American College of Trial Lawyers

THE LAW OF EVIDENCE IN FEDERAL SENTENCING PROCEEDINGS

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American College Of Trial Lawyers

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THE LAW OF EVIDENCE IN FEDERAL SENTENCING PROCEEDINGS

I. Introduction

As its name suggests, the Sentencing Reform Act of 1984 ("SRA")[1] contains "sweeping reforms"[2] that "revolutionized"[3] the way in which federal defendants are sentenced. The SRA ended nearly a century of indeterminate sentencing in response to the perceived "dishonesty" of the extant regime in which, as a result of parole, defendants rarely served their full sentence.[4] More radical was elimination of the virtually unfettered discretion a sentencing judge had in choosing a sentence from within a broad statutory range, a response to criticisms of wide sentencing disparity. Instead, the judge is now generally required to sentence a convicted defendant to a specific sentence from within a narrow range set forth in the Federal Sentencing Guidelines ("Guidelines") written by the U.S. Sentencing Commission.

Fact-finding assumes a central, critical role under Guidelines sentencing. The crime of conviction is merely the starting point ("base offense level") to be adjusted after a series of factual determinations—each having a direct and identifiable impact on the ultimate sentence—regarding offense characteristics *(e.g.,* amount of drugs or money involved), defendant's role in the offense, harm to the victim, and other factors. A controversial feature of the Guidelines requires aggregation for sentencing purposes of all "relevant conduct"—even if the defendant has been acquitted of, or was never

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* This report was prepared by the Federal Rules of Evidence Committee of the American College of Trial Lawyers. The Executive Committee and Board of Regents of the College have approved the report. Inasmuch as this Report addresses only the evidentiary and procedural aspects of sentencing, it should not be read as approval or disapproval by the College of the substantive aspects of federal guidelines sentencing, *e.g.,* the "relevant conduct" provisions.

[1] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988, codified at 18 U.S.C. §§ 3551-3742 (1988) and 28 U.S.C. §§ 991-98 (1988).

[2] *Mistretta v. United States,* 488 U.S. 361, 366 (1989).

[3] *Burns v. United States,* 501 U.S. 129, 132 (1991).

[4] Stephen Breyer, *The Federal Sentencing Guidelines And The Key Compromises Upon Which They Rest,* 17 Hofstra L. Rev. 1, 4 (1988) (citation omitted).

even charged with, committing that conduct.[5] The level calculated after these adjustments marks the point on the vertical axis of a grid (the "Sentencing Table"), while defendant's criminal history (also requiring fact-finding) is measured along the horizontal axis. The point at which the two lines intersect yields the permissible range of sentence from which (absent an authorized departure) the judge must select.[6] Manifestly, the procedures for determining facts material to the Guidelines calculation may have a profound impact on a defendant's sentence.

Though the Commission's daunting task of writing guidelines for 681 criminal statutes took more than two years,[7] little attention was paid to the procedural aspects of fact-finding under this new and vastly different sentencing scheme. Since neither Congress (in the SRA) nor the Commission (in the Guidelines) addressed in any detail critical evidentiary issues such as burdens of proof, admissibility of evidence, confrontation rights and hearing procedures, by default the courts have had to step in to shape and resolve these matters. In so doing, courts have been greatly influenced by pre-Guidelines law on evidentiary issues, which freely permitted judges to consider all sorts of information and "evidence" at sentencing. The resulting state of affairs has prompted one circuit judge to remark that "[w]hen it comes to proof of facts undergirding guideline sentences, the principle courts often apply is that 'Anything Goes.'"[8]

Because evidentiary issues relating to Guidelines sentencing have been greatly influenced by pre-Guidelines law, this Report first gives a brief historical sketch of sentencing in this country and the law of evidence that evolved alongside. The Report

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[5] U.S.S.G. § 1B1.3(a). See *United States v. Watts,* 117 S. Ct. 633, 638 (1997) (a jury verdict of acquittal "does not prevent the sentencing court from considering conduct underlying the acquitted charge"); *United States v. Edwards,* 105 F.3d 1179, 1180 (7th Cir. 1997) ("The 'Relevant Conduct' rule requires the judge to consider drugs that were part of the same plan or course of conduct, whether or not they were specified in the indictment."); *United States v. Ritserma,* 31 F.3d 559, 564-65 (7th Cir, 1994) (the goal of the relevant conduct provision "is to allow a court to reflect in its sentence the actual seriousness of an offense, instead of strictly limiting it to the charge the prosecutor names in the indictment"); *United States v. McCaskey,* 9 F.3d 368, 376 (5th Cir. 1993) (trial court properly considered conduct not resulting in conviction where the presentence investigative report indicated it was relevant), *cert. denied,* 511 U.S. 1042 (1994).

[6] Departures are permitted where a court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). See *also* U.S.S.G. ch. 1, pt. A(4)(b) ("When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.") Departures are also permitted in other circumstances, for example, when the government makes a departure motion in recognition of a defendant's substantial assistance. U.S.S.G. § 5K1.1.

[7] Breyer, *supra* note 4, at 3.

