Cornell Law Review

Volume 79
Issue 2 *January 1994*

Article 2

Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules

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FACT-FINDING AT FEDERAL SENTENCING: WHY THE GUIDELINES SHOULD MEET THE RULES

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INTRODUCTION

The quest to sentence defendants fairly and effectively has led countries and communities continually to reform their sentencing systems. In a recent example of such reform, the United States Congress established the United States Sentencing Commission to draft federal sentencing guidelines.[1] Deep concerns about unwarranted disparity of sentences fueled the transformation to guidelines sentencing, from the previous system of discretionary sentencing aimed at rehabilitation.[2] Under the previous system, defendants who had committed the same crime and had the same prior criminal record could receive dramatically different sentences. Congress directed the Commission to develop guidelines that would reduce this disparity.[3]

Given this broad mandate, the Commission developed detailed presumptive guidelines that require federal judges to make specific factual determinations at sentencing about the nature of the offense and the defendant's criminal history.[4] The guidelines then translate these factual determinations into fines or months of probation or incarceration. The core principle—that specific factual determinations by the court directly produce identifiable consequences—was intended to reduce disparity in outcomes for similar defendants. To accomplish this goal, factual determinations must be accurate.

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1 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3742 (1988), 28 U.S.C. §§ 991-98 (1988)).

2 During the 1970s judges and scholars paid great attention to the problem of sentencing. Judge Marvin E. Frankel was a leading critic of unfettered sentencing discretion and a proponent of sentencing reform. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972). His call for reform was supported by other thoughtful literature about sentencing disparity and its causes. *E.g.*, ROBERT O. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE (1969); WILLARD GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING (1974); JOHN HOGARTH, SENTENCING AS A HUMAN PROCESS (1971); PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (Alfred Blumstein et al. eds., 1983); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

3 In establishing the United States Sentencing Commission, Congress stated that one of its purposes was to establish policies and practices that:

> provide certainty and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct* while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. § 991(b)(1)(B) (1988) (emphasis added). For a discussion of the importance of considering the purposes of sentencing, see Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992).

4 For a discussion of the reasoning and compromises of the Commission, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

Concurrent with reducing disparity, Congress wanted the Commission to develop a system that would assure sentences were fair, both in the individual case and in the overall pattern of sentences.[5] Congress directed that a defendant should receive an appropriate sentence, but not more than that. This means that the imposition of fact-finding standards should not unfairly burden individual defendants. Despite the goal of fair sentencing, Congress, the Sentencing Commission, and the courts have failed to impose the necessary standards to ensure fair and reliable fact-finding.[6]

The accuracy of fact-finding is determined by the burden of proof, the reliability of the underlying evidence, and the opportunity for review of the decision. The burden of proof for questions of fact at pre-guidelines sentencing was low—a mere preponderance of the evidence.[7] Moreover, courts could consider virtually any evidence without regard to its admissibility under the Federal Rules of Evidence.[8] The Supreme Court held that these standards met the requirements of the Constitution.[9]

In establishing sentencing guidelines, neither Congress nor the Commission adjusted the burden of proof at sentencing[10] or the standards for the reliability of evidence, although Congress did provide the safeguard of appellate review.[11] Courts have held generally that sentencing under the guidelines is not so different from pre-guidelines sentencing that higher standards are constitutionally mandated.[12]

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5 S. REP. No. 225, 98th Cong., 2d Sess. 52-56 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235-39.

6 One commentator, writing before the federal guidelines were adopted, foresaw that "[t]o truly eliminate disparity, sentencing reformers must standardize not only substantive sentencing law, but also the procedures that bring to the sentencer the facts to which that law will be applied." Peter B. Pope, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258, 1264 (1986). Pope reviewed the Minnesota guidelines sentencing model and pointed out the importance of fact determinations at each stage of the criminal case.

7 *See* discussion *infra* part I.A.3.

8 *See* discussion *infra* part I.A.

9 *See* discussion *infra* part I.A.2.

10 Neither Congress nor the Commission initially specified what burden of proof should apply at sentencing, leaving the matter for the courts to resolve. The Commission has not subsequently issued a guideline or policy statement on this issue. However, in an amendment that became effective on November 1, 1991, the Commission indicated in the commentary to § 6A1.3 that the preponderance standard is appropriate. UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL: APPENDIX C 216 (1991) (amending the Commentary to § 6A1.3) [hereinafter U.S.S.G.].

11 The statute provides that the defendant as well as the government may appeal a sentence. 18 U.S.C. § 3742(a),(b).

12 *See* discussion *infra* parts I.A.2 and I.A.3. There have been strong dissents to these rulings, including a dissent by Justice White to a denial of certiorari by the Supreme Court. Kinder v. United States, 112 S. Ct. 2290 (1992); *see* discussion *infra* note 217.

The reliance by the Commission and courts on pre-guidelines cases to decide constitutional standards for guidelines sentencing is unsatisfactory for two reasons. First, the Commission and courts have failed to question the original reasoning of the cases establishing the constitutional standards. This article contends that even under pre-guidelines sentencing evidentiary standards were inadequate. Second, the inadequacy of these standards is even greater with guidelines sentencing.[13] Discretion in pre-guidelines sentencing permitted judges to vary their reliance on evidence depending on its level of reliability. Restricting judges' ability to exercise discretion and directly basing sentences on factual determinations, when combined with a failure to raise the reliability standards, has created an unjust sentencing scheme.

A constitutional requirement identified by the Commission or the courts is not the only possible mandate for stricter evidentiary standards at sentencing. There is an alternative solution. The federal judiciary and Congress have the authority to adopt stricter evidentiary standards through rules. This article presents an affirmative analysis of why applying the Federal Rules of Evidence at sentencing would improve fact-finding.

Two key harms to be avoided in fact-finding at guidelines sentencing are inaccuracy in fact-finding and having defendants unfairly bear the burden of errors in fact-finding. In light of these potential harms, this Article analyzes the potential impact of raising the burden of proof at sentencing and of increasing the standards for admissibility of evidence at sentencing. Adjusting the burden of proof clearly affects who will benefit if the evidence is inadequate, but does not necessarily improve the accuracy of fact-finding. Assessing how higher reliability standards for the admissibility of evidence, such as those required by the Federal Rules of Evidence, would affect sentencing involves a more complex analysis.

Who bears the burden of proof at sentencing, the likelihood that evidence offered will be inculpatory, and the probability that evidence that would be inadmissible at trial is more likely to be false than admissible evidence—all these affect the calculation of the impact of evidence at sentencing. At best, the use at sentencing of evidence generally inadmissible at trial, such as hearsay, may increase accuracy while also increasing the number of errors being borne by defendants. However, as the analysis demonstrates, limiting evidence at sentencing to that which meets the Federal Rules of Evidence will ensure that defendants do not unfairly bear the burden of errors and is likely to

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13 Judge Bright of the Eighth Circuit recently noted that "[w]hen it comes to proof of facts undergirding guideline sentences, the principle courts often apply is . . . 'Anything Goes.'" United States v. Smiley, 997 F.2d 475, 483 (8th Cir. 1993) (Bright J., dissenting).

also increase accuracy of fact-finding.[14] The Federal Rules of Evidence, which are generally neutral to both the defendant and the government, provide the most effective method for improving fact-finding at sentencing.

Congress or the federal judiciary can extend application of the Federal Rules of Evidence beyond the culpability phase of trials to govern sentencing.[15] The evidence rules could efficiently be incorporated into the existing sentencing scheme, where both parties are represented by counsel familiar with the rules. Application of evidence rules at sentencing may even be preferable to finding a constitutional requirement for heightened evidentiary standards. Application of the rules would ensure comprehensive reform, rather than piecemeal solutions to specific problems, while still permitting refinement through amendments.

Part I of this Article traces the development of current procedural protections from early American sentencing through the recent adoption of guidelines sentencing. Part II examines how federal courts are currently wrestling with guidelines sentencing under the pre-existing procedural standards. This section discusses how courts have considered increasing sentencing reliability by finding a constitutional requirement for a heightened burden of proof, finding a right of confrontation at sentencing, or adopting specialized rules for fact-finding at sentencing.

Part III presents a new argument for heightened procedural protections. This section applies theories of evidence to fact-finding at sentencing to demonstrate what errors in fact-finding exist under the guidelines, who should bear the consequences of errors, and what choices are available for reducing errors. Part III concludes that improved reliability is best accomplished by applying the Federal Rules of Evidence.

Part IV reviews the issues that arise at sentencing in light of the proposed application of evidentiary rules. This section demonstrates that the Federal Rules of Evidence governing reliability of evidence could readily be applied at sentencing. The Article concludes by explaining how the existing rules could be extended to sentencing.

Judges, academics, and practicing lawyers continue to debate the extent to which specific factual determinations should mandate specific sentences.[16] As long as judges are required to make such fact

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14 *See* discussion *infra* part III.

15 *See* discussion *infra* part IV.C.

16 Judges, academics, and practicing lawyers continue to criticize the Federal Sentencing Guidelines and the United States Sentencing Commission for a variety of reasons including failure to reduce disparity, failure to respond to judicial suggestions for amendments, excessive curtailment of judicial discretion, and continued use of an overly broad definition of relevant conduct. *E.g.*, United States v. Concepcion, 983 F.2d 369, 393

determinations at sentencing and to presumptively rely on them, however, defendants should be protected from unreliable and unfair fact-finding. Applying the Federal Rules of Evidence to guidelines sentencing would be a significant step toward this goal.

I
SENTENCING WITHOUT EVIDENTIARY STANDARDS: PAST AND PRESENT

The heightened importance of fact-finding at guidelines sentencing is inherent in the guidelines' structure. The court is required to make factual determinations at sentencing.[17] These specific fact determinations have identifiable consequences because they determine the prescribed sentencing range. Nothing in the Sentencing Reform Act,[18] the guidelines, or other federal law imposes any substantial procedural protections for this fact-finding.[19] If Congress or the Commission had been drafting sentencing procedures on a clean slate, either might have developed higher standards for evidence at sentencing. Both Congress and the Commission deferred to courts, locating procedural rules as judicial matters. The courts, in turn, relied on pre-guidelines sentencing procedures, despite questions about their original validity and their appropriateness for guidelines sentencing.

(2d Cir. 1992) (Newman, J., concurring) (noting "the bizarre results that occasionally occur from a combination of the Sentencing Guidelines and the sentencing jurisprudence that was developed prior to the Guidelines and is now applied to the Guidelines regime"); United States v. Galloway, 976 F.2d 414, 436 (8th Cir. 1992) (Bright J., dissenting) (arguing that in establishing constitutionality of the guidelines, pre-guidelines case law is inapposite); United States v. Davern, 970 F.2d 1490, 1501 (6th Cir. 1992) (Merritt, C.J., dissenting) (protesting the overbroad reach of the relevant conduct guideline); United States v. Harrington, 947 F.2d 956, 964 (D.C. Cir. 1991) (Edwards, J., concurring) (referring to the guidelines as "a bit of a farce"); *see* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); Deborah Young, *Untested Evidence: A Weak Foundation for Sentencing*, 5 FED. SENTENCING REP. 63 (1992); *The Four Year U.S.S.C. & G.A.O. Impact Reports*, 5 FED. SENTENCING REP. 122-83 (1992); Richard Husseini, Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387 (1990); Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109 (1992).

17 U.S.S.G., *supra* note 10, § 6A1.3.

18 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3742 (1988), 28 U.S.C. §§ 991-98 (1988)).

19 *See, e.g.*, U.S.S.G., *supra* note 10, § 6A1.3 (policy statement specifying that in resolving disputes, sentencing court may consider any relevant information so long as there are "sufficient indicia of reliability to support its probable accuracy"); *see also* FED. R. CRIM. P. 32(a)(1) (noting that sentencing should not take place until factors in dispute are resolved, but failing to specify how to resolve these factors).

The section first examines the history of sentencing in the United States to discern why pre-guidelines sentencing employed such low evidentiary standards. The section then describes guidelines sentencing and its lack of evidentiary standards.

A. The Evolution of Sentencing Without Evidence Standards

Initially, sentencing in the United States was determinate,[20] so there was no fact-finding at sentencing and consequently no need for procedural standards for fact-finding.[21] Even when sentencing evolved into indeterminate sentencing focused on rehabilitation, only the most minimal standards were developed.[22] Because of the vast discretion afforded judges under indeterminate sentencing, few defendants could identify the impact of particular evidence or discern the significance of low evidentiary standards. Consequently, such standards could only be evaluated by assessing the validity of the reasons given for those standards and theorizing about the importance of low standards in the context of indeterminate sentencing.

The Supreme Court evaluated a sentence based on evidence that would have been inadmissible at trial in *Williams v. New York*.[23] The Court affirmed the trial court's right to consider any evidence without regard to rules of evidence.[24] Despite weak analysis,[25] the *Williams* case became the landmark decision on evidentiary standards at sentencing. After determinate sentencing was reintroduced, the Court revisited the issue. In *McMillan v. Pennsylvania*,[26] the Court concluded that preponderance of the evidence was an adequate burden of proof for establishing a fact that invoked a mandatory minimum penalty.[27]

This section reviews how sentencing without significant evidentiary standards evolved, and argues that the reasons given for low standards for evidence at pre-guidelines sentencing were ill-founded. However, the vast discretion afforded judges, which made determining consequences difficult, did permit courts to ameliorate any ad-

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20 Although the first colonies operated under criminal justice systems that gave judges more discretion, as laws and penalties were codified the colonies adopted a more rigid, determinate system of sentencing. BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA 1606-1660 15-22 (1983).

21 Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 822 (1968) [hereinafter *Procedural Due Process*] (stating that once a defendant was found guilty, "[n]o further proceedings were necessary on the issue of quantum of punishment").

22 Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962), *reprinted in* SANFORD H. KADISH, BLAME AND PUNISHMENT 243, 252 (1987).

23 337 U.S. 241 (1949).

24 *Id.* at 251-52.

25 *See* discussion *infra* part I.A.2.

26 477 U.S. 79 (1986).

27 *Id.* at 91.

verse impact on defendants from unreliable fact-finding. Because the sentencing guidelines do not allow similar flexibility, the impact of low evidentiary standards on defendants under guidelines sentencing is harsher. The section concludes with a discussion of the procedural law of sentencing under the guidelines.

1. *Early American Sentencing and Procedure*

The initial lack of procedural protection in sentencing is easy to comprehend when one considers American sentencing history. When the United States was colonized, sentences were definite and harsh.[28] If a defendant was convicted of a felony, the statutorily mandated penalty was often death, unless the defendant could offer a legal reason, such as insanity or pregnancy,[29] against the imposition of that penalty.[30] Thus, technically the court imposed the sentence, but the court had no meaningful discretion once a defendant was convicted of a felony. Neither the defendant's character nor prior criminal conduct was an issue.[31] The legal reasons that excused punishment were defined, and the court only had to make the factual determination of whether the defendant fit one of the excused categories.

Despite the harshness of the prescribed penalties, the system contained some opportunities for leniency. A jury might find a defendant gnilty of a lesser crime in order to avoid the penalty of death.[32] Pardons were also possible.[33] Depending on the colony, the power to pardon was vested in the executive, legislature or the court.[34] Colonies also adopted determined penalties other than death, such as branding, whipping and the stocks,[35] for many felonies. In 1682, William Penn introduced the concept of imprisonment at hard labor as the punishment for many serious crimes.[36] By the end of the seventeenth century the penitentiary had become an accepted, significant part of criminal punishment.[37]

In contrast to felony statutes, statutes governing misdemeanor offenses usually granted the court sentencing discretion, often allowing a choice of either a fine or corporal punishment.[38] Gradually, crimi-

28 *Procedural Due Process, supra* note 21, at 821-22.
29 *Id.* at 832-33.
30 *Id.*
31 *Id.*
32 SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 31 (2d ed. 1973).
33 *Procedural Due Process, supra* note 21, at 822. One study of the period between 1631 and 1660 indicates that Massachusetts carried out fifteen death sentences. CHAPIN, *supra* note 20, at 58.
34 CHAPIN, *supra* note 20, at 60.
35 RUBIN, *supra* note 32, at 26, 28.
36 *Id.* at 27-28.
37 *Id.* at 27-30.
38 *Id.* at 26.

nal laws shifted toward providing more discretion to the sentencing authority for all types of crimes. When Congress first legislated federal criminal laws, beginning in 1789, judges were often given discretion in sentencing individuals convicted of misdemeanors and non-capital felonies.[39]

In the early twentieth century, the concept of punishment as retribution was criticized, and the focus was shifted from the gravity of the particular criminal act to the dangerousness of the offender.[40] Commentators argued that because the assessment of dangerousness was beyond the ken of law alone, the establishment of boards of psychologists or psychiatrists, sociologists, and lawyers should be established to determine the correct treatment for a convicted criminal, with the courts retaining opportunity to modify any sentence imposed.[41] But the role of imposing an initial sentence, however indeterminate that sentence might be,[42] was never transferred to boards of experts.[43] Instead, the concept was followed in the establishment of parole boards and, accordingly, a "board of experts" did ultimately determine the actual length of time served.[44]

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39 Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 n.7 (1993).

40 *Procedural Due Process*, *supra* note 21, at 823-24.

41 Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 462-63 (1928) ("Psychiatry, psychology, and social case work—not to mention those disciplines more remotely connected with the problems of human motivation and behavior—must be drawn into the program for administering criminal justice."); Matthew F. McGuire & Alexander Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B.U. L. REV. 423, 432 (1940) ("[T]he imposition of sentence is . . . a matter for administrative consideration by experts, who by their peculiar training and experience are best able to reach a conclusion as to the type and degree of treatment that is most likely to result successfully in respect to the individual immediately concerned."); Comment, *Reform in Federal Penal Procedure: The Federal Corrections and Parole Improvement Bills*, 53 YALE L.J. 773, 775 (1944) (hereinafter *Reform in Federal Penal Procedure*) ("Because of the opportunity for error afforded by such broad discretion . . . pre-sentence investigations were made available to trial judges under the Federal Probation system, established in 1925.").

42 Some scholars believed that the sentencing reforms did not go far enough in their reliance on experts instead of judges. *Reform in Federal Penal Procedure*, *supra* note 41, at 786-87. These scholars argued that parole boards, not judges, should impose sentences or prescribe the appropriate corrective treatments because such boards would make decisions based "on scientific analysis of individual therapeutic needs." *Id.* at 786.

43 Although the majority of states today have initial sentences imposed by judges, a few states have jury sentencing even in non-capital cases. ARTHUR W. CAMPBELL, LAW OF SENTENCING 258 (2d ed. 1991). States that have jury sentencing in non-capital cases include Kentucky, Missouri, Oklahoma, Tennessee, and Texas. *Id.* at 258 n.32.

44 Chapter One of the guidelines notes that, "the pre-guidelines sentencing system . . . required the court to impose an indeterminate sentence . . . and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison." U.S.S.G., *supra* note 10, § 1A.3. Under this system, defendants generally only served about one-third of the court-imposed sentence. *Id.*

With discretionary, indeterminate sentencing, the courts tried to tailor sentences to meet the goals of treatment and rehabilitation.[45] They increasingly considered a defendant's character, personal relationships, and individual abilities or disabilities in determining sentences. Courts obtained information about defendants from prosecutors, defense attorneys, and probation officers. By the early 1900s, all states had indeterminate sentencing schemes[46] and by 1944 all states had parole boards.[47]

During the rise of indeterminate sentencing, little discussion occurred about the procedural protections afforded defendants at sentencing proceedings.[48] Instead, discussion focused on the substantive transition to determinations of appropriate sentences for rehabilitation.[49] Notably, even as procedural protections for criminal defendants increased, both pretrial and during trial, the lack of protection at sentencing remained.[50]

2. *The Landmark Case on Evidence Standards at Sentencing:* Williams v. New York

In 1948 the Supreme Court held in *Townsend v. Burke*[51] that the due process clause guaranteed a defendant the right to be sentenced based on accurate information.[52] Any hope that this decision would lead to increased procedural protections for sentencing was diminished the following year, however, when the Court decided *Williams v. New York*.[53] New York law provided that before imposing sentence a court had to consider the defendant's previous criminal record, any reports of mental, psychiatric, or physical examinations, and any other information that could aid the court in determining the proper treat-

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45 The theory of indeterminate sentencing was that the criminal was morally sick and could be rehabilitated. The time required for this rehabilitation, however, varied with the individual. RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 1-2 (1979).

46 David J. Rothman, *Sentencing Reforms in Historical Perspective*, 29 CRIME & DELINQ. 631, 637 (1983).

47 RUBIN, *supra* note 32, at 622.

48 The 1957 edition of WHARTON'S CRIMINAL LAW AND PROCEDURE recognized that in most capital cases the court had to allow the defendant to make any statement. RONALD A. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 2181 (1957). Some courts also imposed this rule in non-capital felonies, but the author deemed it unnecessary in misdemeanors. *Id.*

49 McGuire & Holtzoff, *supra* note 41, at 423 (observing that in order to fashion an appropriate sentence, the court should conduct a "thorough study . . . of [the defendant's] background, environment, training, education, and experience").

50 *See infra* notes 94-96.

51 334 U.S. 736 (1948).

52 *Id.* In *Townsend*, the Court overturned a sentence for failure to comply with due process because at sentencing the lower court failed to distinguish prior arrests from prior convictions and because the defendant was not represented by counsel.

53 337 U.S. 241 (1949).

ment of the defendant.[54] The court sentenced Williams to death, despite a jury's recommendation of life imprisonment.[55] At the sentencing, the trial court commented on information from the presentence report, which it considered in determining the sentence, including information that the appellant had committed thirty other burglaries, possessed "a morbid sexuality," and was a "menace to society."[56] The defendant argued on appeal that use of the presentence report under the New York statute conflicted with the right of an individual to be given reasonable notice of charges against him and an opportunity to examine adverse witnesses, as guaranteed by the Due Process Clause of the Fourteenth Amendment.[57]

The Court rejected this argument, emphasizing that historically, different evidentiary rules had been applied at trial and sentencing.[58] The Court then considered practical reasons for the different procedures at trial and sentencing. First, the Court stated that rules of evidence at trial were desigued to prevent consideration of collateral issues and to avoid the possibility of a conviction resting on misconduct other than that charged.[59] In contrast, the judge at sentencing needed a broad spectrum of information, particularly for individualized sentencing with a goal of rehabilitation.[60] Second, the judge needed to be able to rely on the presentence report.[61] The Court concluded that requiring the presentence report's information be presented by testimony would cause undue delay.[62]

The Court decided that full access to information was necessary for a judge's selection of the appropriate penalty because fashioning appropriate individualized, indeterminate sentences required consideration of an offender's past life and habits.[63] The Court approached the problem as an all-or-nothing choice between the existing system, permitting consideration of anything by the court, and the imposition of complete trial procedures with all evidence at sentencing presented by live witnesses subject to cross-examination. Fearing that formalized trial-like procedures would exclude most of the information judges

54 *Id.* at 243.

55 *Id.* at 242.

56 *Id.* at 244.

57 *Id.* at 245.

58 *Id.* at 246.

59 *Id.* at 247.

60 *Id.*

61 *Id.* at 246.

62 *Id.* at 250.

