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Criminal Procedure - United States v. Restrepo: Uncharged Conduct Now Considered in the Ninth Circuit Under Federal Sentencing Guidelines

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CRIMINAL PROCEDURE

UNITED STATES v. RESTREPO: UNCHARGED CONDUCT NOW CONSIDERED IN THE NINTH CIRCUIT UNDER FEDERAL SENTENCING GUIDELINES

My object all sublime
I shall achieve in time
To let the punishment fit the crime
The punishment fit the crime
W.S. Gilbert, THE MIKADO, Act ii (1885)

I. INTRODUCTION

In *United States v. Restrepo*,[1] the Ninth Circuit, on a petition for rehearing, held that conduct of which the defendant was neither charged nor convicted could be taken into consideration at the defendant's sentencing hearing.[2] The court reasoned that this interpretation is consistent with the clear intent of the United States Sentencing Commission and the Federal Sentencing Guidelines.[3]

The Ninth Circuit also held that when considering uncharged conduct at defendant's post-conviction sentencing hearing, a preponderance of the evidence standard is sufficient for due process concerns.[4] When used to enhance a sentence, how-

1. United States v. Restrepo, 903 F.2d 648 (9th Cir. 1990) (per Boochever, J.; Noonan, J., concurring; and Pregerson, J., dissenting) [hereinafter *Restrepo II*].

2. *Restrepo II*, 903 F.2d at 656.

3. *Id.* at 653. *See generally* United States Sentencing Comm'n, Federal Sentencing Guidelines Manual (Nov. 1, 1989) [hereinafter *Guidelines*].

4. *Restrepo II*, 903 F.2d at 656.

ever, a more demanding interpretation of the standard is necessary.[5]

Finally, the court held that applying the *Guidelines* as amended June 15, 1988, and mandated by statute,[6] did not violate the ex post facto clause,[7] although defendant's conduct occurred prior to the amendment.[8]

II. FACTS

A. Factual Background

On March 8, 1988, Dario Restrepo was indicted on two counts of cocaine distribution[9] (counts I and II).[10] His co-defendant, Judith DeMaldonado, was also charged with distribution under count II.[11] In addition, DeMaldonado was indicted on two counts of possession of cocaine with intent to distribute[12] (counts III and IV).[13] DeMaldonado pleaded guilty to counts II, III and IV and agreed to testify against Restrepo in return for a lesser sentence.[14] At trial in the district court, she testified that Restrepo had provided her with all the cocaine she had sold, and an additional amount that she had turned over to the police.[15] Restrepo was convicted of counts I and II.[16]

At his sentencing hearing, Restrepo objected to the *Guide-*

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5. *Id.* at 654.

6. See 18 U.S.C. § 3553(a)(4) (1988) (sentencing court is to apply the version of the *Guidelines* in effect at the time of sentencing).

7. U.S. Const. art. I, § 9, cl. 3. states "No Bill of Attainder or ex post facto Law shall be passed."

8. *Restrepo II*, 903 F.2d at 656.

9. *Id.* at 650. The indictment was pursuant to 21 U.S.C. § 841(a)(1) (1988) which provides in pertinent part: "[I]t 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."

10. *United States v. Restrepo*, 903 F.2d 648, 650. Counts I and II involved a total of 37.5 grams of cocaine. *Id.* at n.2.

11. *Id.*

12. *Id. See also* 21 U.S.C. § 841(a), reproduced in part *supra*, note 9.

13. *Restrepo II*, 903 F.2d at 650. Counts III and IV involved a total of 32.89 grams. *Id.* at n.2.

14. *Id.* at 650.

15. *Id.* When the police searched DeMaldonado's house, she turned in an additional 32.94 grams of cocaine. *Id.* n.2.

16. *Restrepo II*, 903 F.2d at 650.

lines on separation of powers and due process grounds.[17] Restrepo also objected to the court's application of the Multiple Counts section[18] and the Relevant Conduct section,[19] but these objections were overruled.[20]

The district court judge applied the *Guidelines* by following several steps. First, it was determined that the drug offense section entitled "Unlawful Manufacturing, Importing, Exporting or Trafficking"[21] was most applicable to Restrepo's offense.[22] Under

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17. *Id.* Restrepo's argument that the *Guidelines* violate the federal constitutional doctrine of separation of powers was rejected by the Supreme Court in a different case after Restrepo's appeal was filed (*See* Mistretta v. United States, 488 U.S. 361 (1989) in which the Court held that the Sentencing Commission was not a violation of either the separation of powers doctrine or the nondelegation doctrine). *See also infra*, notes 87-102 and accompanying text. In addition, Restrepo's general argument that the *Guidelines* violated due process also failed. *Restrepo II* 903 F.2d at 650-51 n.3. *See also* United States v. Brady, 895 F.2d 538, 544 (9th Cir. 1990) (*Guidelines* facially violate neither substantive nor procedural due process). *See also infra*, notes 103-16 and accompanying text.