[8] *United States v. Smiley,* 997 F.2d 475, 483 (8th Cir. 1993) (Bright, J., dissenting).

next examines the Guidelines and shows that pre-Guidelines law on evidentiary issues has essentially persisted, despite changes under the Guidelines which suggest that prior law might not be appropriate when applied in this different context. The Report concludes by examining various proposals for reform. The proposals discussed below are not limited to divining minimum constitutional standards and urging that sentencing courts adhere to such minimum requirements. Rather, the focus is on ways in which the sentencing process can be made more fair and appropriate. Thus, while due process should inform the evidentiary scheme at sentencing by establishing minimum standards, it should not be viewed as otherwise restricting the bounds of good public policy. "That a practice is constitutional does not make it wise."[9]

II.
Historical Overview of Evidence at Sentencing

A. Background

Sentencing in this country has come full circle from determinate, nondiscretionary sentencing starting in colonial times, to indeterminate, discretionary sentencing (stressing "rehabilitation")[10] in later years, and now finally back toward determinate sentencing under the Guidelines. The current law of evidence at sentencing is better understood in light of this history.

In colonial times, pronouncement of sentence was purely ministerial: conviction of a felony led inexorably to a definite punishment, often death, unless the defendant could offer a legal reason, such as insanity or pregnancy, to excuse that penalty.[11] Courts therefore did not have meaningful discretion once a defendant was convicted,[12] and elaborate fact-finding procedures were unnecessary.

Imprisonment later became the dominant means of punishment for offenders. As inmate population grew, however, various methods were used to reduce overcrowding, such as pardons, good time, probation and parole, contributing to an increasing indeterminacy of sentences.[13] At the same time, the rehabilitative model of punishment gained wide acceptance. Under that model, convicts needed "treatment" to be "cured"

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[9] *United States v. Lombard,* 102 F.3d 1, 5 (1st Cir. 1996).

[10] Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules,* 79 Cornell L. Rev. 299, 307 (1994).

[11] *Williams v. New York,* 337 U.S. 241, 247 (1949) ("the death sentence was an automatic and commonplace result of convictions— even for offenses today deemed trivial"); Young, *supra* note 7, at 306.

[12] Young, *supra* note 10, at 306.

[13] William J. Powell and Michael T. Cimino, Prosecutor/a/ *Discretion under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?,* 97 W. Va. L. Rev. 373,374-77 (1995).

of their criminal tendencies, and the primary goal of imprisonment was to rehabilitate the offender. Sentencing was viewed, therefore, as much as a treatment as it was punishment.[14]

The length of time necessary for rehabilitation could not, of course, be predicted in advance. Accordingly, the sentencing judge imposed an initial indeterminate sentence—for instance, "10 years to life"—but the precise time served was left to a board of "experts" (the parole board) which, after ongoing monitoring of the prisoner's progress, made the ultimate decision as to defendant's release.[15] The court's sentencing decision was a critical component of defendant's overall treatment, and had to be based not only on the nature of the crime but on the nature of the defendant. Courts were therefore encouraged to consider a broad variety of information before imposing sentence—without regard to rules of evidence—such as defendant's background, educational and employment history, family situation, criminal record, and allegations of uncharged criminal conduct.[16] In making its sentencing determination, the court had vast discretion, and was not obliged to explain why the particular sentence was chosen or to justify the exercise of discretion.

B. Rules of Evidence Did Not Apply at Sentencing

Because courts were not required to find facts, rules of evidence typically did not apply at sentencing. *Williams v. New York*,[17] a Supreme Court decision rendered nearly a half-century ago, exemplifies the then-prevailing view that sentencing courts could consider any information regardless of its admissibility under evidentiary rules.

After convicting Williams of murder, the jury made a non-binding recommendation of life imprisonment. But pursuant to a New York statute that permitted the sentencing judge to consider the defendant's criminal record, reports of mental, psychiatric and physical examinations, and "any information that will aid the court in determining the proper treatment of such defendant," the court relied in part on a pre-sentence investigation report and instead imposed a death sentence. The court acknowledged that the report contained many material facts about defendant relevant to sentencing that were not admissible before a jury. Such information included defendant's alleged commission

[14] *See*, *e.g.,* N.Y. Crim. Code § 482 (repealed) (in sentencing defendant, court may seek any information that will aid "in determining the proper *treatment* of such defendant") (emphasis added). See also Young, *supra* note 10, at 308; Kristen D. Sauer, *Informed Conviction; Instructing the Jury about Mandatory Sentencing Consequences,* 95 Colum. L. Rev. 1232, 1234 (1995); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw,* 84 J. Crim. L. & Criminology 679, 701 (1994).

[15] *See* U.S.S.G. ch.1, pt, A(3) (the pre-Guidelines sentencing regime "empowered the parole commission to determine how much of the sentence an offender actually would serve in prison").

[16] Young, *supra* note 10, at 308.

[17] 337 U.S. 241 (1949).

of thirty burglaries in the vicinity of the murder,[18] and "certain activities" (not described in the Supreme Court opinion) indicating that defendant had a "morbid sexuality" and was a "menace to society."[19]

Although Williams did not dispute the accuracy of any of the information or ask for cross-examination, on appeal he asserted that the statutory scheme deprived him of due process because he had no opportunity to confront or cross-examine the witnesses supplying the information in the report. As framed by the Supreme Court, the case presented a "serious and difficult" question relating to "the rules of evidence applicable to the manner in which a judge may obtain information" for sentencing purposes.[20]

The Supreme Court rejected defendant's challenge for a combination of historical, practical and penological reasons. The Court first noted that, historically, tribunals passing on the guilt of a defendant had been limited by strict evidentiary rules, but the opposite had been true of sentencing proceedings: judges had traditionally been accorded wide discretion in the sources and types of evidence used to assist in determining the appropriate sentence.[21] The Court also noted that practical reasons supported the distinction. When the "narrow" issue of guilt was at stake, rules of evidence served to confine the trial to information strictly relevant to the offense charged, and rested in part on a need to prevent a time-consuming and confusing trial of collateral issues. The task of the sentencing judge, however, was broader, and to make an appropriate determination the court needed "the fullest information possible concerning the defendant's life and characteristics."[22]