63 "Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments." *Id.* at 248-49.

relied on at sentencing,[64] the Court concluded that the Due Process Clause should not be applied to require that evidentiary procedure at sentencing match trial procedure.[65]

The Court justified its decision, in part, by pointing out that discretionary sentencing had not made "the lot of offenders harder."[66] Despite its unwillingness to impose any procedural requirements, the Court stated, without further explanation, that this opinion "is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause."[67]

Williams has been criticized recently for failing to meet current constitutional standards.[68] A close examination of *Williams* on its own merits, however, reveals that the Court's assertions about sentencing did not necessarily establish that evidentiary standards were inappropriate or unnecessary at sentencing. The Court relied heavily on the long tradition of applying different standards of evidence at trial and sentencing, without discussing how these different standards originated.[69] The Court then asserted that the sentencing court needed a broad range of information for rehabilitative sentencing, should be able to rely on experts such as the presentence investiga-

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64 *Id.* at 250.

65 *Id.* In dissent, Justice Murphy wrote that "[d]ue process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through *all* the stages of the proceedings against him." *Id.* at 253 (Murphy, J., dissenting) (emphasis added). Justice Murphy also noted that the sentencing judge changed Williams' jury sentence of life imprisonment to death based on "a probation report, consisting almost entirely of evidence that would have been inadmissible at . . . trial." *Id.* According to Justice Murphy, the sentencing judge's consideration of whether to increase Williams' sentence should have involved "the most scrupulous regard for the rights of the defendant." *Id.*

66 *Id.* at 249.

67 *Id.* at 252 n.18 (citing Townsend v. Burke, 334 U.S. 736 (1948)).

68 *See, e.g.*, Susan N. Herman, *Procedural Due Process in Guidelines Sentencing*, 4 FED. SENTENCING REP. 295, 296 (1992). Herman argues that changes in the analysis of procedural due process suggest that *Williams* should not apply today and that subsequent decisions about the right to counsel at sentencing and the right to disclosure of the presentence report undercut *Williams*. *Id.*

69 *Williams*, 337 U.S. at 246. For example, the Court failed to discuss the historical reasons for not requiring evidentiary standards at sentencing. Once sentencing evolved beyond determinate sentencing, such procedural protections might have been expected. One historical explanation offered for the lack of procedural protections and evidentiary standards at sentencing was the belief that any penalty less than the maximum was an act of leniency, not an entitlement. Kadish, *supra* note 22, at 252. The force of this leniency argument when the sentence imposed was branding rather than the death penalty is obvious, but even determinations of leniency may be more valid if founded on reliable evidence. Furthermore, in *Williams* the Court was not moving toward a penalty less than the maximum.

With the advent of the federal sentencing guidelines this leniency notion has been unequivocally abandoned. Sentences are determined by the nature and seriousness of the event, the defendant's criminal history, and other articulated sentencing factors. Unarticulated leniency is not a basis for a reduction in sentence under the Guidelines. *See infra* note 153 and accompanying text.

tors, could not apply evidentiary standards without great delay, and that the loose sentencing scheme generally benefitted defendants. Reexamining these reasons suggests that the Court's conclusion that heightened evidentiary standards would be an impediment was ill-founded.

The Court correctly stated that the imposition of a discretionary sentence aimed at rehabilitation was premised both on knowing the defendant's character and background and on predicting the defendant's future behavior. In analyzing the need for particular evidence at sentencing, however, the *Williams* Court did not distinguish between the *kind* of information a court needed for indeterminate sentencing and the *reliability* of the form of the evidence. The information the Court believed necessary for rehabilitative sentencing included character evidence and prior crimes evidence. This *kind* of information was generally excluded from trials because the evidence was deemed unduly prejudicial in the decision of guilt or innocence,[70] not because the information was in a form deemed *unreliable.*

The *Williams* Court did not consider the different role of evidence rules that excluded trial evidence because it was unreliable, such as hearsay evidence. While a broad range of information was critical for discretionary sentencing, and rightfully encompassed information excluded in the guilt phase, such as prior crimes, the need for such information did not mandate that every form of evidence be accepted.

Applying rules of evidence based on the reliability of evidence, such as the hearsay rules, would not limit the subject matter of the information available to the sentencing court.[71] Evidence of a defendant's character and other attributes that might affect a determination of sentence under the rehabilitative model was not so unusual as to make the application of evidentiary rules inappropriate. For example, a defendant might want to present a letter attesting to the defendant's good character from a former teacher or minister. Such evidence would be objectionable on hearsay grounds. Any such objection could be easily overcome, however. First, the defendant could try to obtain the government's agreement to admit the evidence.[72] If that

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70 FED. R. EVID. 404 advisory committee's note. The two risks of prejudice to the defendant are that the fact-finder might accord undue weight to evidence of the defendant's bad character in the determination of guilt, and that the fact-finder might de-emphasize the risk of erroneously convicting the defendant because the character evidence demonstrates that the defendant deserves to be punished. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 109 (1978).

71 *See* discussion *infra* part IV.B.

72 Stipulations of evidence occur in two key ways. First, the parties may stipulate to facts, thus agreeing the facts as stated are correct. Alternatively, the parties may stipulate to expected testimony, thus agreeing only to what that person's testimony would be. EDWARD

were unsuccessful, the defendant could have the witness come to court.

The *Williams* Court identified the importance of the probation officer's presentence report as another reason not to have evidentiary rules.[73] The Court first pointed out that probation officers were trying to aid offenders, not to prosecute.[74] The Court reasoned that these reports were the best available information and without them the courts would rely on guesswork and inadequate information.[75] However, the Court's reasoning was founded on the mistaken premise of its earlier argument, that is, that the alternative to the presentence report is *no* information. As with character evidence, it would be possible to obtain admissible evidence, relating to information in the presentence report, that would be *better* evidence.

The Court voiced the conceru that if trial courts could not rely on presentence reports, sentencing hearings would become mini-trials.[76] As the hearsay example above recognizes, prohibiting the use of

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J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 235 (1980). The exact procedure to be followed, such as whether the stipulation may be oral, varies among courts. *Id.*

73 A similar argument offered in support of not requiring evidence standards at discretionary sentencing was the need for social science evidence, particularly to assist the court in predicting behavior. Glueck, *supra* note 41, at 462-63. The criminal justice system viewed the use of psychological information as not susceptible to legal standards of proof. *Id.* The imposition of a discretionary sentence was considered a diagnostic judgment by experts, and therefore not appropriately subject to substantive and procedural restraints. *Id.* Although this need for expert judgment is often cited as the reason for not imposing procedural standards in discretionary sentencing, upon closer inspection the argument seems invalid.

The difficulty in sentencing aimed at rehabilitation and treatment did not lay in finding evidence that would meet common evidentiary standards. The difficulty was in evaluating and predicting human behavior. Attempts were made to determine how long someone should be incarcerated in order to be rehabilitated. There never has been a consensus, even among experts, about how to make such a decision. In sum, no evidence could clearly identify an appropriate sentence. This certainly does not, however, lead to the conclusion that less reliable evidence should be admitted for consideration.

Psychological or behavioral information considered at sentencing is no more or less susceptible to legal conclusions than other evidence, which is susceptible to different interpretations and conclusions. At trial the rules of evidence impose evidentiary standards on many types of scientific evidence, such as pathology reports. FED. R. EVID. 803(6). When we believe that the evidence may not be readily interpreted by the fact finder, an expert witness aids in the interpretation. FED. R. EVID. 702-705. Courts do not abandon the standards of evidence because the nature of the evidence is scientific. *See, e.g.*, Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2795 (1993) ("[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable").

74 *Williams*, 337 U.S. at 249.

75 *Id.*

76 Under the gnidelines, when an issue of the degree of guilt is deferred from the trial phase to the sentencing phase, such as in determining relevant conduct, a "mini-trial" may be appropriate. However, in most cases the imposition of evidentiary standards would not make the sentencing proceeding less efficient. *See* discussion *infra* part IV. Moreover, under the gnidelines an increase in time for the sentencing proceeding seems warranted

evidence that is inadmissible at trial could result in witnesses being called at sentencing. Alternatively, courts could ignore second-hand or unsubstantiated reports in determining sentences. Most likely, however, higher evidentiary standards at discretionary sentencing would have increased the expense of the proceeding, in terms of effort, time, and money. Accordingly, under a cost-benefit analysis, there appeared to be systemic costs associated with adopting heightened evidentiary standards and no way to measure the benefit of such evidence.[77]

Although the *Williams* Court cited the trial court's discretion in sentencing as a justification for a lack of procedural standards,[78] the Court did not articulate why this discretion reduced the problems of unfairness and inconsistency generated by low standards for reliability of evidence. Generally, sentencing discretion refers to a court's right to impose any sentence within the statutory parameters. For most federal offenses, the parameters ranged from probation to a maximum sentence of five years incarceration;[79] for more serious offenses the range was from probation to ten years incarceration, or even to life imprisonment.[80] Under this sentencing system, there was no identifiable impact of any specific factor, such as the amount of money embezzled, on the actual sentence. Whether the defendant embezzled $500 or $500,000 a judge could sentence the defendant to probation or to any period of imprisonment up to ten years.[81]

Judges had discretion to decide the goal for sentencing a particular defendant, the facts relevant to that goal, and the ultimate sentence.[82] This vast discretion meant that judges could take into

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by Congress' goal of increasing the fairness and consistency of sentences. With discretionary sentencing, because there was no requirement that a given fact have a certain consequence, the need for accurate fact-finding was less compelling.

77 Current due process analysis incorporates consideration of increased administrative burdens from new procedural protections into the balancing test. *See infra* note 126 and accompanying text.

78 *Williams*, 337 U.S. at 247.

79 *See, e.g.*, 18 U.S.C. § 1341 (1988 & Supp. 1992) (mail fraud).

80 *See, e.g.*, 18 U.S.C. § 2113 (1988) (bank robbery).

81 The only distinction in penalty for most federal crimes was between a misdemeanor and a felony. For example, in the case of embezzlement of public funds, embezzlement of $100 or less would have constituted a misdemeanor, punishable by a maximum of one year in jail and $1,000 fine. 18 U.S.C. § 641 (1988) (embezzlement of public money, property, or records).

82 Stanton Wheeler, Kenneth Mann, and Austin Sarat conducted extensive interviews of federal judges in 1978-1980 to learn how they sentenced white-collar criminals. Deborah Young, *Federal Sentencing: Looking Back to Move Forward*, 60 U. CIN. L. REV. 135 (1991) (reviewing STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS (1988)) [hereinafter Young, *Looking Back to Move Forward*]. Wheeler and his colleagues concluded that sentencing occurred in two stages. First, judges evaluated the seriousness of the offense; then they translated that determination into an actual sentence. *Id.* at 169-70. The first stage entailed evaluating the harm caused, deter-

account characteristics of the offense, the defendant's personal characteristics, the victim's characteristics, and even community sentiment.[83] Consequently, all sorts of evidence might be relevant. Courts could evaluate speculative issues such as the defendant's character and the likelihood of recurrent criminal behavior. Courts could consider the impact of a particular sentence on the community as a whole, or on the defendant's immediate family.

A defendant might present past achievements in education and employment, relationship to the community, and relationship to family. Evidence of these factors often was simply an oral summary by defense counsel at sentencing. Letters of support for the defendant from family, employers, or neighbors were common. Ongoing responsibilities of the defendant that would be impeded by incarceration were also brought to the attention of the court, particularly the need to support a family by continued employment. Because there were no limits on what a court could choose to consider as a basis for sentencing, anecdotal evidence on any topic could be presented.

The prosecution also relied on anecdotal evidence, commonly to show the defendant's other past transgressions, including previously uncharged conduct. The prosecution might also describe the terrible crime or drug or fraud problem in America and the outrageous part this defendant had played in the great crime wave. Because the judge could seize on any aspect of information presented, without even acknowledging it, and adjust a sentence, prosecutors and defendants brought in a wide array of evidence hoping something would favorably influence the judge.

Although the vast discretion exercised by courts did not obviate the need for procedural protections, it did allow courts to avoid some of the most unjust consequences that now occur under guidelines sentencing. At pre-guidelines sentencing a court could ameliorate any lack of reliability by weighting the trustworthiness of the evidence. When a court "judged" a sentence in the traditional sense of authoritatively deciding the sentence, the court was not required to make any factual determinations. When the court did receive factual information, the court could weight that information as it chose.[84] Assessing

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mining the blameworthiness of the defendant, and predicting the consequence of a sentence. *Id.* at 169. Wheeler and his colleagues found that judges substantially agreed on the relative seriousness of offenses. *Id.* at 173-74. Disparity in discretionary sentencing arose in the second stage, translating the assessment of seriousness into the actual sentence.

83 WHEELER ET AL., *supra* note 82, at 54.

84 This analysis was stimulated by Wheeler, Mann and Sarat's discussion of how judges weight different sentencing factors. By weighting the authors mean determining a factor's significance in deciding the sentence. For example, the authors make a distinction between measuring the amount of harm—such as the amount of money embezzled—and determining how much that amount of harm should count in the pre-guidelines sentencing decision. *Id.* at 168-70.

the facts and assigning their relative weights was fundamental to the sentencing judge's discretionary authority. Critics of the system, however, charged that different judges weighted different items of information differently, so that like individuals could receive unlike sentences.[85] The sentencing guidelines remove this discretion and weight individual factors by determining how many points each factor should receive.[86]

One of the generally unacknowledged merits of the discretionary sentencing system was that it permitted judges to weight evidence based on its reliability. For example, a judge might have two cases in which there was an allegation of substantial drug sales over a period of time. In one case, the evidence of this might be direct testimony by an eyewitness. In the other case, the evidence of this might be hearsay testimony by a government agent of what an unidentified informer had said. The judge could impose a harsher sentence in the first case because of the degree of certainty of the alleged conduct. In the second case, with much less reliable evidence, the court could impose a more lenient sentence, to reflect the much lower probability that the information was correct. Despite this vast discretion to weight evidence, courts rarely mentioned it, because there was no requirement that they justify particular sentences.

The *Williams* Court did not explicitly state why it believed that discretion at sentencing required the use of evidence that did not meet admissibility standards. But the Court implied that the need for a broad range of information, rather than a court's ability to adjust a sentence according to the reliability of the evidence, mandated the Court's holding.[87]

A final reason the *Williams* Court gave for not imposing stricter procedural standards was that the indeterminate sentencing scheme without evidentiary standards generally benefitted offenders.[88] This must have seemed ironic to Williams, whose sentence was changed from the jury's recommendation of life imprisonment to the judge's determination of the death penalty. But the Court's argument does highlight one reason that there was not a louder call for procedural reform of sentencing: there was no clear constituency for change. Defendants were as likely to obtain an advantage as prosecutors in presenting "highly colored" statements of fact.[89] With the inability to

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85 *Id.* at 10.

86 The Federal Sentencing Guidelines delineate the presumptive impact of a given factor, such as the type of crime, the degree of harm, and the characteristics of the victim. U.S.S.G., *supra* note 10, §§ 2A1.1-3A1.3.

87 Williams v. New York, 337 U.S. 241, 247, 251-52 (1949).

88 *Id.* at 249.

89 In the mid-1940s, a Sixth Circuit judge observed that a sentencing court "had few real facts before it upon which to base its judgment." McGuire & Holtzoff, *supra* note 41,

determine what the judge might consider important, both defendants and prosecutors took a "kitchen sink" approach to sentencing, trying to mention every possible favorable fact or issue in the hope that the judge would be moved by one of them. Because courts could consider any aspect of the defendant's personal life at sentencing, defendants could be the beneficiaries of open evidence standards.[90]

Another key reason why the issue of low evidentiary standards at discretionary sentencing was not raised more frequently was that the impact of a specific item of evidence was rarely apparent. The reasoning behind discretionary sentencing was usually done privately. Although the prosecutor, defense attorney, and defendant had an opportunity to speak at a sentencing hearing, the court was not required to respond in any way. The court could simply pronounce the sentence. When the court gave no explanation, it was impossible to demonstrate the specific effect on sentencing of the use of informal, unreliable evidence. Moreover, there was no basis for appeal, other than imposition of an illegal sentence.[91]

Despite its weak foundation, the *Williams* rnling has been consistently followed. *Williams* has been cited repeatedly for the proposition that sentencing courts should be allowed to consider any information in any evidentiary form.[92] The principle of *Williams* was subsequently codified in 1970 in 18 U.S.C. § 3577 with the language:

> 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.[93]

The durability of *Williams* stands out amidst the significant development of increased procedural protections for criminal suspects and defendants, which began during the mid-twentieth century. Many of the basic procedural protections, such as the right to counsel, were promulgated in the Federal Rules of Criminal Procedure in 1946.[94] Some of these rights, such as the right to counsel, were subsequently

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at 424 (quoting Judge Florence Allen). Judge Allen also noted that the court routinely received "highly colored" statements of fact from both the government and the defense counsel. *Id.*

90 In contrast, under the guidelines personal history characteristics have much less impact on a sentence. *See* discussion *infra* part I.B.

91 *See, e.g.*, United States v. Fessler, 453 F.2d 953, 954 (3d Cir. 1972).

92 *See, e.g.*, United States v. Wise, 976 F.2d 393, 399 (8th Cir. 1992).

93 This was originally codified as 18 U.S.C. § 3577 in 1970. The Sentencing Reform Act of 1984, 98 Stat. 1987, renumbered the provision as 18 U.S.C. § 3661.

94 The Federal Rules of Criminal Procedure, as enacted in 1946, contained wide-ranging provisions governing warrants for arrests and searches, joinder of defendants, pre-trial motions practice, venue, presentence reports and appeals. U.S. CODE CONG. SERV. 2275 (West 1946).

recognized as constitutionally required.[95] Other protections were established by both statute and case law in the ensuing decades.[96] In 1976, the Federal Rules of Evidence were adopted to codify the evidentiary rules to be applied at all federal trials, both jury and nonjury.[97] These rules were not extended to sentencing, however.[98]

Wide acceptance of *Williams* effectively closed the door to court challenges to the reliability of evidence at sentencing. As long as a judge had discretion to sentence within statutory parameters, there was no restriction on the type of evidence the judge could consider. In the 1959 case of *Williams v. Oklahoma*,[99] the Court again permitted the use of hearsay evidence at sentencing, this time provided orally by the prosecutor rather than in a written presentence report.[100] Because the defendant had conceded that the prosecutor's statements were correct, there was no question of reliability.[101]

Circuit courts eventually addressed the question of the reliability of hearsay used at sentencing. In *United States v. Weston*,[102] the Ninth Circuit reviewed a sentence in which the court had relied on the opinions of unidentified bureau personnel and the unsubstantiated statements made by federal drug agents to the probation officer that the defendant was a large scale heroin dealer.[103] The court concluded that the probative value of this evidence was "almost nil"[104] and that "a sentence cannot be predicated on information of so little value as that here involved."[105] Other courts subsequently interpreted the holding in *Weston* to require some minimal indicia of reliability for hearsay evidence considered at sentencing.[106] "Minimal indicia of reliability" thus became the standard for assessing hearsay evidence at pre-guidelines discretionary sentencing.[107]

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95 Mempha v. Rhay, 389 U.S. 128 (1967).

96 For example, the timing of criminal prosecutions was governed by the Speedy Trial Act, 88 Stat. 2076 (1974) (codified as amended at 18 U.S.C. §§ 3152-56, 3161-74; 28 U.S.C. § 604); the disclosure of exculpatory information was controlled by Brady v. United States, 397 U.S. 742 (1970); the disclosure of statements by government witnesses was limited by the Jencks Act, 84 Stat. 926 (1970) (current version at 18 U.S.C. § 3500), and the eliciting of confessions was circumscribed by Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny.

97 FED. R. EVID. 1101.

98 FED. R. EVID. 1101(d)(3).

99 358 U.S. 576 (1959).

100 *Id.* at 576.

101 *Id.* at 584.

102 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972).

103 *Id.* at 628.

104 *Id.* at 633.

105 *Id.* at 634.

106 *See, e.g.*, United States v. Baylin, 696 F.2d 1030, 1039-40 (3d Cir. 1982).

107 As discussed *infra* part II.A, this standard remains in effect under guidelines sentencing.

In 1967, the Supreme Court considered the application of the due process clause to fact-finding at sentencing. In *Specht v. Patterson*,[108] the Court reviewed a Colorado statute which provided that a defendant convicted for indecent liberties, with a penalty maximum of ten years, could be sentenced under a sex offenders act.[109] The sex offenders act provided for an indeterminate prison term of one day to life if the court found that the defendant constituted a threat of bodily harm, or was an habitual offender and mentally ill.[110] The statute permitted the court to reach that conclusion after reviewing a psychiatric report, without any hearing or confrontation by the defendant.[111] The Court held that the requirements of due process were not satisfied because the sentencing involved making a new finding of fact that was not an ingredient of the offense charged.[112] Due process required that this defendant have an opportunity to be heard, to confront and cross-examine witnesses, and to offer evidence.[113] The Court did not discuss what burden of proof should apply.

3. *The Landmark Case for Preponderance of the Evidence at Sentencing:* McMillan v. Pennsylvania

Even as indeterminate sentencing became entrenched in the American legal system, some judges and scholars began to question the wisdom of such vast discretion in sentencing, probation, and parole decisions.[114] Even before indeterminate sentencing had been adopted nationwide, critics argued that there was unfair disparity among similar defendants in different courts.[115] Concerns about disparity led to calls for reform of sentencing through the creation of guidelines.[116] Congress and some state legislatures responded with determinate sentencing statutes.[117]

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108 386 U.S. 605 (1967).

109 *Id.* at 607.

110 *Id.*

111 *Id.* at 608.

112 *Id.* at 608-11.

113 *Id.* at 610.

114 *See, e.g.*, Kadish, *supra* note 22, at 250 ("[T]he new penology has resulted in vesting in judges and parole and probation agencies the greatest degree of uncontrolled power over the liberty of human beings that one can find in the legal system.").

115 For a list of articles expressing concerns about sentencing disparity, see *supra* note 2.

116 Other sentencing reforms were also suggested, such as the use of appellate review of sentences. The Supreme Court disapproved of this suggestion in Dorszynski v. United States, 418 U.S. 424 (1974).

117 For a summary of the history of mandatory minimum penalties in the United States, see UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991) [hereinafter MANDATORY MINIMUM PENALTIES]. Determinate sentences had previously existed in the United States, beginning with mandatory capital punishment for specified crimes in the late eighteenth century. *Id.* at 5. Determinate sentences for drug offenses were adopted by

In 1984, Congress began adopting numerous statutes with mandatory minimum sentences for drug and weapons offenses.[118] Mandatory minimum sentences require a judge to sentence a defendant to a period of incarceration based on the quantity of drugs or the possession of a weapon despite any other characteristics of the crime, the defendant's degree of involvement, or the likelihood of rehabilitation.[119]

Although these mandatory minimums generated a great deal of controversy, the concern focused on the appropriateness of non-discretionary sentencing according to quantity or a single offense characteristic, in lieu of a totality of the circumstances view of sentencing.[120] Mandatory minimum legislation imposed a more ministerial role on federal judges in sentencing. Once the government established the quantity or other controlling factor, the judge identified the mandatory minimum and then was limited to exercising traditional sentencing discretion by increasing the sentence.

The quantity of the drug or presence of a weapon could be charged in the indictment and either proved at trial, as demonstrated by the jury verdict, or admitted in a guilty plea.[121] In such cases, because the judge did not assume a new fact-finding role, concerns

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Congress in 1956, but repealed in 1970 when they did not appear to decrease criminal activity. *Id.* at 6. In 1984, Congress again began adopting mandatory minimum penalties. *Id.* at 8. For a comprehensive compilation of state sentencing reform as of 1985, see NATIONAL INSTITUTE OF JUSTICE, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT (1985).

