Volume 97 | Issue 2 Article 6

January 1995

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PROSECUTORIAL DISCRETION UNDER THE FEDERAL SENTENCING GUIDELINES: IS THE FOX GUARDING THE HEN HOUSE?

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I. INTRODUCTION

From colonial America up through the twentieth century, judicial decisionmaking was the hallmark of this country's criminal sentencing system. In 1984, however, Congress passed the Sentencing Reform Act and transferred much of the sentencing authority that previously rested with the judiciary to the United States Sentencing Commission and United States Attorneys. This new commission was charged with the task of creating a sentencing system which would solve the unpredictability and disparity in sentencing that had plagued our criminal sen-

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tencing system. The effect of this sentencing reform on federal sentencing is the focus of this article.

Part II of this Article discusses the history of sentencing in the United States, and the progression toward indeterminate sentencing. Part III of this Article focuses on the practical impact of the sentencing guidelines on the federal criminal justice system and suggests that the sentencing guidelines have not solved the unpredictability and disparity problems of pre-guideline sentencing, but have provided the prosecutor with almost complete control over sentencing. Finally, Part IV examines the constitutional questions that still remain concerning the sentencing guidelines.

II. HISTORY OF SENTENCING IN THE UNITED STATES

A. Rigid Sentencing of Colonial America

At the core of the early colonial approach to sentencing was the "prevailing belief in the basic depravity of all human beings, a feeling that made any notion of an offender's possible rehabilitation absurd."[1] Thus, colonial law enforcement swiftly attacked criminal behavior with public and often harsh punishment designed to maximize a sense of disgrace to the offender.[2] The Capital Laws of New England, for example, prescribed the death penalty for twelve offenses including witchcraft, assault in sudden anger, and adultery.[3] Eventually, however, the "demoralizing influence both upon the community and the convict of these public manifestations of disgrace was soon realized, and led, shortly after the adoption of our Constitution, to their discontinuance in Pennsylvania" and throughout the colonies.[4]

This reform in colonial sentencing can be attributed in part to the 1764 work by the Italian, Cesare Beccaria, entitled *On Crimes And*

1. ARTHUR W. CAMPBELL, LAW OF SENTENCING 9 (1978).

2. During this time, the criminal codes were incomplete and judges were provided with little direction concerning choice of punishment.

3. SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT AND EFFECT 2 (1985). Early colonial sentencing was prescribed by colonial laws and provided the sentencing judge with very little or no sentencing discretion.

4. United States v. Moreland, 258 U.S. 433, 449 (1922).

Punishments.[5] Beccaria called for the creation of legislatively determined sentences, the establishment of a clear criminal code, the restriction of pre-trial detention, the need to base a finding of guilt on certainty rather than a mere preponderance of the evidence, and the open administration of the accusation and prosecution of criminal matters before a jury.[6] Beccaria also demanded the elimination of torture and the abolishment of capital punishment.[7] Beccaria's work was based on the theory prevailing at the time that "the certainty of punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity."[8]

Beccaria's reform movement eventually reached the American colonies. John Adams quoted from Beccaria's work during his defense of the British troops on trial in 1770 for their actions in the Boston Massacre.[9] In addition, the United States Constitution's guarantees of a fair, open and speedy trial, the presumption of innocence, and the proscriptions of cruel or unusual punishment can be attributed, in part, to Beccaria's work.[10]

In late eighteenth-century America, imprisonment of the offender, as a means of encouraging spiritual rehabilitation, was substituted for the practice of inflicting physical pain as punishment. The belief spread throughout the new American states "that if, instead of being 'punished,' the offender were incarcerated and subjected to a rigorous system of labor and religion he or she would become 'cured' of criminal tendencies."[11] In 1787, the prominent Quaker Benjamin Rush outlined his proposals for a "House of Reform," where criminals could be kept

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5. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci trans., 1963) (1764).

6. SHANE-DUBOW, *supra* note 3, at 1-2.

7. *Id.* ON CRIMES AND PUNISHMENTS was severely criticized by the ruling powers of the late eighteenth century. In 1776, the Catholic Church placed the work on its list of condemned books. Despite this criticism, however, Beccaria's ideas slowly spread throughout Europe. *Id.*

8. CAMPBELL, *supra* note 1, at 10.

9. SHANE-DUBOW, *supra* note 3, at 2.

10. *Id.*

11. CAMPBELL, *supra* note 1, at 10-11.

from society and amend their deviant ways.[12] In 1790, Pennsylvania adopted Rush's ideas of a "House of Reform" or "penitentiary," as the Quakers called it. Inmates were sentenced to the penitentiary for fixed terms, but did not know the length of their terms.[13] This fact is supported by Rush's push for indeterminate sentencing in 1793:

> The duration of punishments, for all crimes, should be limited: but let this limitation be unknown. I believe this secret to be of the utmost importance in reforming criminals and preventing crimes. The imagination, when agitated with uncertainty, will seldom fail of connecting the longest duration of punishment with the smallest crime.[14]

B. Toward Indeterminate Sentencing

The growing population of the new nation, its immigrant and transient composition, the increased efficiency of the police and courts, the fixed sentence, and other factors all contributed to the rapidly increasing number of inmates, and resulted in overcrowded prisons.[15] To relieve the overcrowding and to make room for new inmates, the use of pardons became widespread. For example, the young state of Ohio "simply pardoned convicts whenever the population rose above 120 in number."[16] Problems with the pardon system, however, including bribery and extortion, led New York to adopt the nation's first "good time" computation law in 1817. The good time proposal was quickly adopted by the majority of states.[17]

Another means of controlling prison population and pursuing goals of rehabilitation, as well as allowing more lenient punishments to those persons who did not appear to present any threat to society, developed during the nineteenth century and became known as the "suspended sentence" or probation.[18] The practice of probation in the United

12. SHANE-DUBOW, *supra* note 3, at 3.
13. *Id.*
14. *Id.* (citation omitted).
15. *Id.*
16. *Id.* at 4 (citation omitted).
17. SHANE-DUBOW, *supra* note 3, at 4.
18. *Id.*

States originated with the work of John Augustus, who in 1841 began to post bonds for persons standing before the Boston courts.[19] In time, as he became trusted by the Boston courts, Augustus was permitted to "post a bail to postpone sentencing" of the offender and "then later return to the courts and comment on the individuals' adjustment to the regime established by Augustus."[20] Thus, probation evolved.

