, and found that due process is violated when acquittals are considered.⁹⁰

Since the Ohio Supreme Court has yet to explicitly rule on whether *Watts* is applicable to Ohio Sentencing Guidelines, lower Ohio courts must look to persuasive authority when deciding the issue. While the federal practice of allowing consideration of acquittals is persuasive, so too is the fact that various other states have refused to follow the trend because their state guidelines differ from the Federal Guidelines. The limits that have been placed on consideration of real offense conduct in Ohio were instituted in part as a result of decisions of other state courts. For example, in *State v. Jeffers*, the Ohio Appeals Court looked to a California appellate decision because no Ohio cases dealt with whether a court could properly consider the fact that it believes the defendant lied on the stand when imposing a sentence.⁹¹

Ohio courts have previously adopted reasoning found in other state decisions in the face of on-point federal precedent when limiting use of real offense conduct in sentencing. In *State v. Longo*, an Ohio Appeals Court held that information derived from a judge's personal investigation could not be considered in sentencing, even though the federal case of *United States v. Grayson* held to the contrary.⁹²

H. CONCLUSION

Over the past few decades, the criminal justice system has experienced dramatic changes as the purposes of sentencing have changed from notions of rehabilitation to those of punishment and retribution. The culmination of change occurred with the passage of the Sentencing Reform Act of 1984 and the institution of the Federal

Sentencing Guidelines. The new guidelines became a model for many state sentencing systems which have undergone drastic reforms of their own.

As federal and state systems have transformed from indeterminate to determinate, sentencing procedures are being reevaluated. No longer do judges have unbridled discretion to bestow criminal sentences; legislatures have usurped authority from the judiciary. Sentencing courts are in the midst of restructuring to be in accord with the new guideline systems.

The decision to follow a real offense or charge offense system has had significant repercussions in sentencing systems. As this paper has discussed, the decision to follow a real offense scheme has forced sentencing courts to decide how much information can be used when imposing a sentence. While the federal and many state systems have been reluctant to place limitations on real offense considerations in an attempt to retain as much discretion as possible, Ohio courts have been more willing to impose limits. For the reasons discussed herein, Ohio courts should prohibit the practice of allowing sentencing courts to consider acquitted conduct.

¹ DEMLEITNER, BERMAN, MILLER & WRIGHT, SENTENCING LAW AND POLICY, CASES, STATUTES, AND GUIDELINES, 284 (Aspen Publishers 2007).

² The Fifth Amendment to the United States Constitution, applicable to the federal government, states, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

³ The Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. CONST. amend VI.

⁴ U.S. CONST. amend. V.

⁵ *U.S. v. Watts*, 519 U.S. 148 (1997).

⁶ DEMLEITNER, BERMAN, MILLER & WRIGHT, SENTENCING LAW AND POLICY, CASES, STATUTES, AND GUIDELINES, 275 (Aspen Publishers 2007).

⁷ Justice Stevens’ dissent in *United States v. Watts* 519 U.S. 148, 159 (1997) described the sweeping change from indeterminate sentencing to determinate as follows,

The goals of rehabilitation and fairness served by individualized sentencing that formerly justified vesting judges with virtually unreviewable sentencing discretion have been replaced by the impersonal interest in uniformity and retribution.

⁸ DEMLEITNER, BERMAN, MILLER & WRIGHT, SENTENCING LAW AND POLICY, CASES, STATUTES, AND GUIDELINES, 283 (Aspen Publishers 2007).

⁹ *Id.* At 275-88.

¹⁰ United States Sentencing Commission, *An Overview of the United States Sentencing Commission*, available at <http://www.ussc.gov/general/USSCoverview.pdf>.

¹¹ 543 U.S. 220 (2005).

¹² *Id.*

¹³ *Id.* at 277-78.

¹⁴ Debate over the force of the Guidelines has always existed. “While the products of the Sentencing Commission’s labors have been given the modest name ‘Guidelines,’ ... they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed.” *Mistretta v. United States*, 488 U.S. 361, 413 (1989). Even in the wake of *Booker*, courts and scholars were skeptical of whether the Guidelines truly were ‘advisory.’