118 From 1984, the year Congress authorized the Federal Sentencing Guidelines, through 1990, additional mandatory minimum penalties were adopted every two years. MANDATORY MINIMUM PENALTIES, *supra* note 117, at 8.

119 For example, current federal mandatory minimum sentences are imposed for, *inter alia*, distribution or possession with intent to distribute certain quantities of drugs and for the use of a weapon in the commission of a crime of violence or drug trafficking. 21 U.S.C. § 841 (1992); 18 U.S.C. § 924 (1992).

120 *See, e.g.*, United States v. Klein, 860 F.2d 1489, 1501 (9th Cir. 1988) (upholding constitutionality of defendant's mandatory minimum sentence but observing that mandatory minimums gave less attention to judicial gradation and discretion). Under sentencing guidelines, courts continue to express dismay over their inability to adjust sentences for factors other than the quantity of drugs. In the course of one sentencing proceeding involving a defendant who had been employed for twenty-four years and never been involved in crime before, Judge Schwarzer of the Northern District of California noted that the evidence clearly established that defendant was found with a bag of crack cocaine in his vehicle. United States v. Anderson, Cr. No. 88-804 (N.D. Cal. Sept. 15, 1989), Excerpt from Transcript reprinted in 2 FED. SENTENCING REP. 185, 186 (1990). Due to the mandatory minimum for this offense, Judge Schwarzer stated that he was compelled to give a ten year sentence but complained that this sentence "did anything but serve justice." *Id.* at 186. Judge Schwarzer described mandatory minimums as "computers automatically imposing sentences without regard to what is just and right, and when that is allowed to happen, the rule of law is drained of the semblance of justice." *Id.*

121 FED. R. CRIM. P. 11.

about procedural safeguards ensuring that the defendant had in fact sold the quantity alleged in the charge did not arise.[122]

When a court did have to determine facts at the sentencing phase that would invoke a mandatory sentence, concerns about both the reliability of evidence and the burden of proof arose. In the 1986 case of *McMillan v. Pennsylvania*,[123] the Supreme Court addressed the issue of burden of proof at a state mandatory minimum sentencing proceeding. McMillan challenged the constitutionality of a Pennsylvania law that provided a minimum sentence of five years of imprisonment for specified felonies if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the felony.[124] The trial court found the act unconstitutional, but the Pennsylvania Supreme Court reversed.[125]

McMillan argued that visible possession of a firearm was an element of the offense and thus should be proved beyond a reasonable doubt and, in the alternative, that even if visible possession was not an element of the offense, due process required a higher burden of proof than a preponderance of the evidence.[126] In *McMillan*, the majority held that Pennsylvania's delineation of "visible possession of a firearm" as a sentencing factor subject to the preponderance of evidence standard did not violate the due process clause.[127] The Court emphasized that under *Patterson v. New York*[128] states had discretion, although not unlimited, to desiguate factors as sentencing factors rather than elements of the offense.[129] The Pennsylvania statute only

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122 Even when there were no fact determinations to be made by the judge, mandatory minimum sentencing dramatically changed sentencing hearings. In many cases, mandatory sentencing left nothing to be said. The defense attorney often was aware that the mandatory minimum penalty was substantially more than the particular judge would have given a similar defendant in the past, so there was no fear of a higher sentence. Because of the mandatory minimum there was no chance of a lower sentence, so there was no incentive to expound on the rehabilitative potential of the defendant. Likewise, the prosecutor did not expect the judge to give more than the mandatory minimum, and may even have thought less was appropriate. Hearings often were perfunctory, ending with the judge explaining to the defendant, sometimes with apologies, why the particular sentence had to be imposed. *See supra* note 120.

123 477 U.S. 79 (1986).

124 *Id.* at 81.

125 *Id.* at 82-83.

126 By 1986 the Supreme Court was using a two-stage analysis for due process. *Id.* at 83. This test was first delineated in Matthews v. Eldridge, 424 U.S. 319 (1976). In the first part of the test, the court would determine whether the claimant had a property or liberty interest protected by the Due Process clause. *Id.* If so, in the second part of the analysis, the court would balance the private interest that would be affected by official action, the risk of erroneous deprivation of the interest and the probable value of any additional safeguards, and the government interest, including the administrative burdens associated with additional safeguards. *Id.* at 335.

127 *McMillan*, 477 U.S. at 91.

128 432 U.S. 197 (1977).

129 477 U.S. at 85.

limited the court's discretion in selecting a penalty within the existing range. In the Court's estimation, the statute was not a case of a "tail which wags the dog."[130]

After concluding that visible possession of a firearm could be designated as a sentencing consideration, the majority perfunctorily concluded that the preponderance of the evidence standard satisfied due process. The Court relied on the tradition of sentencing "without any prescribed burden of proof at all," citing *Williams v. New York*, although the *Williams* opinion never mentioned burden of proof.[131]

Justice Stevens, in dissent, strongly disagreed with the wide discretion given to states in the majority opinion.[132] He argued that because the Pennsylvania statute prohibited conduct for which conviction mandated a special punishment, proof beyond a reasonable doubt should be required.[133] He found the conduct of visibly possessing a firearm to be an element of the offense, despite the Pennsylvania nomenclature of a sentencing factor.[134]

Mandatory minimum statutes, such as the one at issue in *McMillan*, previewed the sentencing guidelines in three key respects. First, the mandatory minimums were a harbinger of sentencing decisions focused on harm—or the easiest indicator of harm—rather than on *mens rea* or rehabilitative potential. With mandatory minimums, the extent of the offense was the single controlling factor in most sentencing decisions.[135] Despite the judiciary's growing concerns about the subjective fairness of mandatory minimums,[136] harsher sentences for drng offenders were popular politically as evidence of the war on drngs.[137] Second, the guidelines were drafted to reflect existing mandatory minimum sentences.[138] For example, the guideline for distributing half a kilogram of cocaine encompassed the mandatory minimum of sixty months for distributing half a kilogram of cocaine.[139] Finally, this intermediate stage of quantity based sentencing without adequate procedures for fact-finding provided a transition to fact determined sentencing without improved procedural protections.

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130 *Id.* at 88.

131 *Id.* at 91 (*citing* Williams v. New York, 337 U.S. 241 (1949)).

132 *Id.* at 95-104 (Stevens, J., dissenting).

133 *Id.* at 96.

134 *Id.*

135 For drug offenses, for example, the quantity of drugs was the controlling factor. U.S.S.G., *supra* note 10, § 2D1.

136 *See supra* note 120.

137 *See, e.g.*, Voters' Unrest Overrode Doubts About Sentencing Law, WASH. POST, May 11, 1986, at A14 (reporting voter approval of mandatory minimum laws in response to growing public unrest over drug sales).

138 MANDATORY MINIMUM PENALTIES, *supra* note 117, at 20, 29.

139 U.S.S.G., *supra* note 10, § 2D1.1(8).

The federal sentencing guidelines were being drafted when *McMillan* was decided. In passing the Sentencing Reform Act, Congress had given little attention to the procedural aspects of sentencing other than the right of appellate review.[140] The only reference to evidentiary standards was the recodification of 18 U.S.C. § 3577.[141] The act does not mention the burden of proof. In drafting the guidelines, the Sentencing Commission did not mandate either the appropriate standard of proof or who would have that burden.[142] The Commission left these matters for the courts.[143]

B. The Lack of Evidentiary Standards in the Guidelines

The guidelines present as radical a change from discretionary sentencing as did the emergence of rehabilitative sentencing at the end of the nineteenth century. This change is not necessarily demonstrated by outcomes in individual cases, however. A defendant may receive the same sentence under the guidelines as at pre-guidelines sentencing.[144] The radical change of the guidelines is demonstrated by what functions judges *must* carry out to impose sentences and by what factors now determine a sentence.[145]

When judges sentenced under discretionary sentencing, they were only required to decide sentences, as an exercise of pure discretion, within the statutorily permissible range. Judges did not have to make factual determinations or to convert factual determinations into months in jail. Judges were not required to assess explicitly the reliability of any evidence or rule on its admissibility. Judges could weight evidence according to its reliability or choose to ignore it. They had discretion in both what the final sentence would be and how to determine that sentence.[146] The sentencing function matched the classic definition of judging: authoritatively deciding the issue.[147]

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140 18 U.S.C. § 3742 (1985 & Supp. 1993).

141 This provision was recodified as 18 U.S.C. § 3661 in the 1984 Sentencing Reform Act.

142 *See supra* note 10.

143 *See infra* notes 193-97 and accompanying text.

144 The United States Sentencing Commission said it designed the guidelines to result in defendants' receiving, on average, substantially the same sentences they would have received under pre-guidelines sentencing. Breyer, *supra* note 4, at 7. However, studies indicate that sentences have increased for many types of crimes. Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 415-16 (1991).

145 The gnidelines are phrased as affirmative directives, such as considering specific factors in determining the level of an offense. By stating what judges must do in passing sentence and limiting discretion, the gnidelines also effectively dictate what judges may not do, such as determining the weight of factors as they could under pre-guidelines sentencing.

146 *See supra* notes 82-86 and accompanying text.

147 THE RANDOM HOUSE COLLEGE DICTIONARY 724 (rev. ed. 1980).

The sentencing guidelines now require a judge to perform three distinct functions. First, the judge must make factual determinations.[148] Even when the defendant has been convicted by a jury, the judge is not bound by the jury's factual determinations.[149] The judge must independently decide the defendant's culpability and role in the offense. Second, after deciding the facts required by the guidelines, the judge must perform the ministerial function of calculating the sentencing range based on the factual determinations.[150] Third, once the judge identifies the appropriate guidelines range, the judge assumes the traditional function of actually determining the sentence.[151] At this point, the guidelines impose an additional, significant constraint.[152] If the sentence chosen is not within the guideline range, the judge must justify the departure from that range.[153]

In addition to prescribing a judge's sentencing functions, the second fundamental change of the guidelines is the establishment of two basic determinants of a sentence: the offense level and the criminal history category. Once a defendant's offense level and criminal history category are established, the court must consider whether any factors exist that warrant adjustments or departures. With each of these determinations the court must make specific findings of fact. Each of these determinations of fact is then calculated into the equation that defines the parameters of the judge's limited discretion. Considering the factors to be assessed in evaluating offense levels, criminal history

148 U.S.S.G., *supra* note 10, § 6A1.3.

149 For examples of cases in which the judge sentenced based on a different set of facts than the jury had found, see *infra* note 251.

150 The guidelines provide a step-by-step overview of how to determine the proper sentencing range. First, the judge selects the applicable offense guideline section from Chapter Two, Offense Conduct. U.S.S.G., *supra* note 10, § 1B1.1(a). Second, after determining the base offense level, any applicable specific offense characteristics are added. *Id.* at § 1B1.1(b). Third, the offense level is adjusted in accordance with Chapter Three, Adjustments. *Id.* at § 1B1.1(c). These three steps are repeated if there are multiple counts of conviction. *Id.* at § 1B1.1(d). The base offense level then is adjusted if the defendant accepted responsibility as defined by § 3E. *Id.* at § 1B1.1(e). Next, the defendant's criminal history category is determined along with any applicable adjustments mandated by § 4B. *Id.* at § 1B1.1(f). Section 5A then supplies the correct guideline range based on the defendant's offense level and criminal history category. *Id.* at § 1B1.1(g).

151 *Id.* at § 1B1.4.

152 This outline of guidelines sentencing is consistent with the application instructions in the guidelines. *Id.* at § 1B1.1. Marc Miller and Daniel J. Freed have argued that this sequence is inconsistent with the authorizing legislation. Marc Miller & Daniel J. Freed, *Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 FED. SENTENCING REP. 235 (1991). They suggest that judges should fact-find, identify purposes for the sentence, consider sentencing options, and only then consider the range recommended by the guidelines.

153 In the introduction to the guidelines, the Commission states that a sentencing court may depart only in an "atypical case . . . where conduct siguificantly differs from the norm. . . ." U.S.S.G., *supra* note 10, § 1A4(b) (policy statement).

categories, and adjustments and departures highlights the importance of accurate fact-finding.

The initial basic determinant is the offense level. An offense level is established by the category of the crime[154] and the amount of harm inflicted.[155] The elements of the offense identify the appropriate category of the crime. Within each category, specified factors determine the degree of harm or severity of offense. To a large extent the guidelines have adopted easily quantifiable measurements of harm. For drug distribution crimes, the primary factors delineating the offense level are the type and quantity of the drug.[156] For crimes involving theft of money, the primary determinant of the offense level is the quantity of money stolen.[157] For example, if a business employee embezzles $15,000, the base offense level will be four out of a possible forty-three levels for embezzlement plus five levels for the "specific offense characteristic" of taking an amount over $10,000. Thus, the total offense level is nine. If more money is embezzled, the offense level will be higher, directly representing the increased harm. These specific factual determinations of degree of harm have a direct impact on the sentence imposed. A determination of a larger quantity of drugs in a distribution case or money in an embezzlement case raises the parameters of the potential legal sentence. Thus, in sharp contrast to pre-guidelines sentencing, the importance of a single factual finding at guidelines sentencing is readily ascertained and directly influences the sentence.[158]

A critical component of the offense level determination is the concept of sentencing the defendant based on all relevant conduct.[159] At the sentencing phase the court must make factual findings about all of the defendant's known criminal conduct. The court is not

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154 There is not a separate guideline for each federal crime. For example, a variety of crimes concerning theft and other property offenses under 18 U.S.C. §§ 641, 656, 657, 659, 1702, 1708, 2113(b), 2312, and 2317 are sentenced according to one guideline, U.S.S.G., *supra* note 10, § 2B1.1.

155 For further discussion of how the guidelines incorporate the traditional assessment of harm at sentencing, see Young, *Looking Back to Move Forward*, *supra* note 82, at 145-46.

156 U.S.S.G., *supra* note 10, § 2D1.1.

157 U.S.S.G., *supra* note 10, § 2B1.1.

158 At pre-guidelines sentencing, a judge could impose a sentence because of a specific fact and the judge could identify that specific factor as the basis of the sentence, but neither was required. *See* discussion *supra* part I.A.

159 U.S.S.G., *supra* note 10, § 1B1.3. For a thorough explanation of the relevant conduct guideline, see William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, S.C. L. REV. 495 (1990). The relevant conduct guideline has been the subject of extensive criticism. *See, e.g.*, United States v. Galloway, 976 F.2d 414, 428 (8th Cir. 1992) (Bright, J., dissenting), *cert. denied*, 113 S. Ct. 1420 (1993); United States v. Silverman, 976 F.2d 1502, 1519 (6th Cir. 1991) (Merritt, C.J., dissenting), *cert. denied*, 113 S. Ct. 1595 (1993); Freed, *supra* note 16, at 1712-14.

bound by what the defendant admitted in a plea of guilty[160] or by what a jury found at trial.[161] For example, a prosecutor may have chosen to try an individual for distributing two kilograms of cocaine because that was readily provable. Before, during, or after trial, the prosecutor may have discovered additional evidence of drug distribution by the defendant. If this evidence was not admissible at trial because the source was hearsay, the defendant may nevertheless be sentenced based on that evidence.

Factual determinations made under the relevant conduct inquiry can dramatically increase a defendant's sentence. Consider the case of a defendant who has pleaded guilty or been convicted of distributing two kilograms of cocaine. At the sentencing phase, the prosecution may contend that the defendant in fact distributed twenty kilograms of cocaine. The court must make this factual determination.[162] If the court determines that the defendant probably did distribute twenty kilograms of cocaine, then the defendant's offense level

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160 Courts routinely consider counts dismissed as part of a plea agreement in calculating the defendaut's sentence if the counts are part of the same course of conduct to which the defendant pleaded guilty. *See* United States v. Frierson, 945 F.2d 650, 653-55 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1515 (1992); United States v. Smallwood, 920 F.2d 1231, 1239 (5th Cir. 1991), *cert. denied*, 111 S. Ct. 2870 (1991); United States v. Rodriguez-Nuez, 919 F.2d 461, 464-65 (7th Cir. 1990); United States v. Williams, 880 F.2d 804, 805-06 (4th Cir. 1989); United States v. Scroggins, 880 F.2d 1204, 1213-14 (11th Cir. 1989), *cert. denied*, 494 U.S. 1083 (1990); United States v. Wright, 873 F.2d 437, 440-41 (1st Cir. 1989); United States v. Sailes, 872 F.2d 735, 738-39 (6th Cir. 1989).

The policy statement in the guidelines states that the court is not bound by the parties' stipulation contained in the plea agreement. U.S.S.G., *supra* note 10, § 6B1.4(d); *see* United States v. Mason, 961 F.2d 1460 (9th Cir. 1992) (district court may base sentencing upon drug quantity asserted by the presentence report rather than the lesser quantity the parties had stipulated); United States v. Russell, 913 F.2d 1288, 1293 (8th Cir. 1990), *cert. denied*, Moore v. United States, 111 S. Ct. 1687 (1991) (defendant's mistaken belief that facts contained in the presentence report would mirror those in the stipulation did not obligate the sentencing court to follow the stipulation). However, the Guidelines mandate that if the defendant pleaded guilty to one offense but stipulated to a more serious offense as part of a formal plea agreement, the court *must* sentence the defendant based on that more serious offense. U.S.S.G., *supra* note 10, § 1B1.2(a); *see* United States v. Gardner, 940 F.2d 587, 590-92 (10th Cir. 1991) (defendant was sentenced for bank robbery, which he had orally stipulated to at sentencing, rather than the less serious offense of bank larceny to which he had plead guilty); United States v. Martin, 893 F.2d 73, 74-76 (5th Cir. 1990) (defendant pleaded guilty to using a communication facility to distribute drugs but stipulated to negotiating for five pounds of methamphetamine; reviewing court found error because district court failed to sentence for the more serious stipulated offense). See *infra* note 179 for an explanation of the effect of policy statements.

161 Courts may consider conduct for which the defendant was acquitted, illegally seized evidence suppressed at trial, and evidence from the trial of codefendants. *See infra* note 251.

162 In a policy statement, the guidelines state that "the court shall resolve disputed sentencing factors. . . ." U.S.S.G., *supra* note 10, § 6A1.3(b). A second reason that a court must resolve disputed factors is that either side may appeal a sentence. 18 U.S.C. § 3742 (1992). If the government did not have the right to appeal, a court might decide in favor of a defendant to avoid reversal.

will be adjusted accordingly. The difference in the sentence is dramatic. The sentencing range for the distribution of two kilograms of cocaine is 78 to 97 months; for twenty kilograms it is 151 to 188 months.[163]

Once a defendant's offense level is initially calculated, it may be adjusted either upward or downward depending on additional factors. Again, consideration of any of these potential adjustments requires additional factual determinations by the court. Adjustments that may raise a defendant's offense level include: the status of the victim,[164] a defendant's aggravating role in an offense,[165] obstructing justice,[166] and multiple counts.[167] Adjustments that may lower a defendant's offense level include: a defendant's mitigating role in an offense[168] and acceptance of responsibility.[169]

The second basic determinant, the defendant's criminal history category, is usually a straightforward determination based on the type and number of the defendant's prior convictions.[170] However, the guidelines provide that a court may consider prior adult criminal conduct that did not result in a conviction.[171] The criminal history category has essentially replaced the traditional assessment at sentencing of the defendant's character and personal history.[172] Policy statements to the guidelines provide that age, education, mental and emotional conditions, physical condition, previous employment, family ties and responsibilities, and community ties are matters "not ordinarily relevant in determining whether a sentence should be outside the guideline range."[173]

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163 U.S.S.G., *supra* note 10, § 5A.

164 *Id.* at § 3A1.

165 An upward adjustment for an aggravating role in the offense is limited to four levels. *Id.* at § 3B1.1 The downward adjustment for a mitigating role in the offense also is limited to four levels. *Id.* at § 3B1.2. In drug cases, where base offense levels are often high, this limited adjustment seems inadequate to differentiate sentences between key players and minor figures in distribution networks. Deborah Young, *Rethinking the Commission's Drug Guidelines*, 3 FED. SENTENCING REP. 63-66 (1990).

166 U.S.S.G., *supra* note 10, § 3C1.1.

167 *Id.* at § 3D1.

168 *Id.* at § 3B1.2.

169 *Id.* at § 3E1.1. A downward adjustment for acceptance of responsibility has been described as "a thinly disguised reduction for pleading guilty." United States v. Escobar-Mejia, 915 F.2d 1152, 1153 (7th Cir. 1990). However, as an application note to this guideline makes clear, a defendant's guilty plea does not guarantee such a reduction. U.S.S.G., *supra* note 10, § 3E1.1 (application note 3).

170 U.S.S.G., *supra* note 10, § 4A1.1.

171 *Id.* at § 4A1.3.

172 Young, *Looking Back to Move Forward*, *supra* note 82, at 147.

173 U.S.S.G., *supra* note 10, §§ 5H1.1-1.6 (policy statements). Such factors may be relevant in determining where, within a particular sentencing range, the defendant should be sentenced. In exceptional cases, courts may also consider these factors with departures.

Military, civic, charitable or public service is also designated "not ordinarily relevant." *Id.* at § 5H1.11 (policy statement). A defendant's race, sex, national origin, creed, religion,

Under the guidelines, factual determinations that affect the offense level or the criminal history category influence both the maximum and minimum penalty that a defendant may receive. Despite the appellation "guidelines," which suggests a guide that courts are free to follow or iguore, the guidelines as applied define the appropriate sentence for conduct for which there is a strong presumption. If a court chooses to sentence outside that prescribed range, the sentence is deemed a "departure" and the court must give reasons to justify it.[174]

A hypothetical example demonstrates the importance of fact-finding at guidelines sentencing. Assume that, after apprehension, a drug dealer agrees to provide information about the drug supplier. The informant tells the government that the supplier has been regularly providing two kilograms of cocaine a month for six months. The government arranges for an undercover agent to purchase two kilograms of cocaine from the supplier. The undercover agent also negotiates with the supplier to buy ten kilograms of cocaine, but the supplier is tipped off before that sale occurs.

The supplier is indicted for the two kilogram sale to the undercover agent and for conspiracy to sell the ten kilograms that were not delivered. Because the government wants to use the informant for future investigations, it does not indict the defendant for the alleged sale of twelve kilograms to the informant. At trial, the defendant is convicted of the two kilogram sale to the agent but acquitted of the conspiracy count. At sentencing an agent tells the court about the informant's statement that the defendant had sold twelve kilograms of cocaine to the informant over a six month period. The government declines to name the informant.[175]

The judge now must decide whether the government has shown by a preponderance of the evidence that the defendant distributed the twelve kilograms of cocaine to the informant and whether the defendant conspired to distribute the ten additional kilograms of cocaine. Thus, the defendant may be sentenced for distributing two kilograms of cocaine, twelve kilograms of cocaine, fourteen kilograms

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and socio-economic status are factors deemed "not relevant" in determining a sentence, inside or outside the guideline range. *Id.* at § 5H1.10 (policy statement). Lack of guidance as a youth is "not relevant" for imposing a sentence outside the guideline range. *Id.* at § 5H1.12 (policy statement).

See infra note 179 for an explanation of the effect of policy statements.

174 *See, e.g.*, U.S.S.G., *supra* note 10, § 5K1.1(a).