18. *Restrepo II*, 903 F.2d at 650. *See also Guidelines* § 3D1.1, the Multiple Counts section, which provides in pertinent part: "When a defendant has been convicted of more that one count, the court shall: (a) Group the counts resulting in conviction into Groups of Closely-Related Counts ("Groups"). . . . (b) Determine the offense level applicable to each Group. . . . (c) Determine the combined offense level applicable to all groups taken together. . . ."

19. *Restrepo II*, 903 F.2d at 650. *See also Guidelines* § 1B1.3, the Relevant Conduct section, which provides in pertinent part:

> (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 basis of the following:
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> (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, 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, or that otherwise were in furtherance of that offense.
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> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. . . . .

20. *Restrepo II*, 903 F.2d at 650.

21. *Guidelines* § 2D1.1. This section also includes possession with intent to commit these offenses.

22. *Restrepo II*, 903 F.2d at 651. The Ninth Circuit discussed the district court's application of the *Guidelines*. *See also Guidelines* §§ 1B1.1 (Application Instructions), 2D1.1.

that section, the base offense level is determined by reference to the Drug Quantity Table.[23] The district judge then used the Relevant Conduct section to set the total quantity of drugs involved.[24] Because all of the drugs involved were part of a common scheme,[25] both the amount of cocaine included in the counts of which Restrepo was not convicted[26] and the additional amount turned in by DeMaldonado[27] were added to the amount involved in the counts of conviction.[28] The judge adjusted for the multiple counts, grouping the two counts of conviction together pursuant to the Multiple Counts section[29] and assigned an offense level corresponding to the total amount of drugs involved.[30] The court adopted a guideline range of forty-one to fifty-one months and sentenced Restrepo to forty-six months in prison.[31] Had the court not aggregated the quantities of all the drugs involved, Restrepo's sentence range would have been

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23. *Restrepo II*, 903 F.2d at 651; *see also Guidelines* § 2D1.1(a)(3) which apply base offense level specified in Drug Quantity Table.

24. *Restrepo II*, 903 F.2d at 651. *See also Guidelines* § 1B1.3, reproduced in part *supra* note 20.

25. *Restrepo II*, 903 F.2d at 651. The district court found the Government had proved Restrepo's and DeMaldonado's participation in the common scheme by at least a preponderance of the evidence. "I'm satisfied certainly by a preponderance of the evidence and in fact, I think, by clear and convincing evidence that Dario Restrepo supplied the cocaine that Judith Maldonado (sic) had at her house and that she sold on March 1, the other cocaine that he wasn't convicted of." *Id.* at 655 (quoting Transcript of Sentencing Proceedings at 65).

26. *Restrepo II*, 903 F.2d at 651. Restrepo was not convicted of counts III and IV, which involved a total of 32.89 grams. *Id.* at 650, n.2.

27. *Restrepo II*, 903 F.2d at 651. The additional amount totalled 32.94 grams. *Id.* at 650, n.2.

28. *Restrepo II*, 903 F.2d at 651. Restrepo was convicted of counts I and II, which involved a total of 37.5 grams. *Id.* at 650, n.2.

29. *Restrepo II*, 903 F.2d at 651. *See also Guidelines* § 3D1.2(d), which provides that counts are to be grouped together if the offense level is determined largely on the basis of the quantity of a substance involved.

30. *Restrepo II*, 903 F.2d at 651. *See also Guidelines* § 3D1.3(b), which provides that in cases of counts grouped together pursuant to § 3D1.2(d), the applicable offense level corresponds to the aggregated quantity of the substance involved.