Massachusetts first formally authorized the use of probation in 1878.[21] The spread of probation to other states was restrained, however, because "it was thought that the courts lacked authority to impose a suspended sentence without specific legislative authority."[22] In 1894, the New York Court of Appeals addressed this issue in *People ex rel. Forsyth v. Court of Sessions of Monroe County.*[23] The New York court ruled that the power to suspend a sentence after conviction is inherent in every court having criminal jurisdiction and that the suspension power was distinct from the power to pardon.[24] Thereafter, other courts endorsed probation and by 1954, forty-seven of the forty-eight states had done so.[25]

C. Indeterminate Sentencing

The use of pardons, good time, probation and later parole all contributed to the growing indeterminacy of sentences rendered by judges of the nineteenth century, vastly different from the rigid sentencing of early colonial America.[26] Each of these practices affected the time served under a sentence by altering the fixed term handed down by the judge at sentencing. These practices led to a refocusing of the sentencing approach toward what is now called "indeterminate sentencing." Under this approach, judges were not only encouraged to weigh the character of the individual defender when imposing a sentence, but

19. *Id.*
20. *Id.*
21. *Id.*
22. SHANE-DUBOW, *supra* note 3, at 5.
23. 141 N.Y. 288 (1894).
24. *Id.* at 294-95.
25. SHANE-DUBOW, *supra* note 3, at 5.
26. *Id.*

when the offender was sentenced to prison, correctional officers were given the ultimate authority to determine when the offender was sufficiently rehabilitated to merit release or parole.[27] The judge's role under indeterminate sentencing was "to bring to bear his accumulated experience, judgment, and, hopefully, wisdom, in order to determine what punishment was appropriate for the offense and the offender, convicted after a trial with well defined rules of evidence and procedure or after a plea of guilty."[28] Thus, judicial decisionmaking remained the hallmark of our system of justice under this new sentencing system.

In 1870, New York became the first state to utilize an indeterminate-sentencing system.[29] By 1922, all but four states and the federal government employed some type of indeterminate sentencing or used the parole system which functioned in the same way.[30] By the 1960s, every state had an indeterminate-sentencing structure or some variation.

D. Twentieth-Century Federal Indeterminate Sentencing

Though Congress had the power to determine the length of federal sentences and how they would be served,[31] it abdicated its authority over sentencing to the judiciary. Congress imposed few requirements upon the judiciary with respect to sentencing.[32] Instead, courts were freely permitted to pick a sentence within a range of punishment.[33] Congress' abdication became more pronounced with the establishment of the United States Parole Commission in 1910, which became part of the Executive Branch and was responsible for determining the actual

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27. CAMPBELL, *supra* note 1, at 11.

28. United States v. Roberts, 726 F. Supp. 1359, 1367 (D.D.C. 1989).

29. CAMPBELL, *supra* note 1, at 12.

30. *Id.* at 13 n.75 (citing FAIR AND CERTAIN PUNISHMENT 95 (1976)).

31. United States v. Wilberger, 18 U.S. (5 Wheat.) 76 (1820). Judicial discretion is also subject to Congressional control. *See Ex Parte* United States, 242 U.S. 27 (1916).

32. "[Indeterminate sentencing] obviously required the judge and the parole officer to make their respective sentencing and release decisions upon their own assessments of the offender's amendability to rehabilitation. As a result, the court and the officer were in positions to exercise, and usually did exercise, very broad discretion." Mistretta v. United States, 488 U.S. 361, 363 (1989).

33. *See* United States v. Grayson, 438 U.S. 41, 46 (1978).

duration of imprisonment.[34] Incremental steps were taken by Congress to gain some control over sentencing with the enactment of some mandatory minimum sentences[35] and the use of consecutive sentences.[36] However, the essence of sentencing remained in the hands of the district court to determine a sentence within a given range. The judge's discretion was almost unreviewable in this regard.

The late 1970s became the era of judges known as "turn 'em loose Bruce" and "hang 'em high Harry." Wide sentencing disparities were found to exist for the same crime among what were believed to be similarly-situated defendants in different jurisdictions.[37] Some judges thought it was their role to rehabilitate, while others believed their role was to punish. Pure punishment was certainly the easier (not to mention being politically popular) and more expedient method of handling individuals whom society considered to be unfit to live amongst them.[38] However, punishment, and not rehabilitation, was to be the primary goal, and the Parole Commission, which had the responsibility of determining when convicts were "rehabilitated" and ready to be inserted back into society, had little or no role in the sentencing system.[39]

After years of study, discussion, and no doubt the movement of political forces, Congress determined that the sentencing system needed more than mere incremental changes, and that the entire system should

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34. *See* Williams v. New York, 337 U.S. 241, 248 (1949). *See also* Geraghty v. United States Parole Comm'n, 719 F.2d 1199, 1211 (3d Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).

35. Act of Nov. 29, 1990, Pub. L. No. 101-647, § 1703, 104 Stat. 4926 (1994).

36. *See, e.g.*, 18 U.S.C. § 924(c) (Supp. V 1993) (five years added to any punishment for the underlying offense); 18 U.S.C. § 656 (Supp. V 1993) (bank embezzlement offenses increased from five years to twenty years in 1989).

37. *See* studies cited in the 1983 Comprehensive Crime Control Act, S. REP. NO. 225, 98th Cong., 1st Sess. 39-49 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182.

38. Rehabilitation was not a popular goal. N. MORRIS, THE FUTURE OF IMPRISONMENT 24-43 (1974); F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981); D. LIPTON ET AL., EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975), *in* S. REP. NO. 225, 98th Cong., 1st Sess. 40 n.16 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182.

39. For a discussion regarding the Parole Commission Sentencing Review, *see* United States v. Addonizio, 442 U.S. 178, 188-89 (1979). *See also* Williams v. New York, 337 U.S. 241, 248 (1949).

be rebuilt.[40] While Congress would seemingly have been satisfied with judges who gave predictably harsh and certain sentences to violent offenders, and simply force the more lenient judges to give harsher sentences, that was not the case. Years of frustration with criminal sentencing culminated in 1984 when rehabilitation as a primary purpose in sentencing was cast aside, and Congress passed the Sentencing Reform Act of 1984 (SRA),[41] transferring much of the authority that previously rested with the judiciary to a new entity, the United States Sentencing Commission (Sentencing Comission).