175 The commentary to section 6A1.3 addresses the general facts set out in this hypothetical. The commentary provides that "[o]ut-of-court declarations by an unidentified informant may be considered 'where there is good cause for nondisclosure of his identity and there is sufficient corroboration by other means.'" U.S.S.G., *supra* note 10, § 6A1.3, comment., *citing* United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980).

of cocaine, or twenty-four kilograms of cocaine. Assuming all other sentencing factors are constant, and assuming no criminal history, the sentence could range from 78 months to 188 months. The court does not have the discretion to choose between these limits, however. The court must make factual determinations about whether the defendant has committed the alleged relevant conduct and sentence accordingly.

As with any factual determination, accuracy can be regulated in more than one way. Three parameters generally determine the outcome of legal fact-finding: the burden of proof, the reliability of the underlying evidence, and the standards for review of the decision. Where the chance of an erroneous decision harming an individual is high, such as conviction of an individual for a crime, a high burden of proof, a high standard of reliability for the evidence, and a guaranteed opportunity for review should be imposed.

As discussed earlier, traditional sentencing imposed none of these protections. All evidence not demonstrated to be unreliable was accepted, no formal burden of proof was imposed, and there was virtually no opportunity for review. The Supreme Court held that these standards met the requirements of the Constitution.[176]

With the adoption of the guidelines, Congress changed only the opportunity for appellate review. Under the guidelines a defendant may appeal a sentence on the basis that the court improperly applied the guidelines.[177] Many of these appeals are, essentially, arguments about the sufficiency of the evidence. Defendants contend that there was insufficient evidence for the initial offense level determination, an adjustment, or a departure.[178]

The guidelines do suggest[179] that the determination of the appropriate sentence is to be made by the court after resolving any factual

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176 *See* discussion *supra* part I.A.

177 18 U.S.C. § 3742(a). The government also has rights to appeal under 18 U.S.C. § 3742(b).

178 The statute specifies that a district court's factual findings and its assessments of a witness' credibility may not be overturned unless the appellate court finds them "clearly erroneous." 18 U.S.C. § 3742(d).

179 The provisions setting forth sentencing procedures were originally issued as guidelines. U.S.S.G., *supra* note 10, §§ 6A1.1-6A1.3. They were subsequently amended to be policy statements. *Id.* Section 6A1.2 was amended to be a policy statement effective June 15, 1988. *Id.* at App. C., amend, 59. Sections 6A1.1 and 6A1.3 were amended effective November 1, 1989. *Id.* at App. C., amends. 293 and 294.

The extent to which policy statements are binding on courts is unclear. Initially, leading commentators interpreted policy statements to be nonbinding on courts. THOMAS HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 46 (1989). However, in Williams v. United States, 112 S. Ct. 1112 (1992), the Supreme Court held that "[w]here . . . a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guidelines." *Id.* at 1119. The *Williams* holding does not necessarily mean that any policy statement is binding. One

disputes in a hearing.[180] This limited prescription acknowledges three aspects of guidelines sentencing: first, the final determination of the appropriate sentence is to be made by the court; second, the sentencing determination may only be reached after any disputes over facts are resolved by the court or determined to be insignificant to the sentence; and third, disputes over factual issues are to be resolved publicly.

The first of these, determination of the sentence by the court, is, in one sense, not a change from pre-guidelines sentencing. Although the probation officer played an important role in advising the court, judges bave consistently assumed the responsibility for sentencing. However, in pre-guidelines sentencing, the court essentially established the maximum and minimum potential sentence. Subsequent parole and probation decisions determined the actual time of the sentence.[181] When Congress established the United States Sentencing Commission, it phased out parole.[182] Thus, under the guidelines, the defendant must actually serve the sentence imposed by the trial court,[183] unless that court's judgment is reversed by an appellate court.

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commentator has argued that "[w]here the policy statement is not an authoritative guide to the intended meaning of a particular guideline, the sentencing court should remain free—consistent with the *Williams* opinion—to reject the policy statement after giving it due consideration." Ronald F. Wright, *The Law of Federal Sentencing in the Supreme Court's 1991-92 Term*, 5 FED. SENTENCING REP. 108, 109 (1992). In Stinson v. United States, 113 S. Ct. 1913 (1993), the Supreme Court in dicta suggested that policy statements generally are binding on federal courts. *Id.* at 1917. Professor Wright described this dicta as "seriously overstat[ing] the authority of policy statements." Ronald F. Wright, *Federal Sentencing Law in the Supreme Court's 1992-93 Term*, 6 FED. SENTENCING REP. 39, 41 n.8 (1993).

180 The guidelines do not explicitly state that a court must hold a sentencing hearing or describe what such a hearing should entail. The first reference to a hearing appears in a policy statement:

> Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute.

U.S.S.G., *supra* note 10, § 6A1.2 (policy statement). The following policy statement refers to Federal Rule of Criminal Procedure 32(a)(1), which provides that there should be a sentencing hearing at which attorneys for the defendant and for the government should have an opportunity to comment on the presentence report and other matters relating to the sentence. The commentary to policy statement 6A1.3 suggests that although factors at pre-guidelines sentencing were determined in an informal fashion, "[m]ore formality is . . . unavoidable if the sentencing process is to be accurate and fair" under guidelines sentencing. *Id.* at § 6A1.3 (commentary).

181 The theory of parole was that parole officials would determine when a prisoner was rehabilitated and ready to rejoin society. Freed, *supra* note 16, at 1689 n.34.

182 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified and amended at 18 U.S.C. §§ 3551-3742 (1988); 28 U.S.C. §§ 991-98 (1988).

183 However, as with pre-guidelines sentencing, federal statutes provide that a defendant's sentence may be administratively reduced by a statutorily specified amount of time for good behavior in prison. 18 U.S.C. § 3624 (1988). Currently, a prisoner may receive up to fifty-four days per year in good time credit. *Id.*

The second factor, the requirement of resolution of disputed facts, is a more significant change. Although the Federal Rules of Criminal Procedure previously required a sentencing hearing, that hearing merely required that the defendant, the defendant's counsel, and the attorney for the government each be given an opportunity to speak.[184] The rules did not require resolution of disputed factual issues. Judge Eisele has written that under discretionary sentencing judges would usually omit from consideration facts in the presentence report that the defendant denied.[185] This clearly was not required, however, by statute or case law. At a minimum, under discretionary sentencing a judge could give evidence less weight if it seemed less reliable. Chapter Six of the guidelines, governing sentencing procedures, provides little guidance for how fact-finding should be accomplished.[186] Consequently, the standards for fact-finding at guidelines sentencing have evolved in the courts.

The requirement that factual disputes be resolved publicly highlights the importance of each factor in sentencing. Moreover, the creation of a record provides both a basis for appellate review of an individual case and for evaluation of the sentencing process. Despite the public record and the specifically delineated right to appeal, appeals based on evidence issues do little to raise evidentiary standards. As with review of alleged evidentiary errors from trial, appellate courts give the trial court great deference, applying a clearly erroneous standard of review.[187]

In practice, specific facts used in sentencing may be determined at various stages of the process. The facts of the case may be first outlined in an arrest warrant,[188] an indictment, or an information.[189] For a mandatory minimum narcotics offense, the quantity of narcotics will be alleged in the indictment. For other offenses, the indictment may be more general. For example, a fraud indictment may or may not allege a specific quantity of money was fraudulently obtained.

Once a trial court admits evidence about the details of an offense, which it then relies on in determining the appropriate sentence, a defendant has little hope for subsequently challenging the use of such

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184 FED. R. CRIM. P. 32(a)(1).

185 United States v. Clark, 792 F. Supp. 637, 649-50 (E.D. Ark. 1992).

186 Policy statement § 6A1.3 merely provides that "[i]n resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G., *supra* note 10, § 6A1.3 (policy statement).

187 18 U.S.C. § 3742(a).

188 The contents of an arrest warrant are governed by Federal Rule of Criminal Procedure 4(c)(1). FED. R. CRIM. P. 4(c)(1).

189 The contents of an information or indictment are governed by Federal Rule of Criminal Procedure 7(c)(1). FED. R. CRIM. P. 7(c)(1).

evidence. The district court's factual findings are protected by the clearly erroneous rule,[190] even when the court relied on uncorroborated hearsay statements of an unidentified declarant.[191]

The Sentencing Reform Act does not specify the burden of proof that should be imposed at sentencing or establish new evidentiary standards for sentencing under the guidelines.[192] Congress left these matters for the Sentencing Commission or the courts to resolve.

The Sentencing Commission acknowledged the need for higher evidentiary standards under the guidelines, but simply adopted the pre-guidelines standard. Policy statement 6A1.3[193] states that at sentencing a court may "consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."[194] Circuit courts developed the "sufficient indicia" standard as a minimal limitation on the expansive information that could be considered by courts at pre-guidelines sentencing.[195] The Commission left to the courts the responsibility to "determine the appropriate procedure" for resolving factual disputes.[196] However, the Commission did state in commentary that "the 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."[197]

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190 18 U.S.C. § 3742(e); *see* United States v. Cetina-Gomez, 951 F.2d 432, 434 (1st Cir. 1991); United States v. Poole, 929 F.2d 1476, 1483 (10th Cir. 1991); United States v. Alfaro, 919 F.2d 962, 966-68 (5th Cir. 1990); United States v. Thomas, 870 F.2d 174, 176 (5th Cir. 1989).

191 United States v. Manthei, 913 F.2d 1130, 1138 (5th Cir. 1990).

192 The Act alludes to evidentiary standards only where it recodifies 18 U.S.C. § 3577 into 18 U.S.C. § 3661. This section provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person" who is being sentenced. 18 U.S.C. § 3661 (1987). The Supreme Court established this standard in Williams v. New York, 337 U.S. 241 (1949). *See supra* part I.A.2.

193 The Commission originally issued § 6A1.3 as a guideline. It was amended, to convert it to a policy statement, effective November 1, 1989. U.S.S.G., *supra* note 10, App. C, amend. 294. The Commission stated, without further explanation, that "[d]esignation of this section as a policy statement is more consistent with the nature of the subject matter." *Id.* For an explanation of the impact of policy statements, see discussion *supra* note 179.

194 U.S.S.G., *supra* note 10, § 6A1.3.

195 The actual standard developed by the circuit courts was one requiring "minimal indicia" of reliability. *E.g.*, United States v. Baylin, 696 F.2d 1030, 1039-40 (3d Cir. 1982). Because the minimal indicia standard and the sufficient indicia standard have been interpreted as imposing approximately the same reliability constraints on courts, this article nses the terms interchangeably. For an example of a case that also uses these terms interchangeably, see United States v. Silverman, 976 F.2d 1502, 1504 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1595 (1993). At least one court has stated that the sufficient indicia standard is the more stringent standard. *See* United States v. Paulino, 996 F.2d 1541 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 449 (1993).

196 U.S.S.G., *supra* note 10, § 6A1.3 commentary.

197 *Id.* at § 6A1.3 commentary.

II

WRESTLING WITH THE GUIDELINES: JUDICIAL APPROACHES TO THE LACK OF EVIDENTIARY STANDARDS

Once the guidelines were enacted, defendants soon began challenging the low standards for fact-finding at sentencing.[198] The focal points of guidelines sentencing are the offense level and the defendant's criminal history, which the government need establish only by the low evidentiary standards. In contrast, evidence that defendants introduced at discretionary sentencing now has minimal impact on sentencing decisions because, in most instances, the guidelines limit consideration of the defendant's age, education, mental and emotional condition, physical condition, previous employment, family ties and responsibilities and community ties.[199] Thus, the prosecution primarily benefits from loose evidentiary standards. Also, unlike with discretionary sentencing, guidelines sentencing enables a defendant to directly trace the length of the sentence imposed to specific evidence. These factors have created among defendants a constituency for changing evidentiary standards at sentencing.[200]

Defendants' challenges to the lack of procedural protections for fact-finding under the guidelines have often involved sentences based on information in the form of hearsay.[201] The hearsay may appear in the presentence report[202] or in testimony by a government

198 *See, e.g.*, United States v. Sciarrino, 884 F.2d 95, 96-97 (3d Cir. 1989), *cert. denied*, 493 U.S. 997 (1989) (defendant's assertion that sentencing guidelines precluded use of hearsay rejected by reviewing court which reasoned that because hearsay was permitted before the guidelines, it should therefore be allowed under the guidelines). Defendants have continued to challenge the low fact-finding standard at sentencing. *See, e.g.*, United States v. Mergerson, 995 F.2d 1285, 1291-93 (5th Cir. 1993) (appellate court rejected defendant's assertion that the district court should have applied a beyond the reasonable doubt standard at sentencing; reviewing court confirmed that the preponderance standard was proper).

199 Policy statements to the guidelines provide that age, education, mental and emotional conditions, physical condition, previous employment, family ties and responsibilities, and community ties are "not ordinarily relevant in determining whether a sentence should be outside the guidelines." U.S.S.G., *supra* note 10, §§ 5H1.1-5H1.6. For an explanation of the impact of policy statements, see *supra* note 179. Professor Marc Miller has argued that Congress' purposes for sentencing require an assessment of a defendant's history and characteristics. Miller, *supra* note 3, at 464.

200 The constituency for changing the evidentiary standards for guidelines sentencing in the courts is defendants and their counsel. Many scholars and judges have joined in this constituency.

201 *See, e.g.*, United States v. Miele, 989 F.2d 659, 664 (3d Cir. 1993); United States v. Silverman, 976 F.2d 1502 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1595 (1993).

202 The presentence report includes information about the history and characteristics of the defendant (including financial status and criminal record); classification of the offense and of the defendant; the kinds of sentence and sentence ranges; explanation of factors that may indicate a departure from the guidelines may be warranted; information regarding impact (*e.g.*, financial, social, medical) upon victim(s); and information con-

agent.[203] This use of hearsay may occur with any fact that must be determined at sentencing, but has proved particularly troubling when the defendant is being sentenced for relevant conduct after conviction for a "base offense."[204]

In addressing these problems, courts have considered three avenues for raising the standards at sentencing: first, a due process requirement that the burden of proof be higher than a preponderance of the evidence, particularly with respect to sentencing for relevant conduct that could have been the basis of separate charges;[205] second, a limit on hearsay evidence required by the Confrontation Clause or Due Process Clause;[206] and third, specialized, judicially created rules to regulate fact-finding procedures at sentencing.[207]

Analysis of these avenues is complicated because judges who appear to share the same basic concern about the lack of procedural protections may propose different solutions predicated on different rationales. One judge may propose a different burden of proof while another proposes not relying on hearsay. The first judge may argue the Due Process Clause requires the higher burden; the second judge may make the same claim or rely on the confrontation clause. Also, relying on pre-guidelines case law necessarily involves applying old rules and analyses to a fundamentally different sentencing system.[208] A review of post-guidelines case law indicates that the degree of thought courts have given to applying old rules to new sentencing varies dramatically.[209]

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cerning nature and extent of non-prison programs and resources available to the defendant. FED. R. CRIM. P. 32(c)(2).

203 *See, e.g.*, United States v. Sherbak, 950 F.2d 1095, 1100-01 (5th Cir. 1992) (district court credited Drug Enforcement Agency officer's unsworn statements over the defendant's counter-assertions).

204 *See* discussion *supra* note 159.

205 *See* discussion *infra* part II.A.

206 U.S. CONST. amends V & VI. *See* discussion *infra* part II.B.

207 *See* discussion *infra* part II.C.

208 Judge Heaney of the Eighth Circuit makes this point. *See* Heaney, *supra* note 16, at 166.

209 *Compare* United States v. Concepcion, 983 F.2d 369, 393 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 163 (1993) (Newman, J., concurring) (noting the "bizarre results" that can be created by applying pre-guidelines case law to guidelines sentencing); United States v. Mobley, 956 F.2d 450, 465-66 (3d Cir. 1992) (Mansmanu, J., dissenting) (describing differences between pre-guidelines and guidelines sentencing schemes and why those differences matter) *with* United States v. Sciarrino, 884 F.2d 95, 96-97 (3d Cir. 1989), *cert. denied*, 493 U.S. 997 (1989) (stating without explanation that because hearsay statements were admissible under pre-guidelines sentencing, they should continue to be admissible under guidelines sentencing).

A. The Burden of Proof

Burdens of proof[210] establish the standard of proof and allocate which party bears the responsibility for providing the proof on a particular issue. The burden of proof theoretically determines outcomes in cases depending on who has the burden of proof and what level of proof is required. In addition to allocating the risk of error, the burden of proof instructs the fact-finder about the degree of confidence society deems appropriate for a particular decision.[211] Absent a statute specifying the burden of proof, defendants have looked to the Due Process Clause as the foundation for that right.

The Supreme Court never ruled that due process required a particular burden of proof under general pre-guidelines discretionary sentencing.[212] Under that sentencing scheme, courts were not required to make any factual findings before imposing a sentence, so there was no clear need for standards establishing facts or direct consequences for failing to do so. In *McMillan*, the Court explicitly did find a preponderance of the evidence standard adequate for mandatory minimum sentencing.[213]

Cases questioning the standard of proof for guidelines sentencing first reached the federal courts of appeal three years after *McMillan*. In *United States v. Wright*,[214] the defendant argued that the preponderance of the evidence standard was inadequate for evaluating evidence of relevant conduct at sentencing.[215] Writing for a First Circuit panel, Judge Breyer, a member of the United States Sentencing Commission, dismissed this challenge with the conclusion from *McMillan* that, "[t]he Supreme Court has held that the 'preponderance standard satisfies due process.' "[216] Judge Breyer's opinion did

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210 "Burden of proof" is a term used to refer to either the "burden of persuasion" or the "burden of production." LILLY, *supra* note 70, at 41 n.2. In the context of evaluating standards for fact-finding at guidelines sentencing, courts have fairly consistently used "burden of proof" to mean "burden of persuasion." To avoid confusion, this article follows the courts' convention. The burden of persuasion regulates the decision of close cases by the fact-finder and the burden of production specifies the result when evidence on an issue is inadequate to satisfy the threshold requirement. Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1300 (1977).

211 Addington v. Texas, 441 U.S. 418, 423 (1978) (citing *In re* Winship, 397 U.S. 358, 370 (1970)) (Harlan, J., concurring).

212 In *Williams v. New York*, the Court concluded that the "due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure," but did not explicitly discuss the burden of proof. 337 U.S. 241, 251 (1949).

213 *See* discussion *supra* part I.A.3.

214 873 F.2d 437 (1st Cir. 1989).

215 *Id.* at 441.

216 *Id.* (citing McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986)).

not discuss whether guidelines sentencing warranted reconsideration of the standards used for discretionary sentencing.

Although the Supreme Court has not addressed the issue,[217] each of the federal courts of appeals has concluded that, in most instances, the appropriate standard of proof for resolving factual disputes at guidelines sentencing is a preponderance of the evidence.[218] Some courts have followed the lead of *Wright* and reached this conclusion with little analysis.[219] Other courts have looked beyond *McMillan* and pointed to the Sentencing Commission's declination to adopt any standard of proof,[220] to the fact that the defendant was already deprived of the right to liberty at the point of conviction so that the

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217 The Supreme Court recently denied certiorari on the issue of burden of proof at sentencing in Kinder v. United States, 112 S. Ct. 2290 (1992). Justice White dissented, noting that, "[t]he Sentencing Guidelines do not explicitly adopt a standard of proof required for relevant conduct, and we have not visited this issue since its new procedures took effect in November 1987." *Id.* at 2292. Justice White observed that, "[t]he burden of proof at sentencing proceedings is an issue of daily importance to the district courts, with implications for all sentencing findings." *Id.* The justice recognized that the importance of this issue rests on the fact that, "[t]he resolution of disputed matters at sentencing . . . controls the length of the sentence actually to be imposed." *Id.*

218 United States v. Wilson, 900 F.2d 1350, 1353-54 (9th Cir. 1990); United States v. Frederick, 897 F.2d 490, 492-93 (10th Cir. 1990), *cert. denied*, 498 U.S. 863 (1990); United States v. Alston, 895 F.2d 1362, 1372-73 (11th Cir. 1990); United States v. Gooden, 892 F.2d 725, 727-28 (8th Cir. 1989), *cert. denied*, 496 U.S. 908 (1990); United States v. Casto, 889 F.2d 567, 570 (5th Cir. 1989); United States v. Silverman, 889 F.2d 1531, 1535 (6th Cir. 1989), *cert. denied*, 113 S. Ct. 1595 (1993); United States v. Guerra, 888 F.2d 247, 249-51 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990); United States v. Burke, 888 F.2d 862, 869 (D.C. Cir. 1989); United States v. McDowell, 888 F.2d 285, 290-91 (3d Cir. 1989); United States v. Urrego-Linares, 879 F.2d 1234, 1237-38 (4th Cir.), *cert. denied*, 493 U.S. 943 (1989); United States v. Wright, 873 F.2d 437, 441-42 (1st Cir. 1989); United States v. White, 888 F.2d 490, 499 (7th Cir. 1989).

219 *See, e.g.*, United States v. Urrego-Linares, 879 F.2d 1234, 1237-38 (4th Cir.), *cert. denied*, 493 U.S. 943 (1989). The court's opinion, which was written by Judge Wilkins (who served as a member of the Federal Sentencing Commission) relied on *McMillan*, stating that it saw no reason to apply a higher standard. *Id.* at 1238. The court added that:

> Fairness to a defendant is substantially increased under guideline sentencing with application of a preponderance of the evidence standard, for if a court is considering applying an aggravating factor which will have the effect of increasing the sentence, the court must afford a defendant the opportunity to oppose and specifically address its application.

Id. See also United States v. White, 888 F.2d 490, 499 (7th Cir. 1989), in which the court noted the potential conflict between respecting a jury's verdict and sentencing for all relevant conduct if a defendant was acquitted of a charge but found the evidence persuasive by a preponderance of the evidence. The court concluded that the issue was not ripe for decision. *Id.* For another case in which the court arrived at this conclusion, see United States v. Alston, 895 F.2d 1362, 1372-73 (11th Cir. 1990).

220 United States v. Gooden 892 F.2d 725, 727-28 (8th Cir. 1989), *cert. denied*, 496 U.S. 908 (1990); United States v. Guerra, 888 F.2d 247, 250-51 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990).

A preliminary draft of the gnidelines required that judges apply a preponderance of the evidence standard. Harvey M. Silets & Susan W. Brenner, *Commentary on the Preliminary Draft of the Sentencing Guidelines Issued by the United States Sentencing Commission in September, 1986*, 77 J. CRIM. L. & CRIMINOLOGY 1069, 1079 (1986). Ironically, this requirement was

sentencing proceeding was not as critical as the finding of guilt,[221] or to the courts' concern with judicial economy.[222] These are essentially the same justifications that were offered for not providing procedural protections at pre-guidelines discretionary sentencing.[223]

The Tenth Circuit explicitly considered the appropriateness of continuing the pre-guidelines standards in *United States v. Frederick*.[224] In addition to relying on *McMillan*, the court found support in the Sentencing Reform Act's continuation of the *Williams* standard that no limits should be placed on the information a court could consider at sentencing.[225] The Tenth Circuit reasoned that because Congress did not modify this rule, the pre-guidelines sentencing procedures were presumptively correct.[226]

In upholding the preponderance standard, some courts also pointed to the appellate courts' previous refusal to raise the standard of proof at sentencings where an increased penalty resulted from a finding that the defendant was a dangerous special offender.[227] Although primarily relying on *McMillan* to find that the government did not have to prove sentencing factors beyond a reasonable doubt, the Ninth Circuit considered the impact of requiring only a preponderance of the evidence. In *United States v. Wilson*,[228] the court recognized that the standard was simply "that the relevant fact is deemed more likely true than not on the basis of the available information—no matter how limited or unreliable."[229]

In discussing their concern with the low burden of proof, judges and scholars have often focused on the Supreme Court's analysis in *McMillan* that a sentencing factor may be determined by a lower burden of proof when that factor is one traditionally associated with sen-

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not enacted because of the realization that the pre-guidelines system differed too greatly to provide an effective model for the new sentencing scheme. *Id.*

221 United States v. McDowell, 888 F.2d 285 (3d Cir. 1989). The *McDowell* court observed that "[o]nce criminal proceedings reach the sentencing stage, the decision has already been made that the defendant can be deprived of his liberty." *Id.* at 290.