That need, explained the Court, was impelled by the modern penological approach to punishment, whereby reformation and rehabilitation—not retribution—had become the dominant objectives. The function of probation officers' reports was to "aid offenders,"[23] and to deny sentencing judges the kind of information contained therein would undermine contemporary penological policies. Indeed, said the Court, it would be totally impractical, if not impossible, to present open court testimony with cross-examination in connection with the type of information contained in presentence reports, and such a procedure could impose an administrative burden and delay.[24]

Congress codified the *Williams* holding in 1970, enacting the following statutory provision: "No limitation shall be placed on the information concerning the background,

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[18] Defendant had not been convicted of any of those burglaries, but the judge had information that defendant had confessed to some and had been identified as the perpetrator of others. *Id.* at 244.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 246.

[22] *Id.* at 247.

[23] *Id.* at 249.

[24] *Id.* at 250.

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."[25] That policy of liberally receiving all sorts of information and "evidence" at sentencing was consistent with the way most courts actually conducted their business. The significance of the statutory imprimatur, however, is that while *Williams* was a constitutional decision, establishing what *could* be done, the statute sets forth Congressional policy, prescribing what *must* be done.

Not surprisingly, when the Federal Rules of Evidence were enacted in 1975, sentencing proceedings were expressly exempted from those rules.[26] With respect to hearsay, however, some courts fashioned a requirement, in recognition of defendants' due process rights, mandating that the hearsay meet a "minimal indicium of reliability" standard.[27]

C. Pre-Guidelines Burden of Proof

The question of applicable burdens of proof at sentencing did not frequently arise before the Guidelines. There were, however, some occasions when fact-finding under indeterminate sentencing schemes was required—for example, when mandatory minimum sentences were at issue. It was in that context that the Supreme Court considered burdens of proof at sentencing.

In *McMillan v. Pennsylvania,*[28] defendants challenged a Pennsylvania statute treating gun possession as a sentencing factor, rather than as an element of the offense. Under the statute, if the defendant was convicted of certain felonies and the court found at sentencing that defendant "visibly possessed a firearm" during the crime, a minimum five-year sentence had to be imposed.[29] The finding could be based on evidence introduced at trial and any additional evidence offered by either side at the sentencing hearing, and the prosecution's burden of proof was the low preponderance of the evidence standard. By contrast, defendants argued, due process required that

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[25] 18 U.S.C. § 3577. This provision was renumbered 18 U.S.C. § 3661 by the SRA. The holding in *Williams* has been repeatedly confirmed by the Supreme Court. *See, e.g., United States v. Watts,* 117 S. Ct. 633, 635 (1997); *Witte v. United States,* 115 S. Ct. 2199, 2205 (1995).

[26] Fed. R. Evid. 1101(d)(3). Privileges, however, may be invoked even at sentencing. Fed. R. Evid. 1101 (c).

[27] See *United States v. Reme,* 738 F.2d 1156, 1167 (11th Cir.), *cert. denied sub nom. Pierrot v. United States,* 471 U.S. 1104 (1985); *United States v. Baylin,* 696 F.2d 1030, 1040 (3d Cir. 1982).

[28] 477 U.S. 79 (1986).

[29] 42 Pa. Cons. Stat. § 9712 (1982).

elements of the offense be established by the far more stringent "beyond a reasonable doubt" standard.[30]

The Court, in a 5-4 decision, upheld the statute. Although acknowledging that there were constitutional limits to a state's ability to define facts as sentencing considerations as opposed to elements of the offense, the majority— while declining to explicate those limits— concluded that they were not transgressed in that case.[31] The Court reasoned that the statute operated solely to limit the sentencing court's discretion in selecting a penalty from within a range that was already available to it, but did not increase defendants' punishment.[32] The majority additionally opined that the statute had not been tailored to "permit the visible possession finding to be a tail which wags the dog of the substantive offense."[33] Hence, the beyond a reasonable doubt standard was not constitutionally mandated.

The Court likewise rejected the claim that the intermediate "clear and convincing evidence" standard was required. Citing *Williams,* the majority noted that sentencing courts have traditionally heard evidence and found facts "without any prescribed burden of proof at all,"[34] and declined to draw a distinction between background and character evidence and evidence relating to the charged crime. Indeed, while the Pennsylvania statute ordained a preponderance standard, the Court seemed to suggest even that was not constitutionally required.[35]

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In sum, under indeterminate sentencing schemes stressing rehabilitation, rules of evidence did not apply (although a few courts required that hearsay be at least minimally reliable); indeed, courts considered and sentenced defendants based on all sorts of information, even of dubious reliability. Moreover, when findings of fact had to be made, the preponderance of the evidence standard passed constitutional muster.

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[30] 477 U.S. at 83.

[31] *Id.* at 86.

[32] *Id,* at 88.

[33] *Id.* at 91.

[34] "We see nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing." *Id.*

III.

Fact-finding Under The Federal Sentencing Guidelines

A. The Importance of Fact-finding

Unlike the previous discretionary sentencing regime, fact-finding under the Guidelines impacts upon the defendant's sentence in an easily identifiable manner. The difference in a convict's sentence resulting from a finding that he distributed, say, one gram as opposed to one kilo of cocaine is measured mathematically under the Guidelines.