Under the SRA, the stated objectives of sentencing required the sentence imposed to: (1) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[42] The SRA also established the Sentencing Commission as part of the Judicial Branch and charged it with the herculean task of creating a sentencing system which would solve the perceived problems of unwarranted disparity of sentences and the lack of certainty in sentencing, and providing true punishment consistent with the intent of Congress.[43] To make sure that the Sentencing Commission took its task seriously, Congress made the Guidelines *compulsory*,[44] *abolished* parole, and *refused*, in the interest of keeping with their goals, to give sentencing judges more discretion.[45]

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40. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 40, 41-46 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182.

41. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified in scattered sections of 18 and 28 U.S.C.).

42. 18 U.S.C. § 3553(a)(2)(A)-(D) (1988).

43. 28 U.S.C. § 991(a)-(b) (1988).

44. 18 U.S.C. § 3553(b) (1988).

45. 133 CONG. REC. S16,644-48 (Nov. 20, 1987). It is doubtful that Congress fully anticipated the effect of the SRA since it became effective November 1, 1987. *See, e.g.*, 1993 UNITED STATES SENTENCING COMMISSION ANNUAL REPORT 182. There were more than 3,000 defendant appeals concerning sentencing issues from March 7, 1993, to September 30, 1993.

It is important to recognize why Congress established the Sentencing Commission, and through it, the Sentencing Guidelines. The problems which led to Congress' action included the scope of judicial discretion, the disparity of sentencing, lack of certainty in sentencing, and the past emphasis on rehabilitation instead of punishment. Congress simply made the decision that the sentencing pendulum had swung too far in the direction of the judges and that it needed to swing back toward the center. However, now that the Sentencing Guidelines have been in operation for over seven years, the argument can and has been made that Congress' action has forced the pendulum too far in the opposite direction. Indeed, a fair analysis would indicate that the problems intrinsic in pre-SRA sentencing remain, and may, in fact, even be worse.[46]

While Congress may not be fully aware of the effect of SRA, it is not because there haven't been complaints.[47] However, Congress has not been moved enough by the criticism to take effective action. Congress has allowed actions of the Sentencing Commission to take effect by taking no affirmative action, thereby allowing the Sentencing Commission to run the sentencing show.[48] While there is nothing inherently wrong with Congress' intent when it enacted the SRA, the question remains whether the sweeping changes that the SRA made in 1984, in fact, do what Congress intended.

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46. *See* discussion *infra* Part III.

47. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990); UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, SENTENCING GUIDELINES, CENTRAL QUESTIONS REMAIN UNANSWERED (Aug. 1992).

Numerous commentators have also made their feelings known. *See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Gerald W. Heaney, *The Reality of Guidelines at Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991). *Contra* William W. Wilkins, Jr., *Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795 (1992). It should be noted that Judge Wilkins is a United States Circuit Judge for the Fourth Circuit Court of Appeals and the Chair of the Sentencing Commission. Judge Heaney is the Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit.

48. The SRA, at 28 U.S.C. § 994(p) (1988), provides that Guidelines promulgated by the Sentencing Commission take effect 180 days after their submission to Congress.

III. THE PRACTICAL IMPACT OF THE SENTENCING GUIDELINES

The sentencing world in the federal criminal system — as its participants knew it — came to an end on November 1, 1987. Much of the substantial power held by federal judges prior to that date simply vanished. The Sentencing Commission and prosecutors became the newly empowered, sentencing hearings became mini-trials, and publishers of legal materials had another opportunity to publish volumes upon volumes of material as a result of Congress' actions. Initially, any legal obstacles placed in the path of the SRA were swept away by the Supreme Court decision in *United States v. Mistretta*.[49] *Mistretta* declared the enactment of the SRA and Congress' empowerment of the Sentencing Commission constitutional.[50] Numerous attempts have been made to have the new sentencing schemes declared unconstitutional without significant success.[51]

Though constitutional questions remain,[52] the Sentencing Guidelines must also be analyzed from a real-world, practical aspect to determine whether or not they are effectively treating the problems that concerned Congress. Unreviewable discretion by the sentencing judge and the unpredictability of the ultimate sentence were of primary concern to Congress prior to the Sentencing Guidelines. The actual application of the Guidelines, however, reveals that unreviewable discretion and unpredictable sentencing remain. The Sentencing Guidelines have merely changed the culprits: the uncontrolled discretion and unpredict-

49. 488 U.S. 361, 374 (1989).

50. *Mistretta* re-enforced the notion that Congress had the authority to determine how sentences were to be imposed for criminal violations of the law. Further, the Supreme Court found that Congress did not improperly delegate its authority to the Commission, and that such delegation to the Judicial Branch was not a violation of separation of powers. Interestingly, only passing dicta was made about the delegation of power to the Executive Branch through its prosecutors and its effect on the separation of powers.

51. Multiple due process and other constitutional challenges have been made to the Guidelines as a whole and in part. *See, e.g.*, United States v. Guajardo, 950 F.2d 203, 206 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1773 (1992); United States v. Pinto, 875 F.2d 143, 144-45 (7th Cir. 1989); United States v. Mondello, 927 F.2d 1463, 1467 (9th Cir. 1991). *Mistretta* effectively legitimized the new sentencing scheme.

52. *See* discussion *infra* Part IV.

ability of the prosecutors, not the judges, are now the causes for concern.[53]

The Sentencing Guidelines have changed the way prosecutors operate at both the beginning and end of the prosecution. Prosecutors can now determine what the sentence will be or what they want it to be prior to indictment: prosecutors know what specific facts will increase sentences and which ones will decrease sentences; they know that they can criminally charge the best or most minimal portion of their case and nonetheless gain the benefit of the weak or biggest part of their case through sentencing proceedings; they know in advance the proof that their investigators need to substantiate the sentence; and, they know that constitutional obligations imposed upon them are not nearly as strong at sentencing as they are in prior phases of the process.[54] Most importantly, the prosecutor's power is enhanced in light of the mere preponderance of evidence standard imposed upon the prosecutor for sentencing issues.[55]

Federal judges, perhaps first taken by surprise by the practical effects of the Sentencing Guidelines, did not take long to note in opinions and commentary the shift in power from their offices to the U. S. Attorneys' offices across the country.[56] Perhaps the frustration of fed-

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53. Professor Alschuler predicted this result in 1978:

> Eliminating or restricting the discretionary powers of parole boards and trial judges is likely to increase the powers of prosecutors, and these powers are likely to be exercised without effective limits through the practice of plea bargaining. The substitution of fixed or presumptive sentences for the discretion of judges and parole boards tends to concentrate sentencing power in the hands of officials who are likely to allow their decisions to be governed by factors irrelevant to the proper goals of sentencing — officials moreover, who typically lack the information, objectivity and experience of trial judges . . . .

Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 577 (1978).

54. The Federal Rules of Evidence do not apply to sentencing. *See* FED. R. EVID. 1101(d)(3).

55. It should be clear that while the probation office is intended to act independently on behalf of the court, the reality is that probation offices have neither the resources nor the training to conduct independent investigations prior to sentencing, and rely upon Assistant United States Attorneys to provide sentencing information.

56. *See, e.g.*, Heaney, *supra* note 47, at 190; United States v. Boshell, 728 F. Supp. 632, 637-38 (E.D. Wash. 1990); United States v. Roberts, 726 F. Supp. 1359, 1363 (D.D.C.

eral judges in seeing their authority being stripped away by the Sentencing Guidelines is best illustrated by the opinion of Judge McNichols from the Eastern District of Washington:

> Congress has thus shifted discretion from persons who have demonstrated essential qualifications to the satisfaction of their peers, various investigatory agencies, and the United States Senate to persons who may be barely out of law school with scant life experience and whose common sense may be an unproven asset.[57]

Although Judge McNichols statement might not represent the feelings of federal judges generally, the transfer of discretion to the prosecuting authorities by the Sentencing Guidelines is indisputable. The Sentencing Guidelines permit prosecutors to help determine the sentence in very specific ways. This new power supplements their preexisting power to coordinate investigations, conduct grand jury proceedings, draft indictments, determine charges to be filed and where they should be filed, and decide whether or not to plea bargain and the terms thereof. Federal prosecutors have turned into the 800-pound gorilla of the criminal process in federal courts. A review of some of the specific provisions of the Sentencing Guidelines clearly demonstrates the considerable power of the prosecutor.

A. Relevant Conduct

Perhaps nowhere in the Sentencing Guidelines is the discretion of the prosecutor, and the opportunity to abuse that discretion, more visible than in Section 1B1.3 of the Sentencing Guidelines, innocently entitled "Relevant Conduct (Factors that Determine the Guideline Range)."[58] Prior to the existence of the Sentencing Guidelines, rele-

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1989), *rev'd sub nom.* United States v. Doe, 934 F.2d 353 (D.C. Cir. 1991); United States v. Kikumura, 918 F.2d 1084, 1119-21 (3d Cir. 1990) (Rosenn, J., concurring); United States v. Miller, 910 F.2d 1321, 1332-33 (6th Cir. 1990).

57. *Boshell*, 728 F. Supp. at 637 (citations omitted).

58. Specifically, Section 1B1.3 provides:

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the

vant information regarding the defendant's conduct outside the conduct directly leading to the conviction was always relevant.[59] However, with the enactment of the Sentencing Guidelines, relevant conduct has a much more direct and substantial impact on the defendant's length of imprisonment. Though usually shocking to the uninitiated, relevant conduct is now regularly used to significantly enhance sentences and has been a rallying cry for those who believe prosecutors have been awarded too much power by the Sentencing Commission, since it is the prosecutor who has the discretion in most instances to offer relevant conduct and how much of it to in fact offer.

It is perhaps easiest to explain the impact of relevant conduct by way of example. Defendant John Doe was indicted and subsequently convicted pursuant to 21 U.S.C. § 841(a)(1)[60] for possession with in-

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basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

United States Sentencing Commission, *Guidelines Manual*, § 1B1.3 (Nov. 1993).

59. *See* Williams v. New York, 337 U.S. 241, 247 (1949).

60. Section 841(a)(1) provides:

(a) Except as authorized by this sub-chapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or . . . .

21 U.S.C. § 841(a)(1) (1988).

tent to distribute four grams of cocaine base (crack cocaine).[61] The Government's evidence was relatively simple. A confidential informant recorded the defendant's sale of four grams of crack cocaine. The crack is recovered, the tape is transcribed, the indictment is returned, and defendant Doe is quickly convicted by a jury of his peers.

Pursuant to Sentencing Guideline Section 2D1.1, a conviction involving four grams of crack cocaine calls for a Level 24, or fifty-one to sixty-three months imprisonment.[62] Now let's assume that the Assistant United States Attorney who prosecuted defendant Doe learns from his drug investigators that they know several of Doe's "friends" who were involved in the drug trade (before or after conviction). Witnesses Brown, White, and Green are debriefed, but are reluctant to share what they know about defendant Doe until they themselves are assured of immunity or a substantially reduced charge. The prosecutor concludes that the request is a reasonable one and gives each of them immunity to provide information on defendant Doe.[63] Not surprisingly, witnesses Brown, White, and Green reveal that they have worked with defendant Doe selling cocaine base in amounts significantly above the four grams for which he was indicted and subsequently convicted of selling. In fact, they *approximate* that the defendant Doe has been involved in the sale of two kilograms of crack cocaine.

This new found information is then supplied to the probation officer who is responsible for the pre-sentencing investigation on defendant Doe's four-gram, crack cocaine conviction. The probation officer throws away all previous calculations based upon the now proven charge in light of Sentencing Guideline Section 1B1.3(a)(2) regarding

61. A drug distribution example is being used because drug distribution, particularly incidents involving cocaine base, is the area of criminal law that has been most prominent on the federal level in recent years. However, relevant conduct analysis is appropriate for any of the crimes set forth in the United States Code which are considered by the Sentencing Guidelines.

62. Criminal history is assumed to be none.

63. The granting of immunity was, of course, preceded by a "proffer" so the prosecutor could hear in advance what it is he would be getting in return for the immunity. It becomes quite clear to the witnesses that unless they have substantial information, or will provide substantial information about defendant Doe, there will be no immunity. Being upright and trustworthy drug dealers, it is easy to learn rules of the game.

the defendant's now obvious course of conduct. He includes this new found relevant conduct in his sentencing report, which is reviewed by defense counsel and the defendant. Obviously, defendant Doe disputes the statements of his "friends," but has no way of disproving their statements. The court hears the undisputed evidence at the sentencing hearing, including any hearsay evidence.[64] Though the character of the witnesses is definitely questionable, the judge finds their testimony to have a "sufficient indicia of reliability to support its probable accuracy."[65] Hence, the judge is forced to add the relevant conduct to the conduct defendant Doe already stands convicted of, increasing his Sentencing Guidelines level from twenty-four to thirty-eight,[66] and increasing his minimum imprisonment exposure from 4.25 years to 19.5 years.