222 *Id.* "The long history of judicial sentencing and strong policy reasons, including judicial economy, persuade us . . . that a defendant's rights in sentencing are met by a preponderance of evidence standard." *Id.* at 291. The *McDowell* court limited its holding to cases involving simple enhancement. *Id.* at 290-91. The court did not consider cases where the adjustment was "a new and separate offense." *Id.* at 291.

223 *See* discussion *supra* Part I.

224 897 F.2d 490 (10th Cir.), *cert. denied*, 498 U.S. 863 (1990).

225 *Id.* at 492.

226 *Id.*

227 United States v. Silverman, 889 F.2d 1531, 1535 (6th Cir. 1989), *cert. denied*, 113 S. Ct. 1595 (1993) (citing United States v. Davis, 710 F.2d 104 (3d Cir.), *cert. denied*, 464 U.S. 1001 (1983)).

228 900 F.2d 1350 (9th Cir. 1990).

229 *Id.* at 1354 (citing United States v. Davis, 715 F. Supp. 1473, 1481 (C.D. Cal. 1989), *cert. denied*, 113 S. Ct. 210 (1992).

tencing, rather than traditionally deemed to be a separate crime.[230] Accordingly, some judges concluded that the sentencing factor involved in calculating the relevant conduct of a drug offense which included separate drug sales went beyond the *McMillan* principle and warranted a higher burden of proof.[231]

In *United States v. Restrepo*,[232] the Ninth Circuit, sitting *en banc*, reconsidered the question of standard of proof in the context of a significant increase in sentence based on relevant conduct. The *Restrepo* court found the preponderance of the evidence standard adequate but defined it to require that a court be convinced "by a preponderance of the evidence that the fact in question exists."[233] This definition contrasts with the literal interpretation that courts need only weigh the evidence and find that the evidence tipped the scales.[234]

Despite the uniformity in outcome among the circuits in upholding the preponderance of the evidence standard, there was great dissension among the Ninth Circuit judges in *Restrepo*.[235] The dissenters distinguished between the guidelines sentencing for relevant conduct and the *McMillan* finding of a sentencing factor.[236] Because separate sales of illegal substances can be charged as separate crimes, some dissenters found that relevant conduct sentencing under the guidelines crossed the constitutional line, drawn in *McMillan*, between elements of a crime and traditional sentencing factors.[237]

Judges opposed to continuing the preponderance of the evidence standard have condoned low evidentiary standards at pre-guidelines sentencing but have argued that prior case law, such as *Williams*,

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230 Generally, judges cite *McMillan* for the proposition that guidelines sentencing may employ the preponderance of the evidence standard without provoking any due process concerns. *See, e.g.*, United States v. Galloway, 976 F.2d 414, 422-26 (8th Cir.) *cert. denied*, 113 S. Ct. 1420 (1992); United States v. Mobley, 956 F.2d 450, 454-459 (3d Cir. 1992); United States v. Richards, 936 F.2d 575 (7th Cir. 1991). In relying upon *McMillan*, courts seek to allay any worry ahout the overlapping of current guidelines practice onto pre-guidelines case law by explaining that "[t]he Sentencing Guidelines do not differ from the Pennsylvania statute [at issue in *McMillan*] in any manner material to a constitutional inquiry." *Galloway*, 976 F.2d at 423 (citing United States v. Restrepo, 946 F.2d 654, 657 (9th Cir. 1991) (en banc) *cert. denied*, 112 S. Ct. 1564 (1992)).

231 *See infra* note 243 and accompanying text.

232 946 F.2d 654 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1564 (1992).

233 *Id.* at 661 (citing United States v. Streeter, 907 F.2d 781, 792 (8th Cir. 1990), *overruled on other grounds*, by United States v. Wise, 976 F.2d 393 (8th Cir. 1992)).

234 United States v. Restrepo, 903 F.2d 648, 654 (9th Cir. 1990) (panel opinion), *modified*, United States v. Restrepo, 946 F.2d 654 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1564 (1992).

235 United States v. Restrepo, 946 F.2d at 663-78.

236 *Id.* at 665 (Norris, J., dissenting).

237 *Id.* at 664-65 (Norris, J., dissenting).

has little relevance in evaluating the guidelines' constitutionality.[238] Some have also contended that sentencing under the guidelines is analogous to the sentencing scheme discussed in *Specht v. Patterson*[239] because the maximum penalty available to the court is raised by a finding of relevant conduct.[240] The Court in *McMillan* distinguished *Specht* because *McMillan* did not raise the maximum potential sentence.[241]

Five courts of appeals have suggested that an increase in penalty due to information presented at the sentencing phase might be so great in relation to the sentence for the original crime of conviction that the standard of proof should be higher than a preponderance of the evidence.[242] In *United States v. Kikumura*,[243] the Third Circuit concluded that due process required fact-finding by clear and convincing evidence when the consequence was an increase in sentence from thirty months to thirty years. The court observed that this was a case of "a tail which wags the dog of the substantive offense."[244] *Kikumura* presented an easier case than usual because the district court had noted that although a preponderance was sufficient, its findings were supported by clear and convincing evidence.[245] Accordingly, reversal was not required.

The problem with *Kikumura* was subsequently illustrated in *United States v. Townley*,[246] in which the Eighth Circuit acknowledged that at some point the disparity might be so great as to require a higher level

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238 United States v. Galloway, 976 F.2d 414, 436 (8th Cir.) (Bright, J. dissenting), *cert. denied*, 113 S. Ct. 1420 (1992). Commentators also have recognized that *Williams* and its progeny simply are inapposite in achieving the guidelines' objectives. Meeting these objectives "requires . . . a complete restructuring of the policies and practices of the federal sentencing system, since that system is and always has been predicated upon the concept of judicial discretion." Silets & Brenner, *supra* note 220, at 1079.

239 386 U.S. 605 (1967).

240 Galloway, 976 F.2d at 441 (Bright, J., dissenting).

241 McMillan v. Pennsylvania, 477 U.S. 79, 88-89 (1986).

242 United States v. Billingsley, 978 F.2d 861, 866 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1661 (1993); United States v. Galloway, 976 F.2d 414, 417 (8th Cir.), *cert. denied*, 113 S. Ct. 1420 (1992); United States v. Lam Kwong-Wah, 966 F.2d 682, 688 (D.C. Cir.), *cert. denied*, 113 S. Ct. 287 (1992); United States v. Restrepo, 946 F.2d 654, 659 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1564 (1992); United States v. St. Julian, 922 F.2d 563, 569 n.1 (10th Cir. 1990), *cert. denied*, 113 S. Ct. 348 (1992).

The Seventh Circuit has sent contradictory messages regarding the proper burden of proof when fact-finding at sentencing greatly increases the length of the sentence. *Compare* United States v. Masters, 978 F.2d 281, 286-87 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2333 (1993) (Constitution does not require higher burden of proof) *with* United States v. Trujillo, 959 F.2d 1377, 1381-82 (7th Cir.), *cert. denied*, 113 S. Ct. 277 (1992) (agreeing with *Kikumura* holding that in some situations a higher burden of proof at sentencing is required) and United States v. Schuster, 948 F.2d 313, 315 (7th Cir. 1992) (same).

243 918 F.2d 1084 (3d Cir. 1990).

244 *Id.* at 1100-01 (citing McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).

245 *Id.* at 1102-04.

246 929 F.2d 365 (8th Cir. 1991).

of proof, although the increase in *Townley* did not reach that point.[247] The "standard" with which the courts are left is that they should know that level of disparity when they see it.[248] This vague standard requires a two-level determination that is unnecessary and difficult. First, a court must identify whether the disparity is "a tail which wags the dog," that is, whether the additional penalty is so great as to raise due process concerns. Second, the court must impose the corresponding standard of proof.[249] Notably, *Kikumura* and related cases fail to identify a logical basis for creating a dual standard. Whether the defendant's sentence is increased by two months or twenty years, the defendant should have the same right to a valid decision based on reliable evidence.

This type of individual case analysis fails to recoguize the importance of a systemwide change in the sentencing process. Under the guidelines, courts consider not just one factor, as in *McMillan*, but many factors. Some of these factors were traditionally considered at sentencing, but many could have been charged as separate crimes. At the same time the guidelines impose specific consequences for each of these factors. Consequently, the guidelines make it possible for the government to avoid the traditional, difficult choice of whether to charge an offense and attempt to prove it beyond a reasonable doubt or to forego seeking punishment because there is insufficient proof of

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247 *Id.* at 370.

248 As in *Townley*, other courts confronted with increases in the length of a sentence have concluded without elaboration that the clear and convincing standard had not been triggered by the increase in defendant's sentence. *See* United States v. Galloway, 976 F.2d 414, 425-27 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1420 (1993) (three-fold increase in defendant's sentence did not violate defendant's due process rights); United States v. Lam Kwong-Wah, 966 F.2d 682, 688 (D.C. Cir.), *cert. denied*, 113 S. Ct. 287 (1992) (six level increase not significant enough to require clear and convincing standard); United States v. Trujillo, 959 F.2d 1377, 1382 (7th Cir.), *cert. denied*, 113 S. Ct. 277 (1992) (sentence increase of 4.5 years did not merit higher level of due process).

249 District courts anticipating the possibility of this two level standard may attempt to forestall the problem by acknowledging it. A number of appellate court decisions observe that district courts are specifying that their resolution of disputed sentencing facts satisfies both the preponderance of the evidence and the clear and convincing standards. *See, e.g.*, United States v. Mergerson, 995 F.2d 1285, 1291 (5th Cir. 1993); United States v. Corbin, 998 F.2d 1377, 1387-88 (7th Cir. 1993); United States v. Concepcion, 983 F.2d 369, 390 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 163 (1993); United States v. Billingsley, 978 F.2d 861, 866 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1661 (1993). Use of both the preponderance and clear and convincing standards may indicate district courts' uncertainty and discomfort with the current vague standard.

Appellate courts routinely dismiss defendants' arguments that the beyond a reasonable doubt standard should be applied. *See, e.g., Mergerson*, 995 F.2d at 1291; *Corbin*, 998 F.2d at 1388. At least one district court, however, has applied the reasonable doubt standard. *See* United States v. Trujillo, 959 F.2d 1377, 1382 (7th Cir.), *cert. denied*, 113 S. Ct. 277 (1992).

the conduct.[250] The judge has no basis under the guidelines for finding the low burden of proof was met but concluding that such a sentence would be excessive. The guidelines thus enable the government to obtain a much higher sentence for a much lower level of proof and expenditure of resources. Moreover, at sentencing a court may ignore a jury's verdict of not guilty on a particular count, even in a case of jury nullification.[251] The judge, if following current law, may not ameliorate the sentence. The traditional checks and balances of jury

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250 An ongoing criticism of the guidelines has been that they transfer to the prosecution the discretion that historically was accorded to the judge. *See, e.g.*, United States v. Harrington, 947 F.2d 956, 963-70 (D.C. Cir. 1991) (Edwards, J., concurring); United States v. Stanley, 928 F.2d 575, 582-83 (2d Cir.), *cert. denied*, 112 S. Ct. 141 (1991); United States v. Boshell, 728 F. Supp. 632, 637-38 (E.D. Wash. 1990); Alschuler, *supra* note 16, at 926; Koh, *supra* note 16.

251 Eleven circuits have ruled that conduct underlying charges of which the defendant was acquitted may be considered at sentencing. *See* United States v. Paulino, 996 F.2d 1541, 1546-49 (3d Cir.), *cert. denied*, 114 S. Ct. 449 (1993) (while jury determined that approximately 390 grams of cocaine were involved in defendant's drug conspiracy, district court calculated defendant's sentence based on its finding that between 127 to 140 kilograms of cocaine were involved); United States v. Wright, 996 F.2d 312 (10th Cir. 1993) (sentencing court may sentence defendant for conspiracy although jury acquitted defendant of that charge), United States v. Lynch, 934 F.2d 1226, 1234-37 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992) (sentencing court took into account defendant's possession of a firearm although the jury had acquitted defendant of this possession); *see also* United States v. Boney, 977 F.2d 624, 635 (D.C. Cir. 1992); United States v. Galloway, 976 F. 2d 414, 422-25 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1420 (1992); United States v. Fonner, 920 F.2d 1330, 1332-33 (7th Cir. 1990); United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2055 (1991); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 180-81 (2d Cir.), *cert. denied*, 498 U.S. 844 (1990); United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir. 1989); United States v. Isom, 886 F.2d 736, 738-39 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747, 748-49 (5th Cir. 1989).

The Ninth Circuit is alone in concluding that a district court may not consider acquitted conduct at sentencing. United States v. Brady, 928 F.2d 844 (9th Cir. 1991). The *Brady* court reasoned that while a sentencing court may consider evidence of factors not part of the offense of conviction, "it does not follow that the Guidelines permit a court to reconsider facts during sentencing that have been rejected by a jury's not guilty verdict." *Id.* at 851.

Judge Newman of the Second Circuit has urged that the role acquitted conduct plays at sentencing "must be modified [because a] just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal." United States v. Concepcion, 983 F.2d 369, 396 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 163 (Newman, J., dissenting).

An amendment proposed to the guidelines in 1993 by the Practitioners' Advisory Group would have precluded the sentencing court from considering conduct of which the jury had acquitted the defendant. Proposed Amendments to the Federal Sentencing Guidelines, 52 CRIM. L. REP. (BNA) 2194 (Feb. 3, 1993). An alternative proposal put forth by the same group would have required the prosecution to prove acquitted conduct by a clear and convincing standard. *Id.* While twenty-two proposals were accepted by the Commission for amendment, neither of these proposals were among those accepted. 58 Fed. Reg. 27,148, 27,148-60 (1993).

Additionally, a court may consider illegally seized evidence which was suppressed at trial. United States v. McCrory, 930 F.2d 63, 69 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992); United States v. Torres, 926 F.2d 321, 322-25 (3d Cir. 1991). A court may also consider evidence from the trial of co-defendants, so long as that evidence does not come

determination of the facts and judge determination of the sentence are eliminated.

Ironically, one court has stated that fairness to a defendant has substantially increased under the guidelines, even with the low standard of proof.[252] A comprehensive look at the procedural protections of the guidelines suggests otherwise. There is no requirement that the government present proof that would be admissible under the Federal Rules of Evidence. There is a presumption that the information in the presentence report is correct.[253] These procedural rules do not protect the defendant.[254]

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as an unfair surprise to defendant. United States v. Morales, 994 F.2d 386, 389-90 (7th Cir. 1993).

252 United States v. Arrego-Linares, 879 F.2d 1234, 1238 (4th Cir.), *cert. denied*, 493 U.S. 943 (1989).

253 *See* United States v. Smiley, 997 F.2d 475, 483 (8th Cir. 1993) (Bright, J., dissenting) (noting that probation officer's sentencing recommendations in the presentence report are "often summarily approve[d]" by the court); United States v. Bartsh, 985 F.2d 930, 932 (8th Cir. 1993) (district court properly accepted presentence report's calculation of amount that defendant embezzled because defendant failed to object to this calculation); United States v. Harrington, 947 F.2d 956, 966 (D.C. Cir. 1991) (Edwards, J., concurring) (observing that "many trial judges appear to accept the Report as written"); United States v. Mir, 919 F.2d 940, 942-43 (5th Cir. 1990) (defendant's failure to present rebuttal evidence to presentence report's finding that he was a leader in a narcotics conspiracy and that he possessed a greater amount of drugs than he admitted to meant that district court could consider the report's findings when calculating defendant's sentence); *see also* FED. R. EVID. 1101(d)(3), Advisory Committee Notes (in sentencing, "great reliance is placed on the presentence investigation and report"); Heaney, *supra* note 16, at 169 n.22 and accompanying text.

Some appellate courts have reversed trial courts which relied on the presumption that the presentence report is correct without considering the quality of the underlying information. *See, e.g.*, United States v. Watkins, 994 F.2d 1192, 1195-96 (6th Cir. 1993) (in calculating the total amount of intended loss caused by defendant's check kiting scheme, sentencing court relied solely on the presentence report because the government did not present any evidence regarding this issue; reviewing court vacated the sentence and remanded for resentencing because the report was inadequate); United States v. Gilliam, 987 F.2d 1009, 1014 (4th Cir. 1993) (presentence report based quantity of drugs that defendant possessed on amount alleged in indictment for the entire conspiracy; appellate court's review of defendant's questioning of the probation officer led court to determine that the report lacked sufficient indicia of reliability and thus sentence was vacated and case was remanded for resentencing); United States v. Leichtnam, 948 F.2d 370, 381-82 (7th Cir. 1991) (sentence vacated and case remanded for resentencing by reviewing court which noted that information in the presentence report regarding drug quantity had been supplied by government attorney and was totally unsubstantiated).

254 *See* Silets & Brenner, *supra* note 220, at 1079. The preliminary draft of the guidelines established the burden of proof at sentencing as the preponderance of the evidence standard. *Id.* Although the Commission later decided to allow courts to determine the proper burden of proof, two critics of the preliminary draft recognized that the preponderance of the evidence standard, which is the de facto standard today, "puts the defendant in a perilous position." *Id.* at 1083.

B. The Use of Hearsay

Hearsay[255] evidence has raised the greatest concern with reliability of evidence at sentencing. At trial using hearsay may be prohibited by the Confrontation Clause or the Due Process Clause of the Constitution or by the Federal Rules of Evidence.[256] The exclusion of hearsay at trial, under a constitutional rationale, is not completely coextensive with the exclusions of the Federal Rules of Evidence, although both trace their origins to the concern in England with the unfairness of prosecution by affidavit.[257] Recent Confrontation Clause cases have permitted out-of-court statements that meet "firmly rooted exceptions" to the hearsay rule.[258] Thus, a right of confrontation at sentencing afforded either by the Constitution or by application of the rules of evidence would provide similar, although not identical, protection against unreliable hearsay.

The concern over hearsay stems from the widely accepted belief that cross-examination can reveal infirmities in testimony that arise from: (1) defects in perception, (2) defects in memory, (3) defects in sincerity or veracity, and (4) defects in narration, such as ambiguity.[259] Secondary reasons given for excluding hearsay are that the declarant is not under oath and the declarant's demeanor cannot be observed.[260] The Federal Rules of Evidence contain a definition of hearsay, a general ban on the use of hearsay, and twenty-nine exceptions to the exclusion, including "catch-all" exceptions.[261] The rules were desigued to admit hearsay only when it arose in circumstances that support its reliability by identifiable guarantees of trustworthiness.[262] Consequently, as Judge Edward Becker and Professor Aviva Orenstein aptly noted, inadmissible, reliable hearsay is an "oxymoron."[263]

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255 Hearsay is commonly defined as an out of court statement offered for the truth of the matter asserted. FED. R. EVID. 801(c).

256 FED. R. EVID. 801-05.

257 This history was recently recounted by Justice Thomas in Illinois v. White, 112 S. Ct. 736, 743-48 (1992) (Thomas, J., concurring in part and concurring in the decision).

258 *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 183 (1987) ("co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that . . . a court need not independently inquire into the reliability of such statements").

259 LILLY, *supra* note 70, at 159.

260 *Id.* at 160.

261 FED. R. EVID. 801-04.

262 For example, statements for purposes of medical diagnosis or treatment are admitted under an exception to the hearsay rule. FED. R. EVID. 803(4). The premise is that an individual will truthfully state medical conditions in order to receive appropriate medical care.

263 Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, The Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 889 (1992).

The Federal Rules of Evidence, other than the single rule governing privileges, explicitly do not apply to sentencing.[264] The Federal Sentencing Guidelines assume that hearsay will still be permitted, as it was under pre-guidelines discretionary sentencing.[265] Accordingly, courts anxious for improved reliability of evidence at sentencing have looked for a constitutional basis to exclude hearsay.

Courts assessing whether a right of confrontation exists at sentencing have looked to the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. Because the Supreme Court had concluded that sentencing based on hearsay did not violate the right to confrontation under pre-guidelines discretionary sentencing in *Williams v. New York*,[266] defendants or courts seeking a different result at guidelines sentencing had to emphasize its differences from discretionary sentencing. Making such a distinction did not appear to be an insurmountable hurdle, because the *Williams* Court's analysis was inextricably linked to the rehabilitative theory underlying discretionary sentencing. The *Williams* Court emphasized that sentencing courts needed full information about the defendant in order to meet the goal of rehabilitative punishment.[267] The Court also recognized that the benefits to the defendant under rehabilitative sentencing were significant, including more lenient penalties.[268] In *Williams*, the Court also emphasized that the defendant had not challenged the veracity of the hearsay information contained in the presentence report.[269]

Despite the significant changes in sentencing, most courts have held that gnidelines sentencing is not so different from discretionary sentencing as to warrant a different analysis of the confrontation or due process right to preclude hearsay.[270] Judicial consideration of the issue, however, has revealed sharply divergent views. Two federal appellate court panels held that there was a right to confrontation at some sentencings.[271] En banc courts reversed both of these cases with strong dissents demonstrating the deep disagreement about the preclusion of hearsay.

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264 FED. R. EVID. 1101(d) (3).

265 *See supra* note 193 and accompanying text.

266 337 U.S. 241 (1949).

267 *Id.* at 247.

268 *Id.*

269 *Id.* at 244.

270 United States v. Sciarrino, 884 F.2d 95, 96-97 (3d Cir. 1989), *cert. denied*, 493 U.S. 997 (1989).

271 United States v. Silverman, 945 F.2d 1337 (6th Cir. 1991), *vacated*, 976 F.2d 1502 (6th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1595 (1993); United States v. Wise, 923 F.2d 86 (8th Cir. 1991), *vacated*, 976 F.2d 393 (8th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1592 (1993).