31. *Restrepo II*, 903 F.2d at 650. The district court made additional findings at the sentencing hearing which served to increase Restrepo's sentence. First, the enhancement provision of § 2D1.3(a)(2)(B) was applied because Restrepo's sale of cocaine in count I occurred within 1000 feet of a school (i.e. the University of Alaska). *Id.* at n.2. Second, Restrepo had obstructed justice before and during his trial. *Id.* As a result, the court increased his base offense level two points. *Id.* In addition, the district court found that Restrepo played the role of leader in the drug dealing ring of which DeMaldonado was a part, and as a result, pursuant to § 3B1.1(c), his offense was increased an additional two points. *Id.*

twenty-seven to thirty-three months.[32]

On appeal, Restrepo challenged the court's aggregation of the drugs involved in counts III and IV with the additional amount turned in by DeMaldonado in determining his base offense level.[33] Restrepo also argued that the preponderance of the evidence standard used at the sentencing hearing violated due process.[34] Restrepo also asserted an ex post facto violation because the district court applied the version of the *Guidelines* in effect at the time of sentencing rather than those effective at the time of his conduct.[35]

B. Procedural Background

The Ninth Circuit had previously considered this appeal in 1989,[36] but decided the case differently. While the same issues were raised, the court limited its analysis to statutory interpretation of the *Guidelines*.[37]

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32. *Restrepo II*, 903 F.2d at 650. The aggregated quantity of cocaine (103.33 grams) carried a base offense level of 18 points (at least 100 grams but less than 200) with an applicable sentence range of 27 to 33 months. *Id.* at 651, n.4. *See Guidelines* §§ 2D1.1(c) (Drug Quantity Table), 5.2 (Sentencing Table). The four point increase raised the offense level to 22 with a sentence range of 41 to 51 months. *Restrepo II*, 903 F.2d at 651, nn.2 & 4.

The amount involved in conviction counts I and II (37.5 grams) carried a base offense level of 14 (at least 25 grams but less than 50). *See Guidelines* §§ 2D1.1(c) and 5.2. With the four point increase to a level of 18, the sentence range would have been 27 to 33 months had the court not aggregated the quantities of drugs. *Restrepo II*, 903 F.2d at 650-51, nn.2 & 4. *See also Guidelines* §§ 2D1.1(c) and 5.2.

33. *Restrepo II*, 903 F.2d at 650.

34. *Id.*, *See* U.S. Const. amend. V and XIV (Due Process Clause applicable to states).

35. *Restrepo II*, 903 F.2d at 650-51. Restrepo made this assertion in briefs filed after oral arguments. *Id. See also* U.S. Const. art. I, § 9, cl. 3. reproduced *supra* note 7.

36. *See* United States v. Restrepo, 883 F.2d 781 (9th Cir. 1989) (per Pergerson, J.; Noonan, J., and Boochever, J., dissenting), *rev'd on reh'g*, 903 F.2d 648 (9th Cir. 1990) [hereinafter *Restrepo I*].

37. *Restrepo I*, 883 F.2d at 784, n.7. The court stated that Restrepo's claim that the Guidelines violated due process by requiring a lesser standard of proof than that required for conviction (i.e. beyond a reasonable doubt) was foreclosed by the Supreme Court's recent decision in McMillan v. Pennsylvania, 477 U.S. 79 (1986). In *McMillan*, the Court ruled, in a challenge to Pennsylvania's Mandatory Sentencing Act, that the preponderance standard satisfied due process). *McMillan*, 477 U.S. at 80. The Ninth Circuit also determined that Restrepo's claim that the Guidelines violated the doctrine of separation of powers must fail (citing *Mistretta*, 488 U.S. 361 (1989)). *See also supra* note 17 and *infra* notes 87-94 and accompanying text. The Ninth Circuit also noted that by deciding the case on statutory grounds, the merits of Restrepo's ex post facto claim

Restrepo argued that no provision of the Multiple Counts section allowed a grouping together of all counts because he was never convicted of the two counts of DeMaldonado's conviction.[38]

The Government argued that while convictions may be required under the Multiple Counts Section, they are not required under the Relevant Conduct section.[39]

Judge Pregerson, writing for the majority in *Restrepo I*,[40] found the *Guidelines* ambiguous because both Restrepo's interpretation and the Government's were supportable.[41] He decided that because of this ambiguity, the "rule of lenity"[42] should be applied.[43] The court held that the district court erred in interpreting the Multiple Counts Section,[44] and held that quantities of drugs involved in charges of which Restrepo was neither charged nor convicted could not be taken into consideration in determining his base offense level.[45]

Judge Boochever, dissenting in *Restrepo I*,[46] wrote that the *Guidelines* were not ambiguous when read with the accompanying commentary, and therefore the "rule of lenity" should not be

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need not be considered. *Restrepo I*, 883 F.2d at 784, n.7 (citing California v. Yamasaki, 442 U.S. 682 (1979) (between a statutory claim and a constitutional claim, the court should pass on statutory claim first)). *Id.* at 692-93.

38. *Restrepo I*, 883 F.2d at 785. *See also Guidelines* Commentary at page 3.9 which states, "This part provides rules for determining a single offense level that encompasses all the *counts of which the defendant is convicted.*" *Id.* (emphasis added).