The addition of the relevant conduct is mandatory — the judge must add it if it is supported.[67] When there is no contradictory evidence and the only questionable aspect of the testimony are the promises that have been received from the Government, the judge would indeed struggle to adequately explain to the appellate court why he ignored testimony of three other witnesses at the sentencing hearing regarding relevant conduct.

While the above example is more extreme than the typical variety of relevant conduct scenario, it is an example of the type of situation that can, and has visited itself upon other defendant Does. For example, in *United States v. Ebbole*,[68] the defendant plead guilty to distrib-

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

65. United States Sentencing Commission, *Guidelines Manual*, § 6A1.3, cmt. (Nov. 1993) (citing United States v. Marshall, 519 F. Supp. 751 (E.D. Wis. 1981), *aff'd*, 719 F.2d 887 (7th Cir. 1983)); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980).

66. United States Sentencing Commission, *Guidelines Manual*, § 2D1.1 (Nov. 1993).

67. *See* United States v. Ebbole, 917 F.2d 1495, 1501 (7th Cir. 1990).

68. 917 F.2d 1495 (7th Cir. 1990). *See also* United States v. Sleet, 893 F.2d 947, 947-48 (8th Cir. 1990) (26.87 grams cocaine up to 396.4 grams); United States v. Miller, 910 F.2d 1321, 1323 (6th Cir. 1990).

It should be noted that relevant conduct is only one of the methods that can be used to dramatically increase sentences. A conspiracy charge under 21 U.S.C. § 846 (1988) permits additional drug quantities to be added after conviction when they are proven to be part of the conspiracy. Relevant conduct under Sentencing Guideline Section 1B1.3 enhances

uting one gram of cocaine which subjected him to a term of imprisonment of twenty-seven to thirty-three months (criminal history of IV).[69] Post conviction information supplied by the prosecutor was included in the probation report and increased the total amount of drugs attributable to the defendant to 1.7 kilograms. Correspondingly, his sentence range increased to 92-115 months, more than three times the original range.[70] After noting the unfairness of this practice, the court concluded that the increase was not only permissible, but mandatory, under the relevant conduct provisions of the sentencing guidelines.[71]

Among the citizenry, the fact that drug dealers are being dealt with harshly is not a concern. However, the legal question remains as to whether this scenario is consistent with Congress' intended sentencing reform and whether it is fair and protects defendants from overzealous prosecutors.[72] With the relevant conduct provisions, the prosecutor can decide in advance how much conduct he will attribute to a given defendant at sentencing, *vis-a-vis* the conduct he writes into the indictment or proves at trial. There is surely, if nothing else, an incentive to indict and try the easiest charge, and save the remaining charges for sentencing where there is a lower standard of proof, lower standards of admissibility, and few of the obligations to a defendant that

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a sentence based upon uncharged conduct, while additional drugs in a conspiracy is an enhancement of charged conduct. *See, e.g.*, United States v. Harrison-Philpot, 978 F.2d 1520, 1522 (9th Cir. 1992) (Evidence at trial proved defendant's involvement in drug conspiracy involving sixty-seven grams of cocaine, but defendant was sentenced to conspiracy with respect to fifteen kilograms. His sentence moved from a minimum of forty-one months to 292 months. The additional evidence was obtained by the United States Attorney's office after conviction.).

69. *Ebbole*, 917 F.2d at 1495-96.

70. *Id.*

71. *Id.* at 1496, 1501. Courts have not had much of a problem in rejecting arguments which question the relevant conduct concept. *See, e.g.*, United States v. Richardson, 939 F.2d 135, 142-43 (4th Cir. 1991); United States v. Schaper, 903 F.2d 891, 896-97 (2d Cir. 1990). Moreover, it is considered quite acceptable to consider dismissed or acquitted conduct at the underlying criminal trial as part of the relevant conduct because there is a lesser burden of proof at the sentencing hearing. See, *e.g.*, United States v. Stevenson, 895 F.2d 867, 877 (2d Cir. 1990). This effectively convicts the defendant of the conduct and proportionately increases the sentence.

72. It should be noted that the authors have worked with a number of prosecutors in the Southern District of West Virginia, and have found each of them to be professional and not of the type that have abused the Guidelines.

are owed prior to the actual trial.[73] The sentencing, with sufficient relevant conduct, can accomplish the same result as being convicted on several substantive charges. The decision with respect to relevant conduct, and whether to even raise it at sentencing at all, is solely within the discretion of the prosecutor, usually decided in his office, and is therefore unreviewable. Factors that may help determine the extent of relevant conduct include reliability of evidence, desire to help the court's consistency in sentencing, desire to comply with an unwritten and unspoken agreement with defense counsel, agreement not to offer relevant conduct because of some promise of cooperation by the defendant, or for any other reason or non-reason to use relevant conduct. Thus, the prosecutor controls the treatment of the defendant at sentencing to a large degree.

While relevant conduct is a very effective way for the prosecutor to help determine the defendant's sentence, the prosecutor may also have the option of seeking "departures" under the Sentencing Guidelines which makes the defendant that much more dependent on the prosecutor's discretion.

B. Departures

Similar to the dependency a defendant has upon the prosecutor with regard to relevant conduct, a type of dependency also exists in the area of "departures."[74] Departure is the term used to describe the imposition of a sentence outside the Sentencing Guidelines range.

Unlike relevant conduct, a departure can be subject to more control by judges and defense attorneys to the extent they can also seek departures based upon evidence.[75] However, the availability of departures to judges and defense attorneys does not diminish the ability of

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73. *Ebbole*, 917 F.2d at 1501; United States v. Miller, 910 F.2d 1321, 1332 (6th Cir. 1990) (Merritt, C.J., dissenting).

74. *See* United States Sentencing Commission, *Guidelines Manual*, § 5K1.1 *et seq.* (Nov. 1993).

75. Defense attorneys have such options as Lesser Harms (§ 5K2.11), Coercion and Duress (§ 5K2.12), and Diminished Capacity (§ 5K2.13). Similarly, courts may also decide a departure is appropriate because of special factors such as Extreme Conduct (§ 5K2.8) and the Disruption of Governmental Functions (§ 5K2.7).

the prosecutor to seek enhancement of the defendant's sentence[76] upward or wield the availability of a downward departure for "substantial assistance" as a club upon the defendant with no reviewability of the prosecutor's actions.