In *United States v. Silverman*,[272] the Sixth Circuit, en banc, reviewed sentences that were founded on determinations of relevant conduct based on hearsay.[273] The majority upheld the sentences, concluding that the standards of *Williams* controlled, and that the use of hearsay did not violate the confrontation clause or the due process clause.[274] The court noted that other Sixth Amendment guarantees, such as the right to jury trial, are not available at sentencing.[275]

In a vigorous dissent, Chief Judge Merritt argued that *Williams* was inapplicable to the guidelines sentencing scheme:

> [T]he new system completely changes the discretionary, nonadversary, nonfactual nature of the sentencing process by introducing the adversary sentencing hearing, the need for precise and accurate findings of disputed facts about other criminal conduct and absolute rules to be applied without deviation requiring the district court to increase dramatically the sentence based on the unconvicted conduct.[276]

Merritt analogized guideline sentencing for relevant conduct to the enhanced sentencing system examined in *Specht v. Patterson*,[277] where the Supreme Court refused to extend the *Williams* rationale to a novel and substantively different sentencing system. Merritt argued that the *Specht* holding required application of the confrontation clause wherever that "[sentencing] scheme requires fact-finding in an adversary setting"[278] and "the sentence is based in part on multiple hearsay."[279]

In *United States v. Wise*,[280] the Eighth Circuit sitting en banc considered the procedural requirement at guidelines sentencing, again in the context of an increased sentence based on alleged relevant conduct.[281] The trial court had relied on hearsay evidence in finding that there was relevant conduct.[282] A panel of the Eighth Circuit reversed the trial court for failing to evaluate whether the reliance on hearsay violated the confrontation clause.[283] The en banc court reversed the

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272 976 F.2d 1502 (6th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1595 (1993).

273 *Id.* at 1503.

274 *Id.* at 1508-11. Judge Nelson concurred in the judgment, but argued that hearsay should be admitted if it met the "probable accuracy" test mentioned in U.S.S.G., *supra* note 10, § 6A1.3(a). *Id.* at 1517 (Nelson, J., concurring).

275 *Id.* at 1511. For an argument that there should be a right to jury determination of facts that determine a defendant's sentence, see Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 773-77 (1993).

276 *Silverman*, 976 F.2d at 1525 (Merritt, C.J., dissenting).

277 386 U.S. 605 (1967).

278 *Silverman*, 976 F.2d at 1526 (Merritt, C.J., dissenting).

279 *Id.*

280 976 F.2d 393 (8th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1592 (1993).

281 *Id.* at 396.

282 *Id.*

283 *Id.* at 395.

panel and affirmed the sentence.[284] Although the problem of hearsay was not critical to the court's decision, the opinion noted that neither a right to confrontation nor due process limited the trial court's consideration of evidence at sentencing.[285]

The importance of having testimony subject to cross-examination as the basis for sentencing is illustrated in *United States v. Simmons*,[286] a case in which a court had the opportunity to review the actual wituess' testimony. In *Simmons*, the appellate court reviewed evidence relied upon by the trial court to determine the quantity of drugs distributed by Simmons' codefendant, Bowers.[287] The trial court relied in part on testimony from Pierce, a customer of Bowers. Pierce testified that she had bought between one tenth and one gram of cocaine base from Bowers on more than twenty occasions.[288]

During Pierce's cross-examination, however, the defense established that Pierce had committed perjury by testifying falsely about her own extensive use of crack.[289] Also, when repeatedly questioned about her drug dealings with the defendant, she answered inconsistently and imprecisely, admitting that the events "ran together."[290] The appellate court concluded that Pierce's testimony was not reliable and could not be a factor in determining the quantity of drugs distributed by Bowers.[291] Because the presentence report had relied on Pierce's statement, the appellate court vacated Bowers' sentence and remanded for a further factual hearing to determine the quantity of drugs distributed by Bowers.[292]

Simmons demonstrates the importance of firsthand testimony. Had Pierce not testified at trial, the prosecutor probably would have reported her information to the probation officer writing the presentence report. If the quantity had been challenged by the defendant, the government most likely would have asked an officer or agent who had interviewed Pierce to testify as to what she had said. The government would not have been obligated to put Pierce on the stand. There would have been no perjury. The officer undoubtedly would have been consistent and confident in answering questions. In assessing the credibility of witnesses for the prosecution and the defense, the court would have had a clean-cut government agent on one

284 *Id.* at 405.
285 *Id.* at 400-04.
286 964 F.2d 763 (8th Cir.), *cert. denied*, 113 S. Ct. 632 (1992).
287 *Id.* at 771.
288 *Id.*
289 *Id.* at 769.
290 *Id.* at 776.
291 *Id.*
292 *Id.*

side and a defendant convicted of distributing large quantities of narcotics on the other.

When hearsay is presented by an agent or in the presentence report, the court has no opportunity to assess demeanor, consistency of the informant's story, bias, or general credibility. Instead the court relinquishes to the government or the probation officer its opportunity to judge the credibility of the actual witness to the alleged criminal conduct. As a result, the witness is never questioned under oath or cross-examined by an adversary.[293]

Although hearsay was routinely relied on in pre-guidelines discretionary sentencing, judges had wide discretion to treat hearsay as they chose. As noted earlier, one judge has written that, under discretionary sentencing, judges usually omitted from consideration facts in the presentence report that the defendant denied, such as hearsay statements.[294] Clearly, however, neither statute nor case law *required* such omissions. At a minimum, under discretionary sentencing a judge could give evidence less weight if it seemed less reliable. The actual impact of hearsay at discretionary sentencing usually could not be determined because judges did not have to state the reasons for their sentences. Because hearsay was an acceptable basis for pre-guidelines discretionary sentencing, courts reluctant to permit it at guidelines sentencing must distinguish between the two sentencing schemes.

Despite the importance of firsthand testimony, as demonstrated in *Simmons*, and some persuasive dissents in circuit courts' en banc opinions, recent cases indicate that most federal courts are unlikely to preclude reliance on hearsay at most guidelines sentencings.[295] Accordingly, preventing consideration of unreliable hearsay must be achieved by other means.

C. Specialized Rules

Courts have varied dramatically in their determinations of evidentiary issues at sentencing. This variation is consistent with the practice under pre-guidelines discretionary sentencing, in which courts determined their own procedures for sentencing. Thus, for example, with no statutory or recognized constitutional rule against the use of hearsay at sentencing, most courts have accepted it and have required only some minimal indicia of reliability.[296] Similarly, most courts have con-

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293 Reliance on hearsay by an agent is routine and much less troublesome at some points in criminal proceedings, such as a preliminary hearing, because the decision will be reevaluated by a grand jury and later by a judge or jury.

294 United States v. Clark, 792 F. Supp. 637, 649 (E.D. Ark. 1992).

295 *See* cases cited *supra* this section.

296 *See* United States v. Query, 928 F.2d 383, 384-85 (11th Cir. 1991) (hearsay evidence may be relied upon to establish quantity of drugs involved so long as defendant has the opportunity to rebut the evidence); United States v. Holmes, 961 F.2d 599, 603 (6th Cir.),

tinued to judge the evidence under a mere preponderance of the evidence standard.[297] However, some courts have developed, explicitly or implicitly, specialized evidentiary rules for sentencing. Scholars have also suggested specialized rules.

Many of the specialized rules developed through case law are designed to guide courts in deciding whether to rely on hearsay. For example, some courts have placed the burden on the defendant to show that the declarant lacked personal knowledge or had a reason to lie.[298] Other courts have placed a more general burden on defendants to rebut hearsay.[299] If the defendant fails to rebut the hearsay, the court accepts it as true.[300] This shifting of the burden, however, is contrary to the principle at trial that the government has the burden of proof on each element of the offense.[301] In the context of relevant conduct, the rule requires the defendant to prove the negative, that is, that the defendant did not engage in the alleged conduct.[302] Shifting the burden does not establish the reliability of the initial hearsay; instead, it permits the court to suggest that the defendant has control of whether or not the hearsay is credited. This illusion hides the underlying, critical need for reliable information in sentencing.

Although most courts have been reluctant to impose a higher burden of proof or to prohibit hearsay at sentencing, some courts have explicitly acknowledged their concerus with the potential unreliability of hearsay and have imposed rules regarding the adequacy of the hearsay evidence.[303] Some reviewing courts have required an ex-

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cert. denied, 113 S. Ct. 232 (1992); United States v. Chavez, 947 F.2d 742, 746 (5th Cir. 1991); United States v. Griffin, 945 F.2d 378, 381-82 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1958 (1992); United States v. Shewmaker, 936 F.2d 1124, 1129 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 884 (1992); United States v. Hubbard, 929 F.2d 307, 309-10 (7th Cir.), *cert. denied*, 112 S. Ct. 206 (1991); United States v. Sciarrino, 884 F.2d 95, 96-97 (3d Cir.), *cert. denied*, 493 U.S. 997 (1989).

297 *See supra* note 218 and accompanying text.

298 *See, e.g.*, United States v. Aymelek, 926 F.2d 64, 68 (1st Cir. 1991).

299 *See* United States v. Corbin, 998 F.2d 1377 (7th Cir. 1993); United States v. Addison, 1993 WL 318780 (6th Cir. 1993) (per curiam); United States v. Chavez, 947 F.2d 742, 746-47 (5th Cir. 1991); United States v. Griffin, 945 F.2d 378, 381-82 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1958 (1992); United States v. Hubbard, 929 F.2d 307, 309-10 (7th Cir.), *cert. denied*, 112 S. Ct. 206 (1991).

300 *See, e.g.*, United States v. Streich, 987 F.2d 104, 107 (2d Cir. 1993) (per curiam) (stating that the defendant's failure to contest a presentence report's hearsay allegations, which were based on interviews with informants, meant that sentencing court could accept the allegations as true).

301 *In re* Winship, 397 U.S. 358, 364 (1970).

302 *See infra* note 342 and accompanying text.

303 *See, e.g.*, United States v. Miele, 989 F.2d 659, 664 (3d Cir. 1993) (arguing that the sufficient indicia of reliability standard "should be applied rigorously").

planation of why hearsay is reliable.[304] In *United States v. Padilla*,[305] the Tenth Circuit required that the hearsay source be named.[306] Other courts have required corroboration of additional criminal conduct by other evidence.[307]

Each of these rules incrementally improves the factual basis for sentencing and reflects how people commonly deal with hearsay in nonlegal matters. Requesting an explanation for why hearsay is reliable essentially asks the proffering party, why do you believe this? Requiring that the ource be named may permit the defense to argue why that particular individual should not be believed. Requiring corroboration of hearsay enables the court to base its fact-finding in part on the other evidence.

Under the Federal Rules of Evidence, these incremental requirements would not suffice for admissibility. Hearsay that does not meet an exception may not be used for substantive evidence.[308] Bolstering hearsay with corroborating physical evidence or testimony does not make it admissible.[309]

The Federal Rules of Evidence treat the admissibility of evidence and the weight the fact-finder chooses to give that evidence as separate determinations. The rules concerning hearsay initially ensure that each piece of evidence admitted has sufficient reliability to be a factor in fact-finding.[310] At sentencing, however, decisions of admissibility and weight are essentially merged.

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304 *See* United States v. Ortiz, 993 F.2d 204, 208 (10th Cir. 1993) (finding that the district court sentence was clearly erroneous for relying upon FBI agent's testimony which was based solely on the uncorroborated, out-of-court statement of a confidential informant).

305 947 F.2d 893 (10th Cir. 1991).

306 *Id.* at 895-96.

307 *See, e.g.*, United States v. Hubbard, 929 F.2d 307, 309-10 (7th Cir.) (finding that hearsay evidence of intent to cause bodily injury was corroborated by physical evidence), *cert. denied*, 112 S. Ct. 206 (1991); United States v. Zuleta-Alvarez, 922 F.2d 33, 36-37 (1st Cir. 1990) (stating that hearsay evidence of drug quantity was corroborated by other witness' testimony at grand jury and trial), *cert. denied*, 111 S. Ct. 2039 (1991).

308 FED. R. EVID. 802.

309 The Federal Rules of Evidence provide that a hearsay statement which does not fall within a specified exception, but has "equivalent circumstantial guarantees of trustworthiness," may be admitted if the court determines that

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 803(24); *see also* FED. R. EVID. 804(5) (same).

310 FED. R. EVID. 801-803. In addition to rules governing hearsay, other Federal Rules of Evidence impose standards of reliability. *See, e.g.*, FED. R. EVID. 602 (prohibiting testimony if witness lacks personal knowledge of the matter of the testimony); FED. R. EVID. 701 (limiting opinion testimony by lay witnesses); FED. R. EVID. 702 (allowing opinion testimony by expert witness only if that witness possesses knowledge, skill, experience, training,

Some courts have not explicitly acknowledged their concerns about reliability, but have demonstrated them by "discounting" the facts as established by hearsay evidence. Discounting occurs when a judge makes a finding that a specific amount of harm—such as a specific quantity of drug distribution—has been established by a preponderance of the evidence, but the judge nevertheless bases the sentence on a lesser amount. This implicit weighing of hearsay can occur when the testimony about the quantity of drugs is necessarily an estimate because the full quantity was not seized. A court may elect to err on the side of caution by taking the smallest amount stated and multiplying it by the number of transactions.[311]

Sometimes the discounting is more extreme. Substantial discounting may suggest that the court is not persuaded about the quantity, despite the evidence. For example, in *United States v. Epstein*,[312] a jury convicted Epstein of conspiring to possess with the intent to distribute cocaine.[313] He was acquitted of a charge of attempting to possess with the intent to distribute two kilograms of cocaine.[314] The government estimated that Epstein and his coconspirator distributed between fifteen and seventeen kilograms of cocaine.[315] At the sentencing, the court reached two critical factual conclusions. First, the court concluded that the coconspirator's "testimony was sufficiently credible to establish the amount of cocaine sold by the defendant."[316] Next, the court conceded that the coconspirator might have overestimated the quantity and noted that the coconspirator's testimony was not totally corroborated.[317] The court then discounted the quantity by fifty percent and held Epstein accountable for distributing between seven and a half and eight and a half kilograms of cocaine.[318]

Epstein suggests the discomfort some trial judges experience with low standards of reliability for evidence. One could argue that if the trial court was so uncomfortable it should have found that the evi-

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or education regarding the subject about which the witness would testify); FED. R. EVID. 901 (providing for authentication or identification of evidence as a "condition precedent to admissibility"); FED. R. EVID. 1002 (generally requiring the original of a writing, recording, or photograph to prove the contents thereof).

311 *See, e.g.*, United States v. Montoya, 967 F.2d 1 (1st Cir.), *cert. denied*, 113 S. Ct. 507 (1992). A DEA agent testified at Montoya's sentencing that a government informant had reported purchasing two to five ounces of cocaine per week from Montoya for three months. The court sentenced Montoya for selling only two ounces of cocaine per week for the twelve week period. *Id.* at 4.

312 United States v. Epstein, No. 89-CR809-2, 1992 U.S. Dist. LEXIS 541 (N.D. Ill. Jan. 15, 1992).

313 *Id.* at *4.

314 *Id.*

315 *Id.*

316 *Id.* at *8.

317 *Id.* at *10.

318 *Id.* at *10-11.

dence lacked sufficient indicia of reliability. Instead, this court seems to have done what was possible before guidelines—weighted evidence without wholly accepting or rejecting what was proffered.[319]

The application of ad hoc rules by different judges in different cases raises the possibility of disparities that the guidelines were specifically intended to minimize.[320] When one judge discounts hearsay evidence about quantity by fifty percent and another does not, defendants may receive dramatically different sentences for similar crimes. While this compromise accounting may resolve the issue in an individual case, it works against the guidelines' goal of avoiding unwarranted or unnecessary disparity in sentencing.

Commentators have also advocated that specialized rules be applied to sentencing, both with respect to burdens of proof and to the admissibility of evidence.[321] Some have urged the adoption of a higher burden of proof at sentencing. Judy Clarke has argued, as did the dissenting judges in *United States v. Restrepo*,[322] that proof beyond a reasonable doubt should be required for criminal conduct that was not part of the offense of conviction.[323] She has also argued that the clear and convincing standard should apply to more traditional sentencing factors.[324]

Professor Margaret Berger has proposed three limitations on the use of hearsay at sentencing: first, prohibiting use of hearsay statements by cooperating individuals to prove relevant conduct; second, requiring corroboration for hearsay at sentencing; and third, limiting admissibility of multiple hearsay.[325] These proposed rules directly ad-

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319 The *Epstein* decision highlights one benefit of the guidelines scheme. Because the guideline require courts to present their reasoning, the *Epstein* court was forced to reveal how it had weighted the evidence. As discussed in part I of this Article, the pre-guidelines sentencing system allowed judges to sentence without expressly stating what factors motivated the sentence. In contrast to the former system, the guidelines' mandatory disclosure of reasoning invites scrutiny and analysis, which facilitate improvements to the guidelines.

320 Congress specifically directed the Sentencing Commission to establish sentencing policies with the purpose of "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B) (1988).

321 *See* Becker & Orenstein, *supra* note 263, at 890-91; 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. SENTENCING REP. 96 (1992); Judy Clarke, *The Need for a Higher Burden of Proof for Fact Finding Under the Guidelines*, 4 FED. SENTENCING REP. 300 (1992).

322 946 F.2d 654, 663 (9th Cir. 1991) (en banc) (Pregerson, J., dissenting), *cert. denied*, 112 S. Ct. 1564 (1992).

323 Clarke, *supra* note 321, at 302.

324 *Id.*

325 Berger, *supra* note 321, at 99. Berger also argues that the goverument should not be permitted to relitigate at sentencing a count on which a defendant was acquitted. This suggestion to prohibit evidence of acquitted counts is consistent with the Ninth Circuit's reasoning in United States v. Brady, 928 F.2d 844, 851-52 (9th Cir. 1991), that it is improper to penalize a defendant for conduct which was the basis for an acquittal. Along the same vein, Berger proposes an "infield fiy rule" that would prohibit the goverument from

dress the reliability and accuracy of fact-finding by targeting some of the most common and troubling kinds of hearsay used at sentencing. Excluding hearsay by cooperating individuals would eliminate a common source of hearsay about the defendant's relevant conduct and role in the offense. Yet, this proposed rule does not address the very similar testimony by paid informants. Furthermore, as Berger points out, hearsay statements by cooperating individuals are often excluded under the Federal Rules of Evidence.[326]

Requiring corroboration of hearsay, consistent with some judicial rulings, raises the level of reliability, but does not address the underlying problem that occurs when part of the evidence is unreliable. Similarly, limiting multiple hearsay means that the testifying witness judges the credibility of the actual declarant, rather than another individual who reported to the in-court witness. This requirement still precludes the court from making its own assessment about the declarant's perception, narration, and sincerity.

Judge Edward Becker and Professor Aviva Orenstein have gone one step further, suggesting that the Supreme Court, acting through an Advisory Committee of the Rules of Evidence, amend the evidentiary rules to make selected rules applicable at sentencing.[327]

Each of these suggestions demonstrates the general concern with the inadequacy of existing procedural safeguards for guidelines sentencing. Each attempts to improve the accuracy of fact-finding in at least some cases or to shift the burden of proof so that an erroneous decision is less likely to harm a defendant. Adopting piece-meal rules, however, fails to recognize the fundamental concern that a defendant should be sentenced based on reliable evidence. Specialized rules achieve some desired results, such as limiting the sentencing increases for relevant conduct, but they fail to recognize that the substantive question of what constitutes relevant conduct and the evidentiary question of what is reliable evidence are best addressed separately. If there is a consensus that defendants should be sentenced on reliable evidence, then Congress and the federal judiciary should look for a comprehensive solution.

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introducing evidence at sentencing of dropped or previously uncharged crimes. Berger, *supra* note 321, at 99. These suggestions may be viewed as substantive rules which address how relevant conduct should be defined, rather than how to accurately and reliably determine relevant conduct. They would greatly limit new evidence of relevant conduct at sentencing.

326 Berger, *supra* note 321, at 99.

327 Becker & Orenstein, *supra* note 263, at 909-14.

III
A New Exploration of Fact-Finding at Sentencing

Despite the courts' substantial attention to guidelines fact-finding, the goal of increased reliability in fact-finding at sentencing has not been attained. A fundamental reason for this failure is the mistaken reliance on pre-guidelines cases to determine guideline procedures.[328] A different approach is necessary.

This section analyzes procedures for fact-finding at guidelines sentencing according to theories of evidence. The analysis evaluates two evidentiary protections with important differences: the impact of raising the burden of proof and the impact of requiring more reliable evidence at sentencing. The analysis then evaluates the extent to which these protections advance the sometimes inconsistent goals of achieving accuracy in fact-finding and not unfairly burdening defendants with errors. Factors affecting this evaluation include the likelihood that evidence offered at sentencing will be inculpatory and the probability that evidence will be false. The loss of discretion by judges in the sentencing process exacerbates the problem of unjust fact-finding because judges can no longer ameliorate the harsh effects of low standards of reliability and proof at sentencing. The section concludes by outlining appropriate procedures for reliable fact-finding at guidelines sentencing.

A. Raising the Burden of Proof

Raising the burden of proof is often considered as a way to improve the reliability of fact-finding at sentencing.[329] However, raising the burden of proof does not guarantee greater accuracy in sentencing determinations. Indeed, as illustrated below, raising the burden of proof may result in fewer accurate outcomes. The benefit to the defendant is that the government bears more of the errors in sentencing decisions if the government has a higher burden.

The impact of changing the burden of proof may be demonstrated by looking at the determination of guilt or innocence and evaluating how outcomes change if the burden of proof is lowered. Assume a null hypothesis that the defendant is guilty. For each defendant, one of two possibilities is correct: The defendant is guilty or the defendant is innocent. For each defendant, the jury will either acquit or convict. Assume the following results in 400 cases where the government's burden of proof is guilt beyond a reasonable doubt:

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328 *See* discussion *supra* Part II.

329 *See, e.g.*, David N. Adair, Jr., *House Built on a Weak Foundation—Sentencing Guidelines and the Preponderance Standard of Proof*, 4 Fed. Sentencing Rep. 292 (1992).

	Jury Convicts	Jury Acquits
DEFENDANT IS GUILTY (300 X)	220 (correct)	80 (Type I error)
DEFENDANT IS INNOCENT (100 X)	10 (Type II error)	90 (correct)

Under the assumptions used,[330] there are ninety errors. Only ten of these errors are instances in which the hypothesis is false, but accepted, referred to in statistics as a Type II error.[331] In this example, these ten Type II errors are instances of convicting the innocent. The other eighty errors are Type I errors, in which the hypothesis is true, but falsely rejected.[332] These eighty Type I errors represent guilty defendants who are acquitted.

Now, assume the burden of proof is lowered to a preponderance of the evidence, which results in an increase in convictions.

	Jury Convicts	Jury Acquits
DEFENDANT IS GUILTY (300 X)	256 (correct)	44 (Type I error)
DEFENDANT IS INNOCENT (100 X)	15 (Type II error)	85 (correct)

There are now fifty-nine errors, a reduction of thirty-one errors. However, fifteen of the errors are now Type II errors, representing innocent defendants who are convicted.

For determinations of guilt or innocence, a higher burden of proof means that the number of Type II errors decreases, despite the fact that the total number of errors increases. The principle used to justify the high burden is commonly cited as, "[i]t is far worse to convict an innocent man than to let a guilty man go free."[333]

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330 These numbers are hypothetical. The numbers in this and in the next chart illustrate the principle that the number of convictions will increase as the burden of proof is lowered.