[I]ndeed, with respect to the congressionally mandated goal of achieving uniformity, the Guidelines are the only way to create consistent sentencing as they are the only uniform standard available to guide the hundreds of district judges around the country. Therefore, in all future sentencings, the court will give heavy weight to the Guidelines in determining an appropriate sentence. In the exercise

of its discretion, the court will only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons...the only way of avoiding gross disparities in sentencing from judge to judge and district to district is for sentencing courts to apply some uniform measure in all cases. The only standard currently available is the Sentencing Guidelines. *United States v. Wilson*, 350 F.Supp 2d 910 (D. Utah 2005).

¹⁵ The remedial majority stated that excision of the standard of review provision did not pose a serious problem in the appeal process. It stated,

That is because...a statute that does not explicitly set forth a standard of review may nonetheless do so implicitly. We infer appropriate review standards from related statutory language, the structure of the statute, and the sound administration of justice. And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for unreasonableness...nor do we share the dissenters' doubts about the practicality of a 'reasonableness' standard of review. Reasonableness standards are not foreign to sentencing law. 543 U.S. 220, 261-62 (2005).

¹⁶ United States Sentencing Commission, *Guidelines Manual*, §1B1.3(a) (Nov. 2009) states,

[The seriousness of the offense shall be determined on the basis of the following: (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and (B) in the case of a jointly undertaken criminal activity, all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense..(3) all harm that resulted from the acts and omissions specified in subsection (a)(1), and all harm that was the object of such acts and omissions...

¹⁷ Victim-Related Adjustments are found at *USSG* §3A1.1, §3A1.2, §3A1.3, AND §3A1.4; Role in the Offense Adjustments are found at §3B1.1, §3B1.2, §3B1.3, §3B1.4, §3B1.5; Obstruction and Related Adjustments are found at §3C1.1, §3C1.2, §3C1.3, §3C1.4; Multiple Counts Adjustments are found at §3D1.1, §3D1.2, §3D1.3, §3D1.4, §3D1.5; Acceptance of Responsibility found at §3E1.1. United States Sentencing Commission, *Guidelines Manual* (Nov. 2009).

¹⁸ United States Sentencing Commission, *An Overview of the United States Sentencing Commission*, available at <http://www.ussc.gov/general/USSCoverview.pdf>.

¹⁹ See *USSG* §6A1.3, *comment.* stating, "The commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements

and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.” *But see U.S. v. Booker*, 543 U.S. 220, 319 (2005) (Thomas dissenting,

[t]he courts holding today corrects the commission’s mistaken belief that a preponderance of the evidence standard is appropriate to meet due process requirements. The fifth amend requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.)

²⁰ *United States v. Watts*, 519 U.S. 148, 169 (1997).

²¹ 180 U.S. 311 (1901).

²² *Id.* at 312.

²³ *See 2009 Federal Sentencing Guidelines Manual, Chapter 4, Part A Commentary* which states,

[A] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence.

²⁴ 337 U.S. 241 (1949).

²⁵ *Id.* at 242.

²⁶ *Id.* at 243.

²⁷ *Id.* at 251.

²⁸ 515 U.S. 389 (1995).

²⁹ *Id.*

³⁰ *Id.* at 390. *See also United States v. Koonce*, 945 F.2d 1145 (10th Cir. 1991) (holding defendant’s prosecution and sentence for being felon in possession of firearms did not violate double jeopardy clause though possession of same firearms during commission or narcotics offense was used in prior prosecution to enhance defendant’s sentence under guidelines); *See also United States v. Mack*, 938 F.2d 678 (holding that enhancement of sentence under Federal Guidelines for other criminal activities does not also constitute punishment for those other activities, and therefore double jeopardy is not implicated when defendant is indicted for activities previously used to increase length of sentence.)

³¹ 519 U.S. 148 (1997).

³² *Id.* at 150.

³³ *Id.* at 155. See also *United States v. Rodriguez-Gonzalez*, 498 U.S. 844 (1990); *United States v. Lloyd*, 10 F.3d 1197 (6th Cir. 1993); *United States v. Martin*, 1992 WL 179241 (C.A.6(Ohio)); *United States v. Boney*, 977 F.2d 624 (D.C. 1992); *United States v. Mocchiola*, 891 F.2d 13 (1st Cir. 1989); *United States v. Fonner*, 920 F.2d 1330 (7th Cir. 1990).