The importance of factual findings at sentencing is underscored by the theory underlying the Guidelines. The Commission compromised between a pure "charge offense" system and a pure "real offense" system. Charge sentencing ties the punishment directly to the elements of the crime for which defendant was convicted, without considering aggravating or mitigating factors, such as the manner in which the crime was committed. A real offense system bases the sentence on "the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted."[36] The methodology settled upon contains elements of each: the offense for which defendant was convicted establishes the base offense level, which is adjusted in light of several "real" aggravating or mitigating factors particular to the type of crime *(e.g.*, quantity of drugs for narcotics crimes, or dollar amount of loss for fraud), several "real" general factors *(e.g.*, leadership role in the offense or harm to the victim) and defendant's criminal history.[37]

As an example, suppose a first-time offender, working solo, is convicted of bilking an elderly widow out of her life savings of $300,000 in an elaborate scheme using the mails. The base offense level for mail fraud is six. An additional eight points are tacked on for the "specific offense characteristic" relating to the amount of the loss, and another two for more-than-minimal planning. The sum is 16, to which another two is added for the vulnerable victim adjustment. Assuming defendant is recalcitrant and refuses to accept responsibility for his wrongdoing (and, therefore, is not entitled to a reduction for "acceptance of responsibility"), the applicable guideline range is 27-33 months for this defendant, whose Criminal History Category is I.[38]

In accord with the "real offense" character of the Guidelines, the court is required to consider all of the defendant's "relevant conduct," even if that conduct was not charged or did not result in a conviction.[39] Thus, in making the Guidelines calculation, acts and omissions that were part of the "same course of conduct"[40] as the offense of conviction are aggregated. In the mail fraud hypothetical, if at the sentencing stage

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[36] U.S.S.G. ch. 1, pt. A(4)(a).

[37] Breyer, *supra* note 4, at 11-12.

[38] See U.S.S.G. §§ 2F1.1, 3A1.1, 3E1.1; U.S.S.G. ch. 4, pt. A; U.S.S.G. ch. 5 pt. A. Sentencing Table.

[39] U.S.S.G. § 1B1.3; *see supra* note 5 and accompanying text.

[40] U.S.S.G. § 1B1.3(a)(2).

information was presented to the court showing that defendant had defrauded other victims in the same scheme for an additional loss of $450,000, 10 points would have been added for the dollar loss characteristic, instead of eight, yielding an increased sentencing range of 33 to 41 months. Or for a more extreme example, the defendant in *United States v. Ebbole*[41] pleaded guilty to distributing a gram of cocaine to an undercover agent, which ordinarily would have resulted in a 27-33 month sentence. But the sentencing court found by a preponderance of the evidence that defendant had possessed 1.2 kilograms as part of the same course of conduct, which more than tripled the range to 92 to 115 months.[42]

It is clear, therefore, that each fact material to the Guidelines calculation can directly impact upon defendant's sentence.

B. How Facts Are Determined

In making the necessary factual findings, the judge's principal source of information about the defendant, the offense and the applicable guidelines— particularly in plea cases (which constitute the vast majority of criminal convictions)— is the presentence investigative report ("PSI").[43] The PSI has therefore been called "the single most important document in the guideline sentencing process."[44] Prepared under statutory direction by a probation officer operating as an "arm of the court,"[45] the PSI is intended to be a "single rendition of the offense" based on the officer's independent assessment of the relevant facts."[46] In practice, however, probation officers rely almost exclusively on

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[41] 917 F.2d 1495, 1495-1496 (7th Cir. 1990).

[42] *Id.* at 1496.

[43] 1 ABA Section of Criminal Justice, Practice Under the New Federal Sentencing Guidelines ch. 8[C], at 8-25 (Robert D. Richman, ed. Supp. 1995) (hereinafter "Practice").

[44] Id, *See also* Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 151 F.R.D. 153, 158 (1993); Note, *An Argument for Confrontation under the Federal Sentencing Guidelines*, 105 Harv. L. Rev. 1880, 1882 (1992).

[45] See, *e.g., United States v. Belgard,* 894 F.2d 1092, 1097 (9th Cir.), *cert, denied,* 498 U.S. 860(1990).

[46] Administrative Office of the United States Courts, *Presentence Investigation Reports Under the Sentencing Reform Act of 1984,* at 7 (1987); Practice, *supra* note 43, at 8-25.

government-provided information, and courts tend to presume the PSI to be reliable.[47] The net result is that information supplied by the government frequently becomes the basis for a sentence that exceeds the guidelines range for the offense of conviction.

The PSI must be disclosed to the parties at least 35 days before sentence is imposed, and the parties are required to communicate their objections to each other and the probation officer within two weeks thereafter. The probation officer may meet with the parties to try to resolve the objections, and any unresolved disputes are identified in a separate addendum given to the court along with the PSI. At sentencing, the court is required either to make findings on each controverted matter or to state that such a finding is unnecessary because the disputed issue will not be considered in, or will not affect, sentencing.[48] Under discretionary sentencing, a judge could easily avoid resolving factual disputes by simply saying that the controversy was immaterial to the chosen sentence. Under the Guidelines, however, given the nature and consequence of most factual disputes, the court will likely be obliged to resolve the dispute.[49]

In fact, while lack of evidentiary standards and broad judicial discretion under pre-Guidelines sentencing have been criticized, one strength of that structure was the correlative discretion judges had to disregard or discount evidence they deemed unreliable.[50] For example, if the PSI said that the probation officer interviewed the case agent who related that an unidentified jailhouse informant had implicated defendant in other crimes, the judge was not obliged to ratchet up the sentence based on that multi-level hearsay. Anecdotal evidence supports the notion that judges operated in that fashion. Circuit Judge Edward R. Becker (a former district judge for twelve years under the old sentencing regime) asserts that judges typically discounted unreliable evidence, and at least one other federal judge has written that disputed facts at sentencing were routinely disregarded in imposing punishment.[51]

Judges have lost that flexibility under the Guidelines. They are no longer imbued with the freedom simply to ignore disputed facts and give the defendant the benefit of

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[47] Gerald W. Heany, *The Reality of Guidelines Sentencing: No End to Disparity,* 28 Am. Grim. L. Rev. 161, 173 (1991); *United States v. Sherbak,* 950 F.2d 1095,1100 (5th Cir. 1992) ("A presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the Sentencing Guidelines").