331 JOHN FREUND & GARY SIMON, MODERN ELEMENTARY STATISTICS 301 (1992).

332 *Id.*

333 Justice Harlan stated this principle in his concurring opinion in *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). He further noted that:

The questions of whether and how standards at sentencing should be raised can only be answered if one identifies what kind of error is most problematic. For example, the sentencing factor that has received the most attention with regard to the burden of proof is relevant conduct.[334] Many commentators have urged that the burden of proof should be at least clear and convincing for relevant conduct that will substantially affect a defendant's sentence.[335] Those who urge a higher burden of proof are actually lobbying for more total errors, but fewer Type II errors. Because the government has the burden of proof for relevant conduct, juries will find fewer defendants to have committed relevant conduct that they did not in fact commit, as is the case with the guilt determination at trial. However, more defendants who did commit relevant conduct will be found not to have done so, resulting in an increase in total errors.[336]

Historically, one reason given for the lack of procedural protections at sentencing was that, after conviction, the defendant should no longer be given the benefit of the doubt; the government and the defendant should equally bear the risk of inaccuracy at sentencing.[337] As long as the burden of proof is on one party, however, there will not be actual equality. That is, even with a preponderance of the evidence standard, if the evidence is fifty-fifty, the party with the burden of proof loses. Nevertheless, the preponderance of the evidence standard does present the most equal consequences possible. The question, then, is whether producing fewer total errors is preferable to more total errors with fewer borne by the defendant.

In each instance of shifting the burden there is a cost. When the guilty go free because of the beyond a reasonable doubt standard at trial, criminals who may victimize others are free to return to the community. The Constitution requires this cost, rather than convicting

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> It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation.

Id.

334 *See supra* note 323. For a listing of several articles critical of the treatment of relevant conduct under the guidelines, see *supra* note 159.

335 Clarke, *supra* note 321, at 302; Husseini, *supra* note 16.

336 This analysis assumes that the same evidence will be presented under either burden of proof. This assumption, however, is likely to be inaccurate for sentencings. Because the burden on the government at sentencings now is so low, both as stated and as applied, the government has little incentive to present substantial evidence. If the burden of proof were raised for sentencings, an indirect result might be that the parties would present more and better evidence. This in turn could result in more accurate sentencing decisions.

337 Kadish, *supra* note 22, at 254-55.

more innocent defendants.[338] Adjusting the burden of proof for a sentencing factor also has costs. Raising the burden of proof for relevant evidence will result in more total errors, but fewer defendants who are innocent of the relevant conduct will be punished for it. The increase in total errors means that more defendants who have committed identical conduct will receive different sentences, contrary to the goal of reducing disparity, and that more defendants will not be punished for the full harm that they committed. Thus, the choice in burdens of proof is a choice between these costs.

Because sentencing for additional relevant conduct seems so similar to convicting for criminal conduct, one might conclude that the choice of which costs to bear should be the same. Yet, with other factors the goal may more clearly be one of accuracy, reflected by fewer total errors, rather than shifting more of the errors to one party. If so, then the lesser burden of preponderance of evidence is appropriate.

Even once the burden of proof is specified, such as by a preponderance of the evidence, courts may not actually apply the standard in the same way. There are two possible, but different, applications of the preponderance standard: either the evidence convinces the fact finder that the proposition is more likely than not, or the weight of the evidence, no matter how slight the total evidence, is in favor of the proponent.[339] The distinction between these applications is critical. The first application may impose a higher standard for the degree of certainty of the ultimate proposition. Under this application, even if the proponent presents substantially more evidence (qualitatively and quantitatively), the proponent will still lose if the fact-finder does not believe that the proponent has established that the proposition is

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338 In explaining why the beyond a reasonable doubt standard is the correct one at criminal trials, the Court has stated that "the interests of the defendant are of such magnitude . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk upon itself." Addington v. Texas, 441 U.S. 418, 423-24 (1979).

339 V. C. Ball stated this difference as follows:

> In civil cases, putting aside certain special types, the finding must be based upon "a preponderance of the evidence." At this point the courts divide. One group treats this latter term as meaning any preponderance, while others require that the preponderance be a "fair" one, or that the jury "believe in the truth" of the fact, or be "satisfied" or "convinced."

V. C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 808 (1961).

Justice Harlan also expressed concern about the two possible interpretations of the preponderance burden of proof: "The preponderance test has been criticized, justifiably in my view, when it is read as asking the trier of fact to weigh in some objective sense the quantity of evidence submitted by each side rather than asking him to decide what he believes most probably happened." In Re Winship, 397 U.S. 358, 371 n.3 (1970) (Harlan, J., concurring).

more likely than not.[340] Under the second application, the proponent would win.

Obviously differing applications of the same burden of proof may be a problem at the guilt phase as well as at sentencing. But there are several reasons why defining the burden of proof may pose a more significant problem with fact-finding at sentencing. First, courts are not accustomed to having to apply any burden of proof in sentencing decisions.[341] At discretionary sentencing, a sentence within the statutory range did not have to be premised on any particular evidence. A court could impose any sentence within the statutory range based on little or no evidence.

Second, courts do not routinely make ultimate fact determinations based on evidence that is inadmissible under the Federal Rules of Evidence. Courts generally apply the preponderance standard to evidence inadmissible under the Federal Rules of Evidence only when deciding preliminary matters such as a motion to suppress evidence. Although a decision regarding suppression is important, it is not final and can be reconsidered in the course of a trial. Using evidence of such low reliability in determining ultimate facts aggravates the confusion between the competing conceptions of the preponderance standard. If all of the evidence under evaluation meets standards of admissibility under the Federal Rules of Evidence, which ensure some reliability, then a finding of preponderance of the evidence is also more likely to be a finding of more likely than not. If, on the other hand, all of the evidence is hearsay deemed unreliable by the Federal Rules of Evidence, then a finding of preponderance of the evidence is less apt to rise to the level of more likely than not.

Third, the unique posture of the parties at sentencing compounds the problem of defining the burden of proof. Frequently, the government will propose an increased sentence because of specific behavior alleged to have been committed by the defendant. The only defense to the allegation may be to deny the occurrence of the event. Proving this negative is difficult.[342] Moreover, the government's evi-

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340 Some have assumed that this application is undisputed:

> All would agree that what counts is the jury's belief in the existence (or nonexistence) of the disputed fact, and the extent to which the evidence actually produces that belief; surely we are not seeking the jury's estimate of the weight of evidence in the abstract, apart from its power actually to convince or persuade them.

Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 53 (1961).

341 At pre-guidelines discretionary sentencing, no burden of proof was required because no specific factual determinations were required. *See supra* note 212 and accompanying text.

342 The problem of proving a negative proposition also arises in civil forfeiture proceedings aimed at illegal drug activity under 21 U.S.C. § 881. Under that statute, the government need only demonstrate probable cause to believe that the property facilitated

dence is often hearsay presented by a government agent, likely to be found credible by the court. As a convicted person, the denying defendant is much less likely to be found credible. If the government is required to have the informant testify in order to have the benefit of the informant's information, the court can at least judge the credibility of the informant, rather than relying on the agent's assessment. Absent such a requirement, courts frequently sentence after weighing a government agent's testimony of hearsay statements against a convicted defendant's denial.[343]

This situation of inequality between the opposing parties contrasts sharply with the common situation in which the burden of preponderance of the evidence is applied: a civil dispute in which the opposing parties approach the court as equals without prejudgment by the court of their likely credibilities. One reason the beyond a reasonable doubt standard is necessary at criminal trials is the imbalance in favor of the prosecution resulting from the greater credibility deemed to accompany government witnesses.[344] This imbalance in favor of the government may be an even more serious problem once the defendant has lost the cloak of the presumption of innocence, as is the case at sentencing.

The question presented in this context is: How can a trial court find such limited evidence, deemed unreliable by the Federal Rules of Evidence, to establish the relevant conduct as more likely than not? The outcome may depend on the reliance on a preponderance of the evidence standard that requires no minimum level of confidence in

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illegal drug activity. The owner of the property then has the burden of demonstrating innocent ownership in order to retain the property. Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 284 (1992). The claimant must prove a negative: the absence of knowledge of illegal activity. *Id.* at 288.

343 *See, e.g.*, United States v. McFarland, 1993 WL 72429 (10th Cir. 1993) (government agent's hearsay testimony concerning amount of drugs credited over defendant's testimony; the reviewing court noted that the goverument could have called the informant who had supplied information to the agent, but that in accordance with U.S.S.G., *supra* note 10, § 6A1.3(a), goverument was not obligated to do so); United States v. Sherbak, 950 F.2d 1095, 1100-01 (5th Cir. 1992) (affirming the district court's decision to credit unsworn statement of Drug Enforcement Agency agent over the defendant's counter-assertions was upheld); United States v. Griffin, 945 F.2d 378, 381-82 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1958 (1992) (concluding that the state agent's testimony, based partly on a confidential informant's statement classifying drug possessed by defendant as crack cocaine rather than powder cocaine, was credible because defendant failed to rebut it).

344 Another possible bias is an attempt by courts to please the more powerful of the represented interests. Richard Higgins & Paul Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130 (1980) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 416 (2d ed. 1977)). At sentencings, there may be substantial support from victims or law enforcement personnel for a severe sentence, but there is rarely support for a lesser sentence except from the defendant's friends and family.

the decision.[345] Some courts have suggested that decisions based on weak evidence such as hearsay are acceptable if the defendant has the opportunity to rebut the testimony or call any witnesses he or she chooses.[346] This approach, however, transforms the government's burden of proof into the much lighter burden of production. Rather than having to convince the fact-finder, the government need only present some evidence with "sufficient indicia of reliability" for its proposition.[347] If the defendant fails to present any contradictory evidence, the court finds in favor of the government.[348] Sometimes this result occurs even when the defendant has denied the alleged facts.[349]

Applying a higher burden of proof at sentencing would avoid the problem of a court sentencing a defendant when the court does not have an abiding conviction of the factual basis for the sentence. The language "clear and convincing," although not assigned a mathematical probability, conveys the idea that the fact-finder must do more than simply weigh which side has the most evidence. However, if the goals are to minimize error and to ensure that a court bases its decision on evidence reliable enough to establish that the proposed fact is more likely than not, a higher burden is unnecessary and may add confusion while increasing total error.

The level of confidence in a decision is related to both the burden of proof and the reliability of the evidence considered. When the burden of proof is higher than the preponderance standard, either clear and convincing or beyond a reasonable doubt, the reliability of the evidence may not be an issue because the fact-finder's determination so clearly evinces an abiding belief in the evidence. However, when there is a possibility that the fact-finder may be evaluating the evidence on each side and deciding in favor of the party that has better evidence, the reliability of the underlying evidence becomes critical. Absent an adequate standard of reliability, the fact-finder's choice of which side has the better evidence may not instill confidence about

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345 For a discussion on the significance of the burden of proof assigned, see *supra* part II.A.

346 *E.g.*, *Griffin*, 945 F.2d at 381-82; United States v. Hubbard, 929 F.2d 307, 309-10 (7th Cir.), *cert. denied*, 112 S. Ct. 206 (1991); United States v. Query, 928 F.2d 383, 384-85 (11th Cir. 1991); United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990).

347 U.S.S.G., *supra* note 10, § 6A1.3(a) (stating that a sentencing court "may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy").

348 *See, e.g.*, United States v. Mir, 919 F.2d at 943 (concluding that because defendant failed to offer evidence to rebut presentence report's calculation of the quantity of drugs and its finding that defendant was a leader in a narcotics conspiracy, district court could consider these factors into consideration at sentencing).

349 *See, e.g.*, United States v. Query, 928 F.2d 383, 384-85 (11th Cir. 1991) (finding that the sentencing court accepted hearsay statements although the defendant denied their accuracy).

the decision among the participants in or observers of the criminal justice system.

B. Requiring Reliable Evidence

The appropriateness of imposing limitations on the evidence a court will hear has long been a matter of debate. Some commentators contend that a judge, unlike a juror, is fully capable of giving even unreliable evidence the amount of credit it is due and no more.[350] This argument has been offered in support of the proposition that Federal Rules of Evidence should not apply or should be eased at bench trials.[351] The drafters of the Federal Rules of Evidence rejected this argument.[352]

The impact of considering evidence inadmissible under the Federal Rules of Evidence cannot be precisely modelled or quantified.[353] Even an imprecise model may be of assistance, however, in clarifying the significance of such evidence. Assume that the government is trying to persuade the sentencing court that a defendant sold an additional kilogram of cocaine and therefore should receive a longer sentence. Assume further that the government bears the burden of proving that fact by a preponderance of the evidence. For the purpose of this hypothetical example, assume that there are two categories of potential evidence: evidence admissible under the Federal Rules of Evidence governing reliability ("FRE admissible evidence") and evidence not admissible under the Federal Rules of Evidence governing reliability ("FRE inadmissible evidence"). An example of FRE admissible evidence is an eyewitness who says she saw the defendant with the drugs. An example of FRE inadmissible evidence is a witness who heard someone who claimed to be an eyewitness say that she saw

350 Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 229-30 (1988); Joseph F. Weiss, Jr., *Are Courts Obsolete?*, 67 NOTRE DAME L. REV. 1385, 1391 (1992).

351 *See, e.g.*, Joseph F. Weis, Jr., *Are Courts Obsolete?*, 67 NOTRE DAME L. REV. 1385, 1391 (1992).

352 Rule 1101(a) states that the rules apply to courts and magistrates and makes no exception for bench trials. FED. R. EVID. 1101(a).

353 One recent research project attempted to measure how much jurors relied on hearsay. The study had jurors read different trial transcripts, some of which presented portions of the evidence via hearsay and some of which presented the evidence directly. The study concluded that there were no significant differences in the frequencies of verdicts among the jurors who read different transcripts. Richard Rakos & Stephen Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655, 661 (1992). Because a key criticism of hearsay testimony is that the factfinder has no opportunity to judge the demeanor of the declarant, studies based on transcripts are insufficient to assess the real concerns of hearsay.

the defendant with the drugs. Both items of evidence are clearly relevant.[354]

Consider what happens if the sentencing court only permits the FRE admissible evidence. Given the limitation, there may be many cases with little evidence and, because the government bears the burden of proof, there may be many cases where the court will *falsely* reject the hypothesis that the defendant sold the uncharged kilogram. This is acceptable because the purpose of the burden is to ensure there are more falsely rejected hypotheses, where a more culpable defendant receives a more lenient sentence, than falsely accepted hypotheses, where a defendant not culpable of distributing the additional kilogram receives a heavier sentence.

Now consider what happens if all relevant evidence, both FRE admissible and FRE inadmissible evidence is considered. There should be fewer errors if one assumes that all evidence is relevant and more likely to be true than false. But if we add one more assumption, that almost all evidence at sentencing is inculpatory, the result will be more *false acceptances* of the hypothesis that the defendant deserves a harsher sentence.

To see this more clearly, assume that all FRE inadmissible evidence is inculpatory. This evidence cannot reduce the number of false rejections, because at best, for the defendants, the evidence will be disbelieved, leaving the defendants where they started based on the FRE admissible evidence. Therefore, inculpatory FRE inadmissible evidence can only lead to increased sentences. More often than not—because the evidence has some expected net probative value—the result will be that defendants who would otherwise *falsely* get a lighter sentence will get the correct, heavier sentence. But on some number of occasions defendants who would correctly get the lighter sentence based only on FRE admissible evidence will falsely get a heavier sentence based on incorrect but admitted FRE inadmissible evidence.

As a consequence, admitting FRE inadmissible evidence at sentencing diminishes the significance of the government's burden by systematically making it easier for the prosecution to obtain a heavier sentence. If the additional evidence were equally divided between inculpatory and exculpatory evidence, admitting it might be justified because there would be fewer total errors. But, because the evidence is likely to be inculpatory, there may be fewer total errors only at the expense of more errors borne by the defendant.

The outcome is even more problematic if FRE inadmissible evidence is much more likely to be false than FRE admissible evidence.

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354 Under the Federal Rules of Evidence, evidence is relevant if it has any tendency to make the existence of a consequential fact more probable or less probable. FED. R. EVID. 401 (1992).

This seems probable when one considers the nature of information provided by informants. Assume informant A tells a government agent that the defendant sold the additional kilogram of heroin. If the agent believes the information, the agent will tell the prosecutor.[355] This agent is the only one who had the opportunity to judge the credibility of the informant. The prosecutor may decide whether or not to rely on the agent's credibility, but neither the prosecutor nor the court has an opportunity to judge the informant's credibility. If the government were required to present FRE admissible evidence,[356] the agent, the prosecutor and the judge would be able to assess, first hand, the credibility of the informant. Three levels of scrutiny are much more likely to find a falsehood or discrepancy than one. According to the rationale of the rules of evidence, the informant is also somewhat more likely to tell the truth under oath, subject to perjury.[357]

If one accepts the probability that more FRE inadmissible evidence will be false or inaccurate, then a possible result is that there will be more errors in judging the additional alleged conduct and that more of these errors will be falsely accepted hypotheses where a nonculpable defendant receives a heavier sentence.

Such sentencing errors are particularly serious because there is little chance of correction on appeal.[358] When FRE inadmissible evidence is permitted, the appellate court will only be able to review the agent's testimony at the sentencing.[359] Essentially, this review is one of sufficiency: absent some glaring inconsistency in the testimony, an appellate court will not reject the trial court's assessment of credibility.[360]

This article posits that even with pre-guidelines sentencing, there should have been more stringent evidentiary standards at sentencing. To the extent that courts based their sentences in part on specific

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355 This analysis assumes that the agents and prosecutors are acting honestly and ethically. A further problem is that the use of inadmissible evidence makes it more difficult to identify evidence that an agent or prosecutor has intentionally fabricated or exaggerated.

356 The Sentencing Guidelines now specify that the government need not call in the actual informant, but instead may simply call the agent who witnessed the informant's statement. *See* U.S.S.G., *supra* note 10, § 6A1.

357 FED. R. EVID. Art. VIII (Advisory Committee's Introductory Note: The Hearsay Problem).

358 Appellate courts review fact-finding at sentencing under a "clearly erroneous" standard. 18 U.S.C. § 3742(d); *see also* Braxton v. United States, 111 S. Ct. 1854, 1858 (1991) (clearly erroneous is proper standard for reviewing district court's finding of fact).

359 For an example and full discussion of the importance of firsthand testimony for appellate review, see *supra* note 286 and accompanying text.

360 A district court's assessment of witness credibility will not be disturbed unless it is "clearly erroneous." 18 U.S.C. § 3742(d); *see also* United States v. Sarasti, 869 F.2d 805, 807 (5th Cir. 1989) ("[c]redibility determinations are peculiarly within the province of the trier-of-fact, and we will not disturb the sentencing judge's findings").

facts, the above analysis applies. There is, however, a potentially more severe impact from FRE inadmissible evidence at guidelines sentencing than there was at pre-guidelines sentencing. The sentencing guidelines do not permit sentencing along a broad spectrum to accommodate varying degrees of reliability of evidence. Once a factor relevant to the defendant's sentence is alleged by the government or the defense, the court must make a factual determination. Moreover, with guidelines sentencing each factual resolution directly affects the individual's sentence, increasing the importance of the reliability of the evidence.[361]

A secondary effect of heightened evidentiary requirements is that they encourage parties to seek and obtain more reliable evidence. For example, if hearsay inadmissible under the rules is not permitted at sentencing then the party proffering the evidence will try to present the declarant.[362] The court can then judge the credibility of the declarant and the opposing party can cross-examine the declarant. Absent some minimal requirement, there is little incentive for the parties to bring more reliable evidence to the court.

To avoid substantial errors and instill confidence in sentencing decisions, courts should rely on FRE admissible evidence and should insist that the evidence establishes that the fact alleged is more likely true than not.

IV

APPLYING RULES OF EVIDENCE AT SENTENCING

Applying the Federal Rules of Evidence governing reliability[363] at sentencing best achieves the goal of improving the reliability of fact-finding.[364] These rules provide consistent standards for the admissibility of evidence among courts and among defendants. Even if courts did develop their own heightened standards for consideration of evi-

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361 As one commentator has noted, using the results of unreliable fact-finding "is like feeding bad data into a computer. The program may be flawless, and the execution of the program by the computer may he flawless, but the result will be wrong." Adair, *supra* note 329, at 294.

362 The commentary to U.S.S.G., *supra* note 10, § 6A1.3 now allows the government to present an agent as a witness giving testimony based on hearsay rather than requiring the government to produce the declarant. *See supra* note 175.

363 Many of the rnles of evidence do not concern the reliability of evidence and would not be applicable at sentencing. For example, Rule 105 relates only to an instruction to a jury regarding limited admissibility. FED. R. EVID. 105. Rules 301 and 302 regulate the use of presumptions only in civil cases. FED. R. EVID. 301-02. Rule 407 concerns subsequent remedial measures, which are not a relevant issue at sentence. FED. R. EVID. 401. Rule 408 relates to offers to compromise only in civil cases. FED. R. EVID. 408.

364 The idea of applying rules of evidence at sentencings proceedings is neither new nor untested. Rules of evidence have been applied at sentencing hearings in the military, M. R. EVID. 1101(c), and in state proceedings. The experiences of courts in these venues demonstrate the feasibility of applying rules of evidence at sentencing.

dence at sentencing, disparity among courts could result, which, under the guidelines, translates into disparity in sentences for defendants.[365]

The Federal Rules of Evidence also offer the significant advantage of addressing the admissibility of a wide range of evidence. They were developed to reflect the long history of common law evidence. Now, after eighteen years of use, the Federal Rules have been applied to all kinds of evidence likely to be presented at sentencing. With the established body of law for interpreting the rules, parties can predict what evidence will meet the standards of admissibility.

Applying the same evidentiary standards at sentencing as at trial also would diminish the likelihood of defendants being charged with "base conduct" by prosecutors hoping to greatly increase the sentence by demonstrating relevant conduct at sentencing. With the hearsay rule applicable at sentencing, initially raising relevant conduct at sentencing would be less attractive. The government would still be able to present additional evidence of relevant conduct at sentencing, but the evidence would have to meet established admissibility standards. The government would have an easier burden than at a trial, because the standard of proof would be a preponderance of the evidence rather than beyond a reasonable doubt. But the government could not convict the defendant for "base conduct" and then increase the defendant's sentence with inadmissible hearsay evidence, even with corroboration.

While applying the Federal Rules of Evidence at sentencing would not prohibit evidence of uncharged conduct, it does highlight the distinction between standards of evidence and substantive determinations about relevant conduct. The Federal Rules of Evidence impose a reliability filter on the evidence that can be considered. The requirement of reliable evidence is distinct from the issue of whether courts ought to sentence defendants for siguificantly different criminal acts than were proved at trial.

Equally important, the Federal Rules of Evidence are largely neutral with respect to which party is offering the evidence.[366] The Federal Rules of Evidence governing reliability were developed after much discussion over what constitutes reliable evidence. Much of the

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365 *See* discussion *supra* note 3.

366 Of the 63 Federal Rules of Evidence, three may be readily identified that contain special provisions for criminal cases depending on which party is using the evidence. Rule 404(b) permits evidence offered to prove a pertinent trait of character by an accused to prove action in conformity therewith, but limits the introduction of such evidence by the prosecution. FED. R. EVID. 404(b). The rape shield provision limits the admission of evidence of the victim's past sexual conduct. FED. R. EVID. 412. Finally, Rule 803(8) precludes the use of public reports setting forth matters observed by law enforcement personnel in criminal cases against defendants. FED. R. EVID. 803(8).

evidence currently offered at sentencing is presented by the government, particularly regarding relevant conduct and role in the offense. Personal history factors currently have little impact on a defendant's sentence. The guidelines are still developing, however, and commentators have urged greater consideration of personal factors.[367] Should the guidelines be so amended, the Federal Rules of Evidence would consistently apply to the newly relevant evidence.