³⁴ Prior to the Watts decision, the United States Sentencing Commission considered three options for limited use of acquitted conduct in sentencing, including (1) exclude the use of acquitted conduct as a basis for determining the guideline range but allow upward departures based on the conduct; (2) allow consideration of acquitted conduct only if proven by clear and convincing evidence; (3) allow use of acquitted conduct in setting guideline range but authorize downward departure for reasons of fundamental fairness. *62 Fed. Reg. 151, 161 (Jan. 2, 1997)*.

³⁵ The Ohio Sentencing Commission explicitly rejected:

(a) purely indeterminate sentencing, which can foster rehabilitation and encourage good behavior, but provides no certainty for the victim or offender; (b) purely determinate sentencing, which can provide certainty, but no opportunity to control behavior in, or after release from, prison; (c) a federal-style matrix grid, which can provide certainty, but may shift sentencing discretion from judges to prosecutors and probation officers; (d) Ohio's former mixed indeterminate, determinate, and mandatory approach, which was confusing and complicated. OHIO CRIMINAL SENTENCING COMMISSION, FELONY SENTENCING MANUAL (1996).

³⁶ OHIO REV. CODE ANN. §181.21 (WEST 2010); OHIO REV. CODE ANN. §181.22 (WEST 2010); OHIO REV. CODE ANN. §181.23 (WEST 2010); OHIO REV. CODE ANN. §181.24 (WEST 2010); OHIO REV. CODE ANN. §181.25 (WEST 2010); OHIO REV. CODE ANN. §181.26 (WEST 2010).

³⁷ S.B. 2, 121st General Assem., (Oh. 1996).

³⁸ See *State v. Foster*, (2006) 109 Ohio St.3d 1, 2006 – Ohio – 856, 845 N.E.2d 470; See OHIO REV. CODE ANN. §2971.03 (WEST 2010) (authorizing indefinite sentences for certain sexually violent offenses).

³⁹ John Wooldredge, Fritz Rauschenberg, Timothy Griffin, Travis Pratt, *The Impact of Ohio's Senate Bill 2 on Sentencing Disparities*, (2002) http://www.uc.edu/ccjr/Reports/ProjectReports/SB2_final_report.pdf.

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- ⁴⁰ OHIO REV. CODE ANN. §2929.13(F) (WEST 2010).
- ⁴¹ OHIO REV. CODE ANN. §2929.11 (WEST 2010).
- ⁴² *Id.*
- ⁴³ OHIO REV. CODE ANN. §2929.11(B) (WEST 2010).
- ⁴⁴ *Id.*
- ⁴⁵ (2006) 109 St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶46-47.
- ⁴⁶ OHIO REV. CODE ANN. §2929.12 (C) (WEST 2010).
- ⁴⁷ OHIO REV. CODE ANN. §2929.12 (WEST 2010).
- ⁴⁸ *See State v. Adams* (1980), 62 Ohio St.2d 151, 157.
- ⁴⁹ (2006) 109 St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶47.
- ⁵⁰ *Id.* at ¶1.
- ⁵¹ *Id.* at ¶24.
- ⁵² (2008) WL 1904000, 2008-Ohio-2049.
- ⁵³ *Id.* at ¶15. *See also State v. Edwards*, (2007) Not Reported in N.E.2d, 2007 WL 3377209, 2007-Ohio-6068; *See also State v. Cook*, (2007) Not Reported in N.E.2d, 2007 WL 475444, 2007-Ohio-625.
- ⁵⁴ No. 97APA11-1467, 97APA11-1468, 1998 WL 542694 (Ohio App. 10 Dist. Aug. 25, 1998).
- ⁵⁵ *Id.* at 1-2.
- ⁵⁶ *Id.* at 3.
- ⁵⁷ 571 N.E.2d 97 (1991).
- ⁵⁸ *Id.* at 78. *See also State v. Lazada*, (1995), 107 Ohio App.3d 189, 667 N.E.2d 1292; *State v. Shellkopf*, No. H-92-009, 1992 WL 386037 (Ohio App. 6 Dist. Dec. 30, 1992).
- ⁵⁹ No. 74305, 1998 WL 774662 (Ohio App. 8 Dist. Oct. 29, 1998).
- ⁶⁰ *Id.* at 1.