[48] See Fed. R. Grim. P. 32.

[49] Practice, *supra* note 38, at 8-33.

[50] *United States v. Gigante,* 94 F.3d 53, 56 (2d Cir. 1996) (in pre-Guidelines era, "a court had discretion to disregard [uncharged or acquitted conduct] entirely, even if proven.") See *also* Young, *supra* note 7, at 315 ("One of the generally unacknowledged merits of discretionary sentencing was that it permitted judges to weight evidence based on its reliability").

[51] Becker, *supra* note 44, at 154. Judge Eisele, in *United States v. Clark,* 792 R Supp. 637, 649 (E.D.Ark. 1992), noted, "[i]f a factor important to sentencing was, after discussion, still denied, *it simply was omitted from consideration." Id.* (emphasis added).

the doubt in close cases. Instead, courts are compelled to resolve all disputed facts material to the sentence.[52]

Courts, however, have not been given much statutory guidance in undertaking that task. The only allusion to evidentiary standards in the SRA is 18 U.S.C. § 3661, which is merely a renumbering without substantive change of 18 U.S.C. § 3557 (the codification of *Williams),*[53]

The Guidelines' consideration of evidentiary issues is only slightly more elaborate. In a Policy Statement, the Commission declared that the sentencing judge may consider relevant information without regard to the rules of evidence, so long as the information has "sufficient indicia of reliability to support its probable accuracy."[54] On its face, that standard is seemingly more stringent than the "minimal indicia of reliability" due process standard courts had applied before the Guidelines, and some courts have expressly said so.[55] But many courts continue to rely on the "minimal indicia" formulation.[56] In the Commentary, the Commission expressly stated that "[reliable hearsay" may be considered but that "[unreliable allegations" shall not.[57]

With respect to fact-finding procedures, the Commission commentary noted that under pre-Guidelines practice, sentencing factors were often determined informally, partially explainable because particular offense and offender characteristics "rarely had a highly specific or required sentencing consequence."[58] That situation, the Commission acknowledged, no longer exists under the Guidelines; to the contrary, resolution of disputed facts would, indeed, "have a measurable effect on the applicable punishment."[59] Consequently, said the Commission, "[m]ore formality" is unavoidable if sentencing is to be accurate and fair.[60]

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[52] See *United States v. Lombard,* 102 F.3d 1, 4 (1st Cir. 1996); *Gigante,* 94 F.3d at 56.

[53] Young, *supra* note 10, at 322 & n.141.

[54] U.S.S.G. § 6A1.3. Policy statements are generally binding on courts. *Williams v. United States,* 503 U.S. 193, 200-01(1992).

[55] *United States v. Mlele,* 989 F.2d 659, 663-664 (3d Cir. 1993) *(citing* U.S.S.G. § 6A1. 3(a); *United States v. Torres,* 926 F.2d 321, 324 (3d Cir. 1991)).

[56] *See.e.g., United States v. Browning,* 61 F.3d752,756 (1 Oth Cir. 1995); *United States v. Huckins,* 53 F3d 276, 279 (9th Cir. 1994); *United States v. Silverman, 976* F.2d 1502, 1506 (6th Cir. 1992) (en bane), *cert, denied,* 113 S. Ct. 1595 (1993).

[57] U.S.S.G. § 6A1.3, comment. The Commission's Official Commentary to the Guidelines is binding on courts unless inconsistent with the Constitution, federal statute, or a guideline itself. *Stinson v. United States,* 113 S. Ct. 1913, 1915 (1993).

[58] U.S.S.G. § 6A1.3, comment.

[59] *Id,*

[60] *Id.*

The additional "formality" in sentencing hearings contemplated by the Commission does not include *a* right to confront adverse witnesses or even an absolute right to call one's own witnesses.[61] Moreover, as for burdens of proof, the Commission, in a 1991 commentary amendment, stated its belief that the preponderance standard meets due process requirements and "policy concerns" in resolving disputed factual issues.[62]

IV.
Proposals for Reform

The pervasive use of hearsay at sentencing, lack of confrontation rights, and light burdens of proof have spawned arguments and proposals for change. Critics of the existing system are of one mind that pre-Guidelines law, which is the foundation for current doctrine, has been inappropriately extended to the Guidelines.

First, critics point out that rehabilitation as the paramount goal of sentencing has now been expressly repudiated.[63] The primary rationale of pre-Guidelines cases such as *Williams v. New York* was that courts needed access to as much information as possible about the offender to arrive at the most appropriate sentence in aid of his or her rehabilitation. Such wide-ranging inquiries are no longer necessary under, and in fact are severely circumscribed by, Guidelines sentencing.[64]

Indeed, under discretionary sentencing the information presented to the judge was generally not subject to scrutiny through adversarial procedures. By contrast, Rule 32 of the Federal Rules of Criminal Procedure now "contemplates full adversarial testing of the issues relevant to a Guidelines sentence."[65] Because the focus under Guidelines

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[61] *United States v. Little,* 61 F.3d 450, 454 n.2 (6th Cir. 1995), cert, *denied,* 116 S. Ct. 954 (1996); *Silverman,* 976 F.2d at 1511; *United States v. Wise,* 976 F.2d 393, 400 (8th Cir. 1992) (en bane), *cert, denied,* 113 S. Ct. 1592 (1993); *United States v. Tardiff,* 969 F.2d 1283, 1287 (1st Cir, 1992).