Finally, the Federal Rules of Evidence are understood by the parties at sentencing. The rules would not bring in a new system that must be learned and interpreted. Reviewing the current sentencing procedures demonstrates how the rules would fit into the system. A look at the types of evidence commonly used at sentencing and an evaluation of those types of evidence under the rules of evidence reveal that the rules may be extended in full to the sentencing phase, with only minimal modifications.[368]

A. Compatibility with Existing Procedures

The sentencing proceeding is a forum easily adaptable to rules of evidence. The parties are each represented by legal counsel.[369] The court and counsel are familiar with the rules of evidence.[370] The issues to be determined are well defined by the guidelines.[371] The considerations about how to use the rules of evidence at sentencing involve trying to apply evidentiary rules to the existing sentencing procedure, without unnecessarily expanding the amount of time and resources needed for sentencing.

Two fundamental components of the current sentencing process are first, the court's acceptance of evidence from the trial or of the

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367 Daniel J. Freed & Marc Miller, *Handcuffing the Sentencing Judge: Are Offender Characteristics Becoming Irrelevant? Are Congressionally Mandated Sentences Displacing Judicial Discretion?*, 2 FED. SENTENCING REP. 189 (Dec. 1989/Jan. 1990) (arguing that the guidelines have been read too narrowly, without regard for the enabling legislation which clearly contemplated continued consideration of personal characteristics). *See also* Koh, *supra* note 16, at 1127-28.

368 The applicability of rules of evidence to sentencing is further demonstrated by their use in military proceedings. In military proceedings the fact-finder also determines the sentence. The fact-finder may be a jury or a judge. In either case, the Military Rules of Evidence, which are almost identical to the Federal Rules of Evidence, are applied at the presentencing proceeding, albeit in a relaxed manner. M. R. EVID. 1101(c). The application of the rules of evidence at sentencing in the military is a result of the recognition that the presentence proceeding is still an adversarial one.

369 *Cf.* Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. ILL. L. REV. 353 (arguing that application of rules of evidence in administrative proceedings may be inappropriate because the parties are not represented by counsel).

370 *Cf.* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 396 (1942) (noting that parties in an administrative proceeding may not be familiar with the rules of evidence).

371 *See supra* notes 148-53 and accompanying text.

defendant's admission to the government's proffer at the guilty plea; and second, the use of the presentence report as a focal point for identifying disputed issues and providing notice prior to the sentencing hearing of any facts or conclusions in the presentence report that a party wishes to challenge.

1. *The Court's Acceptance of Trial or Plea Evidence*

For the approximately sixteen percent of federal criminal cases that proceed to trial,[372] most of the fact-finding necessary for sentencing will be based on evidence presented at the trial, which accordingly will have met the standards of the Federal Rules of Evidence.[373] The sentencing court is not bound by how the jurors viewed the evidence, as may be demonstrated by their verdict, but may reach its own conclusions about the credibility of witnesses or reliability of the evidence.[374] The evidence presented at trial will provide the core evidence for determining the level of the offense committed. Because the offense level is determined by all relevant conduct, the court may also consider evidence of criminal conduct beyond what was charged in the indictment[375] Such evidence frequently will have been the subject of testimony at trial as uncharged acts in a conspiracy or as other bad acts admissible to show motive or intent.[376] When there is relevant conduct that was not brought out at trial, the court may obtain additional information on that conduct.[377]

The remaining eighty-four percent of cases, which are resolved by guilty pleas, will obviously not have the trial record on which to rely. Nevertheless, the sentencing court does not start from zero. With a

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372 In 1990, 40,452 of 46,725 federal criminal defendants pleaded guilty and the remaining 7,874 proceeded to trial. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 528, tbl. 5.36 (1991).

373 A potential problem will occur when the trial judge is unavailable for sentencing, for example, if the trial judge is unavailable. In the vast majority of cases, however, the court which heard the trial will also sentence.

374 *See, e.g.*, United States v. Stanberry, 963 F.2d 1323 (10th Cir. 1992) (finding that a defendant convicted on drug-related charges was not entitled to a special jury determination of facts relevant only to sentencing). *See supra* note 251 (for additional cases in which the sentencing judge has disregarded the jury's view of the evidence).

375 U.S.S.G., *supra* note 10, § 1B1.3.

376 Rule 404(b) provides that if certain conditions are met, evidence of other crimes, wrongs, or acts is admissible at trial to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). However, this evidence is not permitted if it is being used to prove "the character of a person in order to show action in conformity therewith." *Id.*

377 This discussion reflects the current guidelines rule requiring sentencing to be based on all relevant conduct. U.S.S.G., *supra* note 10, § 1B1.3. Many judges and scholars have expressed their dismay with this rule, particularly when combined with the low preponderance of the evidence standard. *See* discussion *supra* note 159. If the guidelines were amended to limit or exclude relevant conduct as a basis for sentencing, there would be a substantial decrease in the issues to be resolved at sentencing.

disposition by guilty plea, Federal Rule of Criminal Procedure 11 requires that the court establish that there is a factual basis for the plea.[378] This may begin with the court asking the defendant to describe the events of the offense that is the subject of the guilty plea. Or the court may initially ask the prosecutor to summarize the evidence that would be produced if the case were to go to trial or to state the relevant facts regarding the defendant's guilt. The prosecutor has great latitude in how detailed the factual proffer is. When a defendant is pleading guilty to an offense with a mandatory minimum sentence, however, the prosecutor must clearly state the factual basis for invoking the mandatory minimum. Often the proffer will be very specific, because this is the prosecutor's best opportunity to inform the judge of the facts of the case.

Pursuant to Rule 11, the court asks the defendant to confirm that the facts of the offense were stated correctly.[379] If the defendant confirms that the statement of facts was correct, that statement may be subsequently treated as fact in the sentencing process. If the defendant disagrees with a portion of the prosecutor's statements, the court should address the disputed facts. If the court believes that the disagreement is insignificant—such as regarding a specific time a crime occurred—then the court may find that the defendant agrees with the statement of facts in all material aspects.[380] Where there is disagreement as to a material element of the offense, the matter must be resolved before the plea of guilty may proceed. Consequently, at the time of sentencing, the only factual disputes that should arise as to the nature of the offense are ones arising from additional information obtained after the plea proceeding.[381]

In an effort to ensure that a plea "goes down," the court, the defense, or the prosecutor may try to avoid a full discussion of the facts at this stage. Prior to the guidelines, this avoidance posed few problems. If a defendant had admitted the elements of the crime, there was no need to discuss further details. When mandatory minimums were introduced, the only added fact to be established at the plea was the amount of the drugs or other element triggering the mandatory minimum. With the introduction of sentencing guidelines, the requirements for a guilty plea were not changed. Under

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378 "The court should not enter a judgment upon such [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." FED. R. CRIM. P. 11(f).

379 FED. R. CRIM. P. 11(f).

380 FED. R. CRIM. P. 11.

381 As noted in United States v. Peak, 992 F.2d 39 (4th Cir. 1993), courts routinely accept pleas before considering the presentence report. Because the presentence report often contains factual findings that the defendant will attempt to challenge, factual disputes after the plea proceeding are common. *Id.*

Federal Rule of Criminal Procedure 11, a court must determine that the defendant's plea is voluntary after ensuring that the defendant has been informed of the rights to trial and counsel and that the defendant understands the nature of the charge to which the plea is offered and any pertinent mandatory minimum or maximum sentence.[382]

Importantly, however, Rule 11 does not require that the defendant be informed of a preliminary assessment of the sentencing guidelines.[383] Most defendants are so informed by their counsel, and by the government if a plea agreement is involved.[384] But there is no requirement under either Rule 11 or under the sentencing guidelines that key sentencing issues be resolved at the plea stage.[385] For example, there is no requirement that the government inform the defendant of all the relevant conduct it intends to describe to the presentence report writer. Nor is the government required to inform the defendant if it intends to assert that the defendant was a supervisor or leader, such that the sentence could be raised under the guidelines.

At present, there is little incentive for the prosecutor to raise these issues at the plea[386] and in some cases the prosecutor will not yet have information about relevant conduct or the defendant's role in an offense. Even if the prosecutor does have the information, there is no requirement to have the defendant admit to such things as relevant conduct. Instead, the prosecutor may choose to present that informa-

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382 FED. R. CRIM. P. 11(c).

383 United States v. Stephens, 906 F.2d 251, 253 (6th Cir. 1990) (finding that at the time defendant entered his plea, he "was adequately informed of the consequences of his plea, even if the specific Guideline range was not known by him"); United States v. Salva, 902 F.2d 483, 486-87 (7th Cir. 1990); United States v. Gomez-Cuevas, 917 F.2d 1521, 1526 (10th Cir. 1990); United States v. Rhodes, 913 F.2d 839, 843 (10th Cir. 1990), *cert. denied*, 498 U.S. 1122 (1991); United States v. Henry, 893 F.2d 46, 48 (3d Cir. 1990); United States v. Turner, 881 F.2d 684, 686 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989); United States v. Fernandez, 877 F.2d 1138, 1143 (2d Cir. 1989).

384 *See, e.g.*, United States v. Craig, 985 F.2d 175, 179-80 (4th Cir. 1993) (erroneous estimate by defendant's counsel insufficient ground to allow defendant to withdraw plea).

385 The guidelines direct a district court to defer its decision to accept or reject a plea agreement until the court has considered the presentence report, unless the report is not required. U.S.S.G., *supra* note 10, § 6B1.1(c). This language indicates that the Commission wants the court to be aware of areas of disagreement before accepting a defendant's plea. However, courts routinely accept pleas before reviewing the presentence report. *See, e.g., Peak*, 992 F.2d at 40 (reviewing court noted that presentence investigations normally are not conducted until after the guilty plea is entered).

386 Effective November 1, 1993, the commentary to U.S.S.G. § 6B1.2 was amended to include a paragraph encouraging the prosecuting attorney to disclose to the defendant relevant facts and circumstances concerning the offense and offender characteristics before the defendant enters a plea of guilty or *nolo contendere*. U.S.S.G. § 6B1.2, *supra* note 10, at App. C, amend. 495. According to the Commission, the intent of the amendment was to promote "plea negotiations that realistically reflect probable outcomes." *Id.* The amendment specifies that it does not provide defendants with "any rights not otherwise recoguized by law." *Id.*

tion in the course of the presentence investigation to the presentence writer.[387] Once such information is incorporated into the presentence report, most courts will accept it, noting that hearsay is admissible at sentencing, and will deny the defendant's challenge to the allegation of additional criminal conduct unless the defendant can present evidence to the contrary.[388] Thus, it becomes the defendant's burden to disprove alleged relevant conduct.

If the government were not permitted to rely on hearsay, particularly hearsay presented via the presentence report, the equation would change. If the government were required to establish facts by admissible evidence, even under the low standard of preponderance, the government would have a greater incentive to be candid with the defendant at the plea stage and to state the known facts reflecting relevant conduct, role in the offense, or other sentencing factors at the time of the plea.[389]

Presently judges decide individually whether to require that the defendant be under oath when concurring in the statement of facts that serves as the basis of the plea. Whether or not the defendant is under oath, any statement that the defendant agrees with the facts as presented by the prosecutor is an admission that would appropriately be admissible under the rules of evidence.[390] Thus, if the Federal Rules of Evidence are applied at sentencing, the prosecutor will have a substantial incentive to be candid with the defendant at the time of the plea. As a result, the sentencing process may be shorter than at present where lengthy disputes may occur regarding relevant conduct. The same incentives would exist for the prosecutor to candidly address other frequently disputed facts that affect the sentence imposed, such as whether the defendant supervised others in committing the criminal acts.

Thus, whether a defendant's conviction is by trial or plea, at the time of conviction there is a substantial factual basis for sentencing already established. With either a trial or plea, there may be additional evidence of relevant conduct that was not admissible at trial.

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387 Noting that probation officers (who author the presentence reports) sometimes lack the resources to conduct independent investigations, Judge Heaney asserts that prosecutors often control the information contained in the presentence report. Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 777 (1992).

388 United States v. Montoya, 967 F.2d 1, 3 (1st Cir.), *cert. denied*, 113 S. Ct. 507 (1992). *But see* United States v. Leichtnam, 948 F.2d 370, 381-82 (7th Cir. 1991) (sentence vacated and case remanded for resentencing by reviewing court which noted that information in the presentence report was supplied by a government attorney and was totally unsubstantiated).

389 *See supra* note 386.

390 A statement offered against a party which is the party's own statement is deemed "not hearsay." FED. R. EVID. 801(d)(2)(A).

2. *The Use of the Presentence Report*

The presentence report provides the key factual summary for the sentencing process.[391] In preparing the report, the presentence writer may review court documents and interview government investigators, victims, employers and acquaintances of the defendant. The presentence writer will always attempt to interview the defendant and the prosecutor or the case agent.

The extent to which the factual basis established at a plea or trial is subsequently communicated to the presentence writer varies tremendously. The presentence writer will rarely have been present during the trial and thus the writer may obtain the first factual information about the offense from the prosecutor, defense counsel, or the defendant.[392] In the case of a plea, the presentence writer may have been in court during the plea proceeding and thus be familiar with the proffered statement of facts. Where this was not the case, the presentence writer again may have obtained the initial account of the facts from the prosecutor, the defense counsel, or the defendant. Otherwise, a transcript of the plea proceeding could be prepared and provided to the presentence writer so that all parties move forward to the sentencing phase with a common understanding of the facts.

Presentence reports now generally follow a standardized format designed around the sentencing guidelines.[393] The report may even include a work sheet showing how the presentence writer calculated the defendant's sentencing range according to the guidelines. Once the presentence report is completed, the presentence writer presents it to the court in private.[394] Prior to the scheduled date for sentencing, the report is provided to the defendant and the defendant's counsel and to the prosecutor.[395] At that time, each side reviews the report to assess whether there are any errors. A party who believes there is an error, in the stated facts or conclusions, notifies the court, probation office and opposing counsel. Because the presentence writer has consulted both sides prior to writing the report, there are often no disputes with the factual statements. More common are contentions that the facts have been misinterpreted. For example, the parties may disagree about whether the defendant's refusal to discuss

391 This report is mandatory "unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority . . . and the court explains this finding on the record." U.S.S.G., *supra* note 10, § 6A1.1.

392 *See supra* note 387 and accompanying text.

393 For an explanation of the contents of a presentence report, see *supra* note 202.

394 FED. R. CRIM. P. 32(c).

395 FED. R. CRIM. P. 32 (c)(3) requires that the report be provided "at a reasonable time" before sentencing. As long as that requirement is met, the guidelines allow courts to set their own procedures "to provide for the timely disclosure of the presentence report." U.S.S.G., *supra* note 10, § 6A1.2.

another's role in the offense indicates a lack of acceptance of responsibility.[396]

At the time of sentencing, the presentence report is accepted by the court as correct unless there are specified objections.[397] The court may decide what interpretation to give the facts or may hear argument from the parties and then resolve the issues. The court generally holds a hearing on disputed factual issues.[398] Because a party must notify the court and opposing party of any facts the party disputes, there is adequate notice for the parties to be prepared to present evidence and to respond to evidence. At this phase the Federal Rules of Evidence could easily be applied at hearings to resolve factual disputes. Currently, when the defendant disputes a fact contained in the presentence report, the defendant must present contrary evidence.[399] If the defendant fails to present such evidence, the court may accept the presentence report as accurate.[400] This unfairly shifts the burden to the defendant.

B. Key Evidence Under the Federal Rules

Much of the evidence currently considered at sentencing proceedings is already admissible under the Federal Rules of Evidence. Courts have acknowledged this in cases challenging the low standards of proof for evidence.

A key change would occur, however, in courts' reliance on hearsay at sentencing. Much of the hearsay presented to courts is in the presentence report. Consider how the rules would broadly address hearsay at sentencing. The definition of nonhearsay and the many exceptions to the hearsay prohibition still permit extensive hearsay, although the basic hearsay rule is stated in the language of a prohibition. Examples of hearsay commonly used at sentencing that would be admissible under the federal rules include statements by the defendant that are offered by the government, as admissions of a party opponent under rule 801(d)(2), and records of prior criminal conduct

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396 *See, e.g.*, United States v. Sanchez, 984 F.2d 769, 774 (7th Cir. 1993) (defendant's request for reduction based on his acceptance of responsibility was properly denied because defendant failed to identify his drug supplier).

397 The presentence report need not be the only written material that the court reviews. The commentary specifies that in determining facts relevant to sentencing, the court may consider "any other relevant information" in addition to the presentence report. U.S.S.G., *supra* note 10, § 6B1.4, comment. For example, the parties may submit sentencing memoranda which are a mixture of facts and arguments. But the presentence report is usually the first sentencing document the court receives and comes with the imprimatur of impartiality and professional investigation by a probation officer.

398 *See supra* note 180 and accompanying text.

399 The court has discretion to allow the defendant to introduce evidence regarding alleged factual inaccuracies. FED. R. CRIM. P. 32(c)(3)(A).

400 *See, e.g.*, United States v. Rogers, 1 F.3d 341, 345 (5th Cir. 1993).

for which there was a conviction, admissible as judgments of previous convictions under rule 803(22).

Some appellate courts have already answered defendants' arguments that trial courts relied on hearsay at sentencing by pointing out that the hearsay was admissible under the Federal Rules. In *United States v. Johnson*,[401] the Tenth Circuit concluded that a letter written by the defendant and relied on at sentencing would not be hearsay because it was an admission under rule 801(d)(2). Under the same rule, the First Circuit, in *United States v. Wright*,[402] held that an admission by a defendant recounted to the court by a probation officer at sentencing was not hearsay.[403]

Examples of hearsay that would be excluded include an agent's testimony about an informant's estimate of the quantity of drugs a defendant distributed or about an informant's assertions of a defendant's ties to organized crime. Applying the hearsay rule to evidence such as the quantity of drugs distributed would greatly reduce the relevant conduct problems that have so troubled courts.[404]

C. Making the Rules Applicable to Sentencing

No statute requires rules of evidence to be applied at sentencing in federal courts.[405] The Federal Rules of Evidence, which were adopted in 1975, state that the rules, other than with respect to privileges, do not apply at sentencing.[406] Whether or not the Sentencing Commission has the authority to issue guidelines governing evidentiary standards at sentencing is a matter of some debate.[407] Clearly, however, the Federal Rules of Evidence could be amended to extend

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401 971 F.2d 562 (10th Cir. 1992).

402 873 F.2d 437 (1st Cir. 1991).

403 *Id.* at 441.

404 *See supra* notes 159 and 272 and accompanying text.

405 The Military Rules of Evidence provides, however, that rules of evidence apply at the sentencing phase. M. R. EVID. 1101(c).

406 Federal Rule of Evidence 1101(d) states:

> (d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:
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> (1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.
>
> (2) Grand jury. Proceedings before grand juries.
>
> (3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; *sentencing*, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

FED. R. EVID. 1101(d) (emphasis added).

407 *See, e.g.*, HUTCHISON & YELLEN, *supra* note 179, at 406 (observing that "[n]othing in 28 U.S.C. § 994 authorizes the Commission to prescribe evidentiary rules.").

application of the rules governing reliability to sentencing proceedings.

The Rules Enabling Act governs amendments to the Federal Rules of Evidence.[408] In accordance with this act, the Supreme Court can prescribe rules of evidence. The Standing Commission on Rules of Practice and Procedure of the Judicial Conference of the United States can make proposals to the Supreme Court to change such procedural rules.[409] When changes are prescribed by the Supreme Court, Congress has seven months to respond, amend the proposal, or delay the effective date of the amendment.[410] Inaction by Congress is taken as assent.[411] In the alternative, Congress may initiate changes to the Federal Rules of Evidence by legislation. Of the six substantive changes made to the Federal Rules of Evidence since 1975, Congress initiated three.[412]

A proposal to amend the Federal Rules of Evidence must specify which rules should govern sentencing.[413] Several of the rules would be inapplicable to the issue of reliability of evidence, including those that limit the introduction of evidence of a defendant's prior criminal conduct.[414] The rules applicable to sentencing should include those that impose reliability standards, such as the rules governing opinion and expert testimony,[415] hearsay,[416] authentication,[417] and contents of writings.[418] Application of these rules, which are neutral to the defendant and government, would fairly raise the reliability of evidence relied upon at sentencing.

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408 28 U.S.C. §§ 2071-74 (1993).

409 28 U.S.C. § 2073 (1993). The Standing Committee consists of members of the bench and bar. *Id.* The Chief Justice appoints these members. Becker & Orenstein, *supra* note 263, at 860 n.6. The Supreme Court appoints separate Advisory Committees in the civil, criminal, appellate, and bankruptcy areas to propose rule changes. *Id.* at 860. However, no advisory committee has ever been established for evidence rules. The civil and criminal Advisory Committees currently are responsible for monitoring and proposing changes to the Federal Rules of Evidence. *Id.*

410 28 U.S.C. § 2074(a) (1993).

411 28 U.S.C. § 2074(a) (1993). A different procedure applies to changes affecting privilege rules; for those Congress *must* approve any changes. 28 U.S.C. § 2074(b) (1993).

412 SALTZBURG & REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 774 (1990).

413 FED. R. EVID. 1101(d)(3).

414 Under the current sentencing guidelines, such prior criminal conduct may be relevant, either as relevant conduct or as criminal history. U.S.S.G., *supra* note 10, §§ 1B1.3 and 4A1.1.

415 FED. R. EVID. 701-06.

416 FED. R. EVID. 801-06.

417 FED. R. EVID. 901-03.

418 FED. R. EVID. 1001-07.

CONCLUSION

Recent decisions have highlighted the concern about the reliability of fact-finding at guidelines sentencing. Some judges and scholars have urged that the Constitution requires more procedural protections at guidelines sentencing, but this argument has not prevailed. Others have urged adoption of specific rules for sentencing. Proposals have addressed the issues of kinds of evidence to be considered, burdens of proof and the quality of the evidence. Much confusion about these issues has arisen because of the lack of clarity about what errors are problematic and how burdens of proof and standards of reliability for evidence jointly affect the quantity and kind of errors.

This article has addressed this issue of error. For decisions where the least total error is desired, the preponderance of the evidence burden of proof is appropriate. But this burden should be applied to require that the fact-finder be persuaded that the alleged fact is more probable than not. For decisions similar to determining guilt, where the goal is to have fewer errors borne by defendants, imposing a burden of proof on the government of clear and convincing proof or proof beyond a reasonable doubt may be appropriate.

To achieve the level of confidence in the preponderance of the evidence standard for sentencing that now exists in civil cases, standards of reliability should be applied to the evidence presented at sentencing proceedings. This article suggests a simple solution: apply the existing Federal Rules of Evidence at sentencing. Fact determinations at sentencing now have a direct and idenrifiable impact on the penalty imposed. Accordingly, the reliability of fact determinations at sentencing is critical to achieving the goals of lessening disparity, sentencing fairly, and instilling confidence in sentencing decisions.

The fact determinations at guidelines sentencing are the type of specific judgments for which the Federal Rules of Evidence are designed. The rules provide a familiar guide to the admissibility of evidence. They consistently impose minimum standards of reliability, neutral to the government and defendant.

This proposal has another virtue. Judges, who understand the problems that have arisen from faulty fact-finding at sentencing, can use their authority under the Rules Enabling Act to adopt such rules. Or Congress may legislate the change. The Commission, even if it has the authority, has shown no inclination to exercise it. Courts have felt constrained by precedent in deciding individual cases, even though that precedent arose under a fundamentally different sentencing system. By amending the Federal Rules of Evidence to apply to sentencing, judges or Congress can affirmatively choose to have all sentences based on reliable evidence.