Only upon the motion of the prosecutor can the court "depart" from the Sentencing Guidelines when the defendant has provided "substantial assistance" in the investigation or prosecution of others.[77] The significant effect of a substantial-assistance motion is illustrated by the following example. Where the calculations for a defendant call for a 120-month imprisonment sentence, a properly framed motion for substantial assistance from the Government permits the court to sentence the defendant to twenty-four months. Though the prosecutor must make the motion, the court determines the reduction in sentence on the grounds set forth by the Sentencing Commission.[78] The court may not, either on its own or on a defense motion, depart from the Sentencing Guidelines because it perceives substantial assistance to have taken place.[79] Moreover, the district judge has no right to expect or request an explanation from the prosecutor when there is no substantial-assistance motion when the judge feels it may be justified.[80] Prosecutors have almost unlimited discretion to make a motion and thereby alter the sentence.[81]

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76. *See* United States v. Kikumura, 918 F.2d 1084, 1089 (3d Cir. 1990), discussed *infra.*

77. United States Sentencing Commission, *Guidelines Manual,* § 5K1.1 (Nov. 1994).

78. *Id.*

79. *See, e.g.,* United States v. Romolo, 937 F.2d 20, 23 (1st Cir. 1991); United States v. Agu, 949 F.2d 63, 65 (2d Cir. 1991); United States v. Chavez, 902 F.2d 259, 267 (4th Cir. 1990); United States v. Levy, 904 F.2d 1026, 1034-35 (6th Cir. 1990).

80. *See, e.g.,* United States v. Daniels, 929 F.2d 128, 131 (4th Cir. 1991).

81. While the Government's discretion with substantial assistance motions has not been found to violate due process, United States v. La Guardia, 902 F.2d 1010, 1018 (1st Cir. 1990), the judge does have authority to review the refusal to grant or file a substantial-assistance motion if the Government's refusal was based on an unconstitutional motive. Wade v. United States, 112 S. Ct. 1840, 1844 (1992). Arguments that a judge has more authority to consider a motion for substantial assistance without a Government motion have received some sympathy. *See* United States v. Justice, 877 F.2d 664, 667 (8th Cir. 1989); United States v. White, 869 F.2d 822, 825 (5th Cir. 1989). However, the vast majority of courts have not agreed.

By itself, the fact that the prosecutor has sole discretion to move for a departure from the Sentencing Guidelines because of cooperation seems to be nothing more than a prosecutorial club which can and should be used to help further the administration of justice. However, Congress' interest in overhauling the sentencing system must not be forgotten. Prior to the Sentencing Guidelines, there was little or no predictability in sentencing, too much discretion was given to judges, and different defendants were treated differently from one district to another for the same crime. Predictability and equal treatment were Congress' primary goals. Unfortunately, substantial-assistance motions have not assisted in reaching these goals. Substantial-assistance motions have been less than uniformly applied under the same set of standard guidelines, and thereby continue the pre-guidelines concerns of unequal treatment and unpredictability.[82]

The United States Sentencing Commission recognized this problem in its 1993 Annual Report[83] when it listed three findings of a long-term study on substantial assistance:

1. A significant increase from 1989 to 1992 in the national rate of departure for substantial assistance (from 5.8% to 15.1% of all cases);
2. A wide variation in the rate of substantial assistance departure among circuits and districts (from 0.0% to 48.8%); and
3. Considerable variation in the kinds of defendant assistance that result in substantial assistance motions as well as the extent of departure granted by the court.

In the Southern District of West Virginia, the percentage of substantial-assistance departures between October 1, 1992 through September 30, 1993 was only 7.3% (29 of the total 395 sentenced), while the Northern District's percentage was 11.4%.[84] In the Eastern District of

82. Cooperation to one prosecutor may be nothing to another. Information that a given defendant wishes to share may be important to one prosecutor in one jurisdiction because of the type of work being done there, and unimportant to the prosecutor in the next district. It should also be noted that notwithstanding crimes for perjury, false swearing, etc., a harsh Sentencing Guidelines sentence in the drug arena can be ameliorated substantially by having "knowledge" about fellow drug dealers.

83. 1993 UNITED STATES SENTENCING COMMISSION ANNUAL REPORT 11.

84. *Id.* at 161.

Pennsylvania, it appeared that there were many more cooperating individuals since prosecutors there filed substantial-assistance motions 50.8% of the time, while in the Western District of Arkansas defendants were obviously less talkative, where a mere .06% motions for substantial assistance were filed.[85] Is it reasonable to conclude that defendants in the Eastern District of Pennsylvania are truly more assisting than defendants charged with similar crimes in other locations?[86] Probably not. Instead, prosecutors in Pennsylvania obviously had policies — either individually or as a unit — that the motion would be made under less demanding scenarios. Ironically, this is just the kind of disparity in sentencing which caused Congress to enact the SRA.

The discretionary use of substantial-assistance motions by prosecutors has been found to be constitutional.[87] However, the fact that substantial-assistance departures account for over 70% of all departures[88] clearly illustrates the effect of the discretion exercised by the prosecutor.

Substantial-assistance motions are not the only means of altering sentences. Fourteen specific grounds have been explicitly cited by the Sentencing Commission as acceptable reasons for departure. The Sentencing Commission also provides a general statement on departures which allows a court to go outside the established sentencing range if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[89]

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85. *Id.* at 161-62.

86. It should be noted that a full one-third of the substantial assistance departures were substantially derived from drug trafficking prosecutions. *Id.* at 165.

87. *See* United States v. Saldivar, 730 F. Supp. 329, 330-31 (D. Nev. 1990).

88. 1993 UNITED STATES SENTENCING COMMISSION ANNUAL REPORT 159.

89. United States Sentencing Commission, *Sentencing Guidelines*, § 5K2.0 (Nov. 1993) (citing 18 U.S.C. § 3553(b) (1988)). The possible grounds for a departure are fairly narrow. Many individual factors have been considered by the Sentencing Commission and are not subject to departure. *See* United States v. Studley, 907 F.2d 254, 259 (1st Cir. 1990) (court's finding that defendant was not a threat to society not a ground for departure); United States v. Joyner, 924 F.2d 454, 461 (2d Cir. 1991) (disparities in co-defendants' sentences not grounds for departure); United States v. Rutana, 932 F.2d 1155, 1158 (6th Cir. 1991) (socio-economic status not a ground for departure).

Many of the factors that are used to determine whether or not a departure is appropriate are known to the prosecutor and his agents. Departures are fact intensive. If a departure is sought by the prosecutor, evidence is collected and submitted to the court in a sentencing hearing for consideration. If for whatever reason the prosecutor does not wish to seek a departure, the prosecutor just doesn't do so, and facts known which would already support an upward or downward departure are ignored.