[62] U.S .S .G. § 6A1.3, comment.

[63] The SRA lists punishment, deterrence, incapacitation and rehabilitation (in that order) as factors the court should consider in imposing sentence. 18 U.S.C. § 3553(a)(2)(A)-(D), U.S.S.G. ch. 1, pt. A(3), notes Congress' "basic objective" with regard to sentencing when it enacted the SRA: honesty, uniformity, and proportionality. *Id.* 28 U.S.C. § 994(k) instructs the Sentencing Commission to "insure that the guidelines reflect the /^appropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed vocational training, medical care, or other correctional treatment." *Id.* (emphasis added).

[64] See *generally* U.S.S.G. ch. 5, pt. H.

[65] *Burns v. United States,* 501 U.S. 129, 135 (1991).

sentencing is on the offense of conviction and related crimes, rather than the offender, "the facts that are now relevant to sentencing are more susceptible to trial-type proof than those facts relevant under the rehabilitative scheme ..." [66]

Judges and scholars have propounded arguments to increase the reliability of fact-finding at sentencing. Some are examined below. In addition, some of our own ideas to remedy problems that have become prevalent under Guidelines sentencing are offered. Specifically, we address (i) the frequent use of hearsay allegations to increase a defendant's sentence; and (ii) prosecutors' use of "relevant conduct" to lengthen a defendant's sentence, even though that conduct may not have been charged or resulted in a conviction.

A. Confrontation Clause Rights

The Supreme Court has not yet decided whether the Sixth Amendment's Confrontation Clause applies to sentencing proceedings. The courts of appeals—sometimes over strong dissents[67]—have generally agreed that the Guidelines sentencing regime does not compel recognition of confrontation rights. Dissenting judges and scholars, however, have argued that defendants should have such rights. It may well be that the Supreme Court, when it ultimately confronts the issue, will decide against confrontation rights as a constitutional imperative. We nevertheless believe that evidentiary rules grounded in the policies underlying the Confrontation Clause should be adopted for use at sentencing.

The argument in favor of confrontation starts with the text of the Sixth Amendment, which confers such rights in "all criminal prosecutions." It would seem self-evident that a sentencing hearing is an integral part of a criminal prosecution, particularly in light of the fact that at the time the Sixth Amendment was adopted, trial and sentencing were part of a single proceeding.[68]

The confrontation argument is strengthened when one considers the apparent purpose of the Clause. Although the precise intent of the framers is unknown,[69] the Sixth Amendment operates to afford criminal defendants a fair opportunity to challenge and expose weaknesses in the prosecution's evidence at trial, principally through

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[66] Note, *supra* note 44, at 1886.

[67] See *Wise,* 976 F.2d at 406-410 (Arnold, C.J., concurring in part and dissenting in part); *Silverman,* 976 F.2d at 1524-27 (Merrik, C.J., dissenting).

[68] "If 'plain meaning' is the criterion, this is an easy case [in favor of confrontation rights]." *Wise,* 976 F.2d at 407 (Arnold, C.J., concurring in part and dissenting in part). *But see United States v. Kikumura,* 918 F.2d 1084, 1102 (3d Cir. 1990) ("As a textual maker, the sixth amendment, which refers to 'criminal prosecutions,' arguably applies only at trial.").

[69] See, *e.g., White v. Illinois,* 112 S. Ct. 736 (1992) (Thomas, J., concurring in part and concurring in the judgment); *California v. Green,* 399 U.S. 149 (1970) (Harlan, J., concurring).

face-to-face cross-examination,[70] Under the Guidelines, where factual findings on disputed issues may be as consequential to defendants as the conviction itself, it may be cogently argued that defendants should be afforded similar rights.

Specht *v. Patterson,*[71] *a* Supreme Court case decided on due process grounds, also suggests that a defendant may be entitled to confront adverse witnesses at sentencing. Under the statutory scheme in that case, if a defendant was convicted of certain sex offenses, he was subject to an indeterminate sentence of one day to life upon a finding, in a separate proceeding, that he posed a threat of bodily harm to the public, or was a mentally ill. habitual offender. The Supreme Court held that that requisite finding was a "new finding of fact... that was not an ingredient of the offense charged" and defendant was therefore entitled, among other things, to be 'confronted with witnesses against him" and "the right to cross-examine."[72] Under the Guidelines, courts frequently make new factual findings that are not elements of the charged offenses.[73]

When *a* defendant is at risk of an increased sentence based on hearsay allegations, he should have a right to confront and cross-examine his accuser under oath to expose bias, lack of perception, memory defects, motive to lie and other factors bearing on the reliability of the proffered testimony. In the typical case, where at best defendant is given the opportunity to cross-examine a law enforcement officer relaying the accusations, the defendant does not have a realistic chance to undermine the charges, even though the informant may be mistaken or—worse—lying.