39. *Restrepo I*, 883 F.2d at 785. *See Guidelines*, § 1B1.3, reproduced in part, *supra* note 20. In addition to that section, the Government pointed to the Application Notes which provide: "This subsection applies to offenses of types for which convictions on multiple counts would be grouped together pursuant to § 3D1.2(d); *multiple convictions are not required.*" *Guidelines* at page 1.19. (emphasis added).

40. *Restrepo I*, 883 F.2d at 782. Judge Pregerson wrote the dissenting opinion in *Restrepo II*.

41. *Restrepo I*, 883 F.2d at 786.

42. *Id.* (quoting Rewis v. United States, 401 U.S. 808 at 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity")). *See also* Bifulco v. United States, 447 U.S. 381 at 387 (1980) (rule of lenity applies to substantive criminal statutes, as well as imposition of penalties).

43. *Restrepo I*, 883 F.2d at 786.

44. *Id. See also supra* notes 30-31 and accompanying text.

45. *Restrepo I*, 883 F.2d at 786.

46. *Restrepo I*, 883 F.2d at 786. Judge Boochever wrote the majority opinion in *Restrepo II*.

applied.[47] As a result, Judge Boochever argued that the intent of the Sentencing Commission was clear,[48] that conduct of which the defendant is neither charged nor convicted may be used to adjust the offense level under Chapter Three of the *Guidelines*.[49]

III. BACKGROUND

A. THE GUIDELINES

For almost a century, the federal criminal justice system has utilized a system of indeterminate sentencing.[50] Under this system, statutes specified maximum penalties for crimes, but judges were left with wide discretion in determining the appropriate sentence.[51] As a result, serious disparities in sentencing were common.[52] As early as 1958, Congress sought to create more rigid criteria for sentencing in the federal courts.[53] These efforts proved to be largely unsuccessful,[54] and fundamental dissatisfaction with the uncertainties and disparities of the present system continued.[55]

In response, Congress enacted the Sentence Reform Act in 1984[56] and established the United States Sentencing Commission (the Commission).[57] The Commission is an independant entity within the judicial branch[58] comprised of seven voting members appointed by the President with the advice and consent of

47. *Restrepo I*, 883 F.2d at 786-87. Specifically, he cited the commentary to § 1B1.3, which provides: "[I]n a drug distribution case, quantities of drugs not specified in the count of conviction are to be included [in determining the offense level] if they were part of the same course of conduct as the count of conviction." *Guidelines* Commentary at page 1.20.

48. *Restrepo I*, 883 F.2d at 787.

49. *Id.* at 787-88.

50. *See* United States v. Mistretta, 488 U.S. 361, 363 (1989) for a discussion of pre-*Guidelines* sentencing policies and practices. Also see *infra* notes 87-102 for a discussion of substantive issues of *Mistretta*.

51. *Mistretta*, 488 U.S. at 363.

52. *Id.* at 365.

53. *Id.* In 1958, Congress authorized the creation of judicial sentencing institutes and joint councils to formulate standards and criteria for sentencing. *Id.*

54. *Mistretta*, 488 U.S. at 365-66.

55. *Id.* at 366.

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

57. 28 U.S.C. § 991(a) (1988).

58. *Id.*

Congress.[59] At least three of the members are Federal judges,[60] and the Attorney General, or his designee, serves as an ex-officio non-voting member.[61]

The Commission's purpose was to establish just sentencing policies and practices and establish detailed guidelines prescribing appropriate sentences for offenders convicted of federal crimes.[62] The guidelines were to be designed to assure certainty and fairness, and reduce the problems associated with the previous system.[63] The *Guidelines* were submitted to Congress, and became effective on November 1, 1987.[64] Congress, in enacting the sentencing law, sought to achieve three objectives:[65] honesty;[66] uniformity;[67] and proportionality in sentencing.[68] Through honesty in sentencing, Congress sought to eliminate previous situations whereby an offender would be sentenced to twelve years, but released on parole after four.[69] Congress achieved this objective by abolishing parole.[70] The Commission

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59. *Id.* 28 U.S.C. § 991(a) also provides that the Chairman and members of the Commission shall be subject to removal by the President only for "neglect of duty or malfeasance in office or for other good cause shown."

60. *Id.*

61. *Id.* In addition, § 991(a) provides that no more than four members of the Commission may be of the same political party.

62. *See* 28 U.S.C. § 991(b) (1988) and 18 U.S.C. § 3553(a)(2) (1988).