Perhaps one of the best examples of a prosecutor's use of departures to increase a sentence above and beyond the offense or conviction is found in *United States v. Kikumura.*[90] Kikumura was convicted of a variety of charges related to, among other things, the transportation of weapons in interstate commerce. The sentence was calculated pursuant to Sentencing Guideline § 2K1.6. The calculation determined Kikumura to be a Level 18, exposing him to twenty-seven to thirty-three months. However, the Government, in a sentencing memorandum, advised Kikumura that it would seek a substantial upward departure based on his alleged terroristic activities.[91] The Government then presented witnesses to support the departures sought. The district court heard the evidence and ruled the upward departure warranted.[92] The district court sentenced Kikumura to thirty years imprisonment, thereby constituting a departure of more than twenty-seven years.

The Third Circuit Court of Appeals started its analysis of the district court's departure by acknowledging that "real offense sentencing" can create potential and significant unfairness because of the nature of the collateral, post-verdict adjudication for which the procedural protections are significantly lower than at the trial itself.[93] After considering each of the reasons that the district court relied upon for departing in such a magnitude, and the clearly erroneous standard it was

90. 918 F.2d 1084 (3d Cir. 1990).

91. *Id.* at 1094.

92. The court found that Kikumura had formulated the intent to cause multiple deaths and serious injuries and was involved in a planned detonation of unusually dangerous explosives, an intent to disrupt a governmental function, extreme conduct, endangerment of public health/safety and national security, and an inadequacy of criminal history category. *Id.* at 1097.

93. *Id.* at 1099.

operating under, the court decided that the district court's upward departure was legal and permissible.[94] However, the court found that the extent of the departure was not reasonable, and the sentence was vacated so that the district court could modify the sentence accordingly.

In his concurring opinion, Judge Rosenn agreed with the court's holding generally, but noted his concern that the Government had manipulated Kikumura's charge and sentencing, thus illustrating that the Sentencing Guidelines had replaced judicial discretion with prosecutorial discretion.[95] Judge Rosenn concluded that the original charges were manipulated in such a way to allow the plea of guilty and then allow the Government to use a sentencing hearing as a method by which the punishment desired would be obtained. He noted that the strategy significantly lightened the Government's burden at sentencing as it was not required to furnish Kikumura "with the evidence against him to assure an informed and able cross-examination," was not burdened with the Rules of Evidence, and had a significantly lesser burden of proof than it would have had at trial.[96] Judge Rosenn contended that the Sentencing Guidelines encouraged this strategy, and it was clear that the Government's primary case against Kikumura was what it put on during the sentencing hearing, and not what was contained in the indictment. Judge Rosenn's conclusions are supported,[97] and other courts have expressed similar concerns.[98]

The shift of discretion from the judge to the prosecutor under the Sentencing Guidelines clearly raises practical concerns about the "tail wagging the dog." While there can be disagreement about the transfer of discretion being good or bad, there can be no disagreement that a savvy prosecutor can effectively sentence the defendant himself after determining what the sentence should be. But again, this is a practical

94. *Id.* at 1109 (citing 18 U.S.C. § 3553(b)).

95. *Kikumura,* 918 F.2d at 1119 (Rosen, J., concurring).

96. *Id.* at 1120.

97. Judge Rosenn cited a Federal Courts' Study Report which noted: "We have been told that the rigidity of the Guidelines is causing a massive, though unintended transfer of discretion of authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38 (Apr. 1990).

98. *Roberts,* 726 F. Supp. at 1372-73; *Boshell,* 728 F. Supp. at 637.

problem which must be considered when discussing the Sentencing Guidelines, *vis-a-vis* Congress' intent by creating the Sentencing Commission. On a higher plane, the new-found prosecutorial discretion also has constitutional ramifications.

IV. CONSTITUTIONAL QUESTIONS

Though it is routinely cited for the premise that the Sentencing Guidelines are constitutional, the Supreme Court's decision in *United States v. Mistretta*[99] is fairly limited in its constitutional analysis. *Mistretta* substantially limited its analysis to the delegation of powers from Congress to the Commission, which is part of the Judiciary. The Court also decided that there was no separation-of-powers violation with the delegation of authority to the Commission. However, several other constitutional issues were not raised, and therefore, not ruled upon by the Court.[100] They include issues directly related to the prosecutor's role under the Sentencing Guidelines.

Perhaps no area of constitutional concern has attracted as much attention as the due process aspect of the Sentencing Guidelines.[101] Due process rights of a defendant are in effect at sentencing.[102] However, the courts of appeals have routinely rejected due process challenges.[103] The primary bases for rejecting those challenges are found in two pre-Sentencing Guidelines Supreme Court decisions in *McMillan v. Pennsylvania*[104] and *Williams v. New York*,[105] which

99. 488 U.S. 361 (1985).

100. *Id.* at 391 (raising the possibility of a constitutional problem if power had been conferred upon the *executive branch*).

101. Several due process issues have been raised, including those raised in Lauren Greenwald, Note, *Relevant Conduct and the Impact of the Preponderance Standard of Proof under the Federal Sentencing Guidelines; A Denial of Due Process*, 18 VT. L. REV. 529 n.23, 532-33 (1994). Prosecutorial discretion has also raised due process concerns. *See Roberts*, 726 F. Supp. at 1367. Relevant conduct is also laden with due process concerns. *See Miller*, 910 F.2d at 1330 (Merritt, J. dissenting).

102. Gardner v. Florida, 430 U.S. 349, 358 (1977).

103. Heaney, *supra* note 47, at 212 n.156. (circuit courts rejecting due process claims that the burden of proof at sentencing is unconstitutional). *See, e.g., Roberts*, 726 F. Supp. 1359 (D.D.C. 1989), *rev'd sub nom.* United States v. Doe, 934 F.2d 353 (D.C. Cir. 1991); *Boshell*, 728 F. Supp. 632 (E.D. Wash. 1990), *modified*, 952 F.2d 1101 (9th Cir. 1991).

104. 477 U.S. 79 (1986). Reliance upon *McMillan* has been criticized because of the

appear to permit the exercise of prosecutorial discretion allowed in the Sentencing Guidelines.