⁶¹ *Id.* at 2.

⁶² See also *State v. Anderson*, 135 Ohio App.3d 759, 1999-Ohio-928, 735 N.E.2d 909; *State v. Daniel*, No. 05AP-564, 05AP-683, 2006 WL 2573500, (Ohio App. 10 Dist. Aug. 31, 2006); *State v. Armetta*, No. 84366, 2005 WL 1705738, (Ohio App. 8 Dist. July 21, 2005); *State v. Russo*, No. 78096, 2001 WL 605414 (Ohio App. 8 Dist. May 31, 2001); *State v. Barrera*, No. S-98-047, 1999 WL 504216 (Ohio App. 6 Dist. 1999); *State v. Gipson*, No. 75369, 1999 WL 328610 (Ohio App. 8 Dist. May 20, 1999).

⁶³ No. 1997CA00171, 1998 WL 516300 (Ohio App. 5 Dist. Jan. 26, 1998).

⁶⁴ *Id.* at 3.

⁶⁵ *Id.*

⁶⁶ *State v. Jeffers*, (1978) 57 Ohio App.2d 107, 385 N.E.2d 641.

⁶⁷ *Columbus v. Bee*, (1979) 67 Ohio App.2d 65, 425 N.E.2d 409.

⁶⁸ *State v. Longo*, (1982) 4 Ohio App.3d 136, 446 N.E.2d 1145.

⁶⁹ OHIO REV. CODE ANN. §2929.12 (WEST 2010). O.R.C. §2929.12 reads as follows:

(A) Unless otherwise required by section [2929.13](#) or [2929.14](#) of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section [2929.11](#) of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section [2919.25](#) or a violation of section [2903.11](#), [2903.12](#), or [2903.13](#) of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section [2929.16](#), [2929.17](#), or [2929.18](#) of the Revised Code, or under post-release control pursuant to section [2967.28](#) or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section [2967.16](#) or section [2929.141](#) of the Revised Code.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

⁷⁰ OHIO REV. CODE ANN. §2929.19 (WEST 2010).

⁷¹ 519 U.S. 148, 159 (1997).

⁷² See *Caminetti v. U.S.*, 242 U.S. 470 (1917).

⁷³ See *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 106 (1980).

⁷⁴ See USSG §1B1.3 comment.

⁷⁵ USSG §5K2.21.

⁷⁶ The current version of the amendment exists in the *2009 Federal Sentencing Guidelines Manual*, USSG §5K2.21.

⁷⁷ OHIO REV. CODE ANN. §2929.022 (WEST 2010).

⁷⁸ OHIO REV. CODE ANN. §2929.11 (WEST 2010).

⁷⁹ OHIO REV. CODE ANN. §2929.11(B) (WEST 2010).

⁸⁰ See *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir., 2007) (Dissent concluding that consideration of acquitted conduct undermines protection of jury trial under Sixth Amendment); *People v. Rose*, 776 N.W.2d 888, 889 (Mich., 2010) (Dissent urging majority to reconsider consideration of acquittals in sentencing because presumption of innocence and due process is denied through use); *United States v. Canania*, 532 F.3d 764, 777 (9th Cir., 2007) (Concurrence finding use of acquitted conduct violates due process right to notice and jury trial right in Sixth Amendment); *United States v.*

Pimental, 367 F.Supp. 2d 143, 153 (D.Mass., 2005) (Importance of jury is diminished when findings are ignored).

⁸¹ 364 S.E.2d 133 (N.C. 1988).

⁸² *Id.* at 425.

⁸³ *Id.*

⁸⁴ 323 S.E.2d 150 (Ga. 1984).

⁸⁵ *See also Jefferson v. State*, 353 S.E.2d 468 (Ga. 1987).

⁸⁶ 488 So.2d 649 (Fla. Dist. Ct. App. 1986).

⁸⁷ *Id.* at 650.

⁸⁸ 530 A.2d 775 (N.H., 1987).

⁸⁹ *Id.* at 375.

⁹⁰ *Id.*

⁹¹ *State v. Jeffers*, (1978) 57 Ohio App.2d 107, 385 N.E.2d 641, *citing Poteet v. Fauver*, 517 F.2d 393 (3rd Cir. 1975).

⁹² 438 U.S. 41 (1978).