We recognize, however, that in exceptional circumstances the government may have a compelling need to avoid face-to-face examination of the declarant. For example, an informant's life may be endangered or the integrity of an ongoing investigation may be compromised if the informant were forced to testify. Where the government shows that compelling interests are at stake, the court should have discretion to modify the right of confrontation to balance defendant's rights and the government's legitimate interests. The court may consider conducting an in-camera examination of the informant based on written questions submitted by the defendant, may demand affidavits and strict corroboration of the informant's accusations, or may devise other means to adequately balance the parties' respective interests.

In deciding the appropriate procedure, the court's discretion to depart from an absolute right of confrontation should be exercised in inverse proportion to the amount by which defendant's sentence would be increased were the accusations credited, in other words, if defendant's sentence would be significantly increased based on the hearsay, the court should be hesitant to entertain anything less than full confrontation; in these circumstances, the government may choose to forego an enhanced sentence altogether. But where the sentence would be lengthened by only a few months and the

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[70] *See, e.g., Coy v. Iowa, 487* U.S. 1012, 1020 (1988) (placing screen between defendant and witnesses at trial violates Confrontation Clause).

[71] 386 U.S. 605(1967).

[72] *Id.* at 610.

[73] *See supra* note 5 and accompanying text.

government can show a compelling need not to produce the witness, the court may wish to fashion an alternate procedure.

Recognizing confrontation rights at sentencing, albeit in modified form, would help assure that sentences are based on reliable evidence. The prosecution would not, of course, be required to produce the source of information for cross-examination if the evidence falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness.[74] But the common situation of a law enforcement officer relaying allegations made by an unidentified "confidential informant" would be obviated.

B. Burdens of Proof

While recently reaffirming that "application of the preponderance standard at sentencing generally satisfies due process," the Supreme Court declined to address the question, on which it noted "a divergence of opinion among the circuits," of "whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence."[75]

The arguments in favor of a higher burden of proof, such as the intermediate "clear and convincing" standard, distinguish the pre-Guidelines case of *McMillan v. Pennsylvania* on the ground that the defendants there were not exposed to a greater punishment range than already available to the sentencing judge. Indeed, the Supreme Court acknowledged that defendant's argument would have been stronger had that not been the case.[76] By contrast, under the Guidelines, defendants *are* exposed to greater punishment when critical disputed facts are found against them. That potential militates in favor of a higher burden of proof.

Judges and commentators have also argued that the *Matthews v. Eldridge*[77] due process test requires a higher evidentiary burden.[78] Under that test, the court must consider (i) the private interest at stake; (ii) the risk of an erroneous deprivation of that interest and the value of additional procedural safeguards; and (iii) the government's interest, including cost and administrative concerns.[79] Proponents argue that the balance of these factors mandates a burden of proof greater than the preponderance standard.

The Third Circuit, in *United States v. Kikumura*,[80] was the first court to impose a higher standard of proof in sentencing than the preponderance of the evidence

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[74] *Ohio v. Roberts,* 448 U.S. 56, 65-66 (1980).

[75] *Watts,* 117 S. Ct. 633, 637 (1997).

[76] *McMillan v. Pennsylvania,* 477 U.S. 79, 88 (1986).

[77] 424 U.S. 319 (1976).

[78] *See, e.g.,* Note, *supra* note 44, at 1895-96.

[79] *Matthews,* 424 U.S. at 335.

[80] 918 F.2d 1084 (3d Cir. 1990).

standard. In rare cases, the *Kikumura* court explained, due process requires disputed facts at sentencing to be decided on the basis of a clear and convincing standard of proof.[81] In *Kikumura,* the trial court had departed upwards from a sentencing range of 27 to 33 months and imposed a 30 *year* sentence, based in part on allegations that defendant was a terrorist affiliated with the Japanese Red Army who was on a major terrorist bombing mission in this country. Citing *McMillan,* the Third Circuit observed that the case was a dramatic example of a sentencing hearing functioning as a "tail which wags the dog of the substantive offense."[82] The court concluded that it could not reflexively apply the same procedures that are adequate for "more mundane, familiar sentencing determinations"[83] and held that a clear and convincing evidence burden of proof was mandated (and satisfied) in that case.[84]

Several other courts have expressed a willingness to adopt *Kikumura's* clear and convincing standard in certain, extreme circumstances, or at least require *a* finding beyond a preponderance of the evidence.[85] Commentators have welcomed *Kikumura's* willingness to impose a higher burden of proof, but have questioned whether there is a principled basis for not imposing that higher burden when *any* increased sentence will result from fact-finding at sentencing.[86] We believe that the clear and convincing burden of proof is more appropriate than the low preponderance standard in at least two circumstances: (i) when the government seeks to increase defendant's sentence by *any* amount using uncharged "relevant conduct"; and (ii) when defendant's sentence, regardless of the circumstances, would be substantially increased based on evidence presented at sentencing.

At sentencing, defendants are stripped of important trial protections such as jury determination of facts, the reasonable doubt standard and confrontation rights. Presently, prosecutors have a tremendous incentive to charge a defendant with a single, easily provable count and then to seek additional punishment at the sentencing stage by establishing other "relevant conduct" by the relatively light preponderance standard. The manifest unfairness of such a practice would be mitigated by holding the government to a higher burden of proof when it seeks to add to defendant's sentence based on uncharged conduct. Although in recognition of the differences between trial and sentencing we do not advocate that the reasonable doubt standard apply, we think that in these circumstances the familiar, intermediate clear and convincing standard should be used instead of the preponderance standard.

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[81] *Id.* at 1101.

[82] *Id.* at 1100-01.

[83] *Id.* at 1101.