To the extent there have been successful constitutional attacks on prosecutor's discretion, it has occurred on the fringes. For example, in *United States v. Fortier*,[106] the prosecutor, in a sentencing hearing, attempted to add an additional 249 grams of cocaine to the defendant's conduct through the relevant conduct provisions of the Sentencing Guidelines. However, the Eighth Circuit Court of Appeals found that the relevant conduct offered by the Government, although reliable, was introduced as triple hearsay, without the benefit of witnesses, and thereby in violation of the confrontation clause.[107]

The prosecutor's burden of proof at sentencing has also come under attack.[108] If the prosecutor is permitted wide-ranging discretion which effectively allows him to determine sentencing, then the least that can be done is to hold the prosecutor to a standard of proof more strict than a preponderance, or in the words of the Sentencing Guidelines, "sufficient *indicia* of reliability to support its probable accuracy."[109] Most attempts to modify the burden have been rejected based upon *McMillan*, which was decided before the actual, practical effect of the Sentencing Guidelines became apparent. These rejections have come notwithstanding the fact that sentencing today is much different than sentencing prior to the Sentencing Guidelines. Sentencing hearings have become mini-trials (or major trials) involving witnesses, evidence, and arguments to the court. Sentencing is now open to becoming an "end run" around the indictment by a savvy prosecutor who does not advise the defendant what he should expect at sentencing by pleading

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McMillan pre-Guideline assumptions. *See* Heaney, *supra* note 47, at 213.

105. 337 U.S. 241 (1948).

106. 911 F.2d 100 (8th Cir. 1990), *rev'd*, 976 F.2d 393 (8th Cir. 1992).

107. *Id.* at 103-04. *See also* M. Johnson, Comment, *Criminal Constitution Law — Eighth Circuit Applies the Confrontation Clause at a Sentence Hearing — United States v. Fortier, 911 F.2d 100 (8th Cir. 1990)*, 17 WM. MITCHELL L. REV. 829 (1991).

108. *See* Lauren Greenwald, Note, *Relevant Conduct and the Impact of the Preponderance Standard of Proof under the Federal Sentencing Guidelines: A Denial of Due Process*, 18 VT. L. REV. 529 (1994).

109. United States Sentencing Commission, *Sentencing Guidelines*, § 6A1.3(a) (Nov. 1993) (emphasis added).

guilty or going to trial. This situation is much different than that found in *McMillan* and has raised the ire of some federal judges.[110] Some courts have taken specific action.

In *Kikumura*, for example, the Ninth Circuit Court of Appeals saw the opportunity to increase the burden of proof for prosecutors in a fact situation which presented an extreme use of the sentencing mechanism to increase a sentence. In situations where hearsay is substantially relied upon, and the magnitude of a departure is disproportionate, the standard of proof should be increased to a clear and convincing standard.[111] *Kikumura* is consistent with *Fortier* to the extent that the confrontation clause is cited as the reason behind the imposition of a higher constitutional standard of proof when facially unreliable facts form the basis for the sentence enhancement.

Kikumura and *Fortier* (to a lesser degree) are consistent with the warnings — warnings which have been fairly well ignored by other circuit courts of appeal[112] — that when a sentencing hearing turns into what the trial should have been after a complete indictment was returned, then a higher standard of proof may be constitutionally required. Other circuits have refused to adopt this reasoning.[113]

V. CONCLUSION

History has demonstrated that criminal sentencing has been the subject of a variety of theories and methods. Fixed or determinate sentences, indeterminate sentences, or a combination of both, have all been utilized. Each of the sentencing options have their own problems. None are perfect. Today's criminal sentencing system evidences traits of several types of sentencing schemes.

While state legislatures predominantly rely upon indeterminate sentencing and thereby grant much of the sentencing discretion to judg-

110. *Miller*, 910 F.2d at 1330-31 (Merritt, J. dissenting); *Roberts*, 726 F. Supp. at 1367-68; *Boshell*, 728 F. Supp. at 637-38; *Harrison-Philpot*, 978 F.2d at 1527-28 (Wiggins, J., concurring); *Kikumura*, 918 F.2d at 1119-20 (Rosenn, J., concurring).

111. *Kikumura*, 918 F.2d at 1101-02.

112. *McMillan*, 477 U.S. at 88-89 (citations omitted).

113. *See, e.g.*, United States v. Urrego-Linares, 879 F.2d 1234, 1238 (4th Cir. 1989).

es and parole boards, Congress rejected indeterminate sentencing with the enactment of the SRA. Congress found the discretion previously exercised by judges and parole commissions inconsistent with its goals of consistency, fairness and predictability in sentencing. The SRA was enacted to accomplish these goals.

However, the Sentencing Commission's enactment of the operating provisions of the new Sentencing Guidelines merely turned the federal sentencing process into a prosecutor's panacea. A prosecutor can now direct the investigation, decide who to charge, when to charge, what to include and not include in the indictment, decide who to negotiate with and the substance of any plea bargain, grant use immunity, and maneuver the facts and evidence that determine the sentence to a large degree. The sentence can be harsh or lenient, and the prosecutor determines which it is. Most importantly, each of these decisions, including the sentencing decision, are unreviewable because they are not a matter of record. Only the results of the decisions are reviewable.

Hence, the unbridled discretion of the judiciary that caused Congress to overhaul the federal sentencing system has merely been transferred in large part to the prosecutors who are just as likely to exercise it differently from one to another. Disparity remains, creating fertile ground for unfair sentencing. Congress' goals have not been effectively realized by the SRA. However, possible improvements to the Sentencing Guidelines include:

1. Require relevant conduct to be revealed to the defendant and the court during pre-trial discovery, and no later than the guilty plea or trial. Without this information, defendants cannot make sound decisions and their counsel cannot offer sound advice.

2. Allow judges to prevent prosecutors from bringing minimal charges in the indictment and then seeking to dramatically enhance sentences at the sentencing hearing through departures.

3. Allow judges to have a larger role in determining whether or not a sentence reduction is appropriate based upon cooperation. Also, if substantial assistance motions remain part of the Sentencing Guidelines, there should be consistency within the Department of Justice on when they should be given so that the huge disparities which now exist can be mitigated.

4. Because of the substantial impact of post-conviction proceedings, the Federal Rules of Evidence should apply in full, statements of disputed facts should not be accepted by the court without the defendant having the right to confront the witnesses offering such facts, and the standard of proof should be increased to a clear and convincing standard to adequately reflect the impact of the Sentencing Guidelines.

It is only with such changes, and perhaps others, that the federal sentencing scheme will start to accomplish what Congress intended.