[84] *Id.*

[85] *See United States v. Gigante,* 94 F.3d 53, 56 (2d Cir. 1996); *United States v. Mergerson, 4* F.3d 337, 344 (5th Cir. 1993); *United States v. Corbin,* 998 F.2d 1377, 1387 (7th Cir. 1993); *United Staies v. Restrepo,* 946 F.2d 654, 656, n. 1 (9th Cir. 1991) (en banc), *cert, denied,* 503 U.S. 961 (1992); *United States v. Lam Kwong-Wah,* 966 F.2d 682, 688 (D.C. Cir.), *cert, denied,* 506 U.S. 901 (1992).

[86] *E.g.,* Young, *supra* note 7, at 339.

Similarly, whenever a significant increase in punishment would result from evidence presented at the sentencing stage, the clear and convincing standard should apply. That is in accord with the *Kikumura* court's holding. When the consequences to a defendant are as profound as the loss of liberty for an extensive period, we should not be satisfied with having the relevant facts determined by the same standard that governs civil disputes.

C. Rules of Evidence

Although we do not think that it is necessary to adopt the Federal Rules of Evidence in their entirety for use in sentencing proceedings, we believe that the rules relating to hearsay should be recognized when defendant's sentence would be materially affected. Similarly, certain other evidentiary rules, enumerated below, may appropriately be applied in the sentencing context.

The Rules define hearsay[87] and set forth the appropriate exceptions to the general principle that hearsay is inadmissible.[88] By definition, the Rules filter out only unreliable allegations, for if there are "guarantees of trustworthiness" equivalent to the other exceptions, the hearsay is admissible under the catchall exception.[89]

All this is closely related to confrontation rights, as the Supreme Court has recognized that defendants have no right of confrontation if a firmly-rooted hearsay exception applies or if the out-of-court statements bear particularized guarantees of trustworthiness.[90] Thus, if the hearsay meets an exception, there is likely no constitutional right of confrontation. Conversely, if the hearsay cannot meet an applicable exception, it is presumably the sort that requires probing by defendant to assure the court of its suitability for increasing a defendant's sentence. Adoption of the hearsay rules would therefore help identify when our proposed modified right of confrontation would be triggered and in any event would serve an independent value of helping to assure that sentences are based on reliable evidence.

Certain other rules of evidence can readily be applied at sentencing to enhance reliability of factfinding. For example: Rule 106, the "complete writing" rule;[91] Rule 602, requiring a witness to testify based on personal knowledge; article VII, relating to opinion and expert testimony; article IX, governing authentication; and article X, the

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[87] Fed. R. Evid, 801 (C)

[88] See Fed. R. Evid. 803-804.

[89] See Fed. R. Evid. 803(24).

[90] *Idaho v. Wright,* 497 U.S. 805, 814-815 (1990). *See also White v. Illinois,* 502 U.S. 346, 356-357 (1992) (hearsay falling within an established exception *per se* not violative of Confrontation Clause).

[91] Federal Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

rules relating to admissibility of duplicate documents and summaries of voluminous writings.

D. Other Proposals

A variety of other proposals for reform have been made. Judge Becker (the author of *Kikumura),* targeting hearsay that would elevate the sentencing range, proposes development of an "unfairness index" that would evaluate the government's evidence to determine which hearsay is so unreliable that the government must either produce the witness or do without the evidence. As part of his methodology, he proposes that certain devices, such as affidavits and discovery, may in some cases alleviate problems underlying hearsay.[92]

Professor Deborah Young argues that the best way to achieve needed, comprehensive reform is to adopt an amended version of the Federal Rules of Evidence for sentencing purposes. She notes that the Rules are generally neutral to both government and the defendant, are designed to insure reliable fact-finding, and are familiar to practitioners and judges. Moreover, since the Rules are not of constitutional magnitude, refinements can be made through amendments.[93]

Less ambitious in her proposed reforms is Professor Margaret Berger, who suggests that certain specialized rules be adopted responding to some of the more troubling problems.[94] For example, she submits that hearsay statements made by individuals in custody, engaged in plea bargaining, or awaiting sentence may not be used to prove relevant conduct. As for other hearsay, it should not be used at sentencing unless corroborated by trial testimony, tangible evidence, or defendant's allocution.

We believe that, in general, evidentiary reforms in sentencing should be party-neutral, as are the Federal Rules of Evidence themselves. Thus, defendants seeking downward departures should be subject to the same evidentiary strictures and burdens as the government in seeking an upward modification. Implementation of reforms, however, may require reconsideration of the inherent presumptions in the Guidelines, for they affect who bears the burden of proving disputed facts.

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[92] Becker, *supra* note 44, at 170-71.

[93] Young, *supra* note 10, at 371-72.

[94] Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule,* 5 Fed. Sent. R. 96 (1992).

Conclusion

Although some may argue that more formalized evidentiary rules will make the sentencing process less streamlined and will consume precious judicial and prosecutorial resources, the reality is that in a criminal justice system where the overwhelming majority of prosecutions are resolved by guilty plea prior to trial, sentencing has become *the* critical stage of the proceeding. It seems to us, therefore, that the need for uniform, appropriate rules that courts are to follow at a proceeding in which decisions are made concerning whether and, if so, for how long, a person will be incarcerated outweighs any incremental societal cost of implementing such rules.

The legacy of the bygone era where courts sentenced to "rehabilitate" is an evidentiary scheme that in many instances does not afford Guidelines defendants adequate protection against enhanced punishment based on unreliable evidence. This Report has examined the past, the present, and proposals for the future. It seems clear that the unfairness inhering in the present system should be remedied, and that a variety of tools are at the disposal of conscientious courts, legislators and commissioners.

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