63. *See* 28 U.S.C. § 991(b)(1)(B) (1988) (requirements of fairness and certainty as purposes of the Commission). Also, see § 994(f) (Commission directed to give "particular attention" to requirements providing for "certainty and fairness in sentencing and reducing unwarranted sentencing disparities.").

64. 18 U.S.C. § 3551 (1988). Offenders who commit crimes on or after Nov. 1, 1987 will receive sentences under the *Guidelines*. S. REP. No. 225, 98th Cong., 2d Sess. 54, 189, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3372.

65. *See Guidelines Commentary* at 1.2, (1989). *See also* S. REP. No. 225, 98th Cong., 2d Sess. 54, 56, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3237, 3239.

66. *See Guidelines Commentary* at 1.2, (1989). *See also* S. REP. No. 225, 98th Cong., 2d Sess. 54, 56, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3237, 3239.

67. *See Guidelines Commentary* at 1.2, (1989). *See also* S. REP. No. 225, 98th Cong., 2d Sess. 54, 56, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3237, 3239.

68. *See Guidelines Commentary* at 1.2, (1989). *See also* S. REP. No. 225, 98th Cong., 2d Sess. 54, 56, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3237, 3239.

69. S. REP. No. 225, 98th Cong., 2d Sess. 56, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3239.

70. Section 235(b)(1) of the Sentencing Reform Act provides that the law shall remain in effect for five years after the effective date of the Act as to defendants convicted before that date and as to sentences imposed before the new guidelines take effect. PUB. L. No. 98-473 § 235, 98 STAT. 2032 (1984), as amended by PUB. L. No. 99-217, §§ 2 & 4, 99 STAT. 1728, 1730, *codified in* 18 U.S.C. § 3551 (Supp. 1990). Section 235(b)(3) of the Sentencing Reform Act requires the Parole Commission to set release dates for all offenders sentenced under the old Act who will remain in prison after the effective date. 18

noted an inherent tension, however, between uniformity (treating similiar cases alike) and proportionality (treating different cases differently).[71] The Commission agreed that only including a few simple categories of crimes would make the *Guidelines* uniform and easy to apply, but at the same time would not recognize important differences between some offenses.[72] The Commission found this conflict impossible to resolve, and settled for a balance between a broad categorization and a highly detailed and complex one.[73]

The Commission also had to resolve whether to base sentences on the actual conduct of the offender ("real offense" sentencing), or to base sentences solely on the elements of the offense with which the offender was charged ("charge offense" sentencing).[74] The Commission initially sought a "pure" real of-

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U.S.C. § 3551 (Supp. 1990).

Some confusion exists as to whether the "effective date" refers to the enactment date of the Comprehensive Crime Control Act (Oct. 12, 1984) or the Sentencing Reform Act (Nov. 1, 1987), but courts have held that the five year period commenced Nov. 1, 1987. *See e.g.* Romano v. Luther, 816 F.2d 832 (2d. Cir. 1987) (1984 date would result in the strange consequence of having the transition period begin three years before the new sentencing system became effective). The Parole Commission must therefore set release dates for all offenders sentenced under the old Act who will remain in prison after Nov. 1, 1992. *Romano* 816 F.2d at 839.

71. *See Guidelines* Commentary at 1.2. The Commission observed that perfect uniformity — giving identical sentences to every offender — would destroy proportionality. *Id.*

72. *Id.* The Commission observed that having only a few categories of crimes would "lump together offenses that are different in important respects." *Id.*

At the same time, the Commission believed a system tailored to fit every conceivable situation would be unworkable and would "compromise the certainty of punishment. . . ." *Id.* The Commission gave the following example of the complexities involved:

> A bank robber with (or without) a gun, which the robber kept hidden (or brandished) might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

Id.

73. *Guidelines* at 1.3. The Commission stated "In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple categorization and detailed complex subcategorization. . . . Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach." *Id.*

74. *Id.* at 1.5. *See generally* Breyer, *The Federal Sentencing Guidelines and the*

fense system,[75] but found that system would require consideration of the precise harms to take into account, and found such an approach to be "too complex to be workable."[76] The present Guidelines represent a move toward a charge offense system, while retaining some aspects of the real offense system.[77] The Guidelines first look to the offense charged to determine the "base offense level."[78] The sentencing judge may modify that sentence if there are any aggravating or mitigating circumstances.[79] Further adjustments for certain types of offenses[80] are allowed by the Relevant Conduct section after consideration of conduct related to the charged offense.[81]

B. JUDICIAL INTERPRETATION

1. Separation of Powers and Nondelegation

In an earlier Ninth Circuit decision, *Gubienso-Ortiz v. Kanahele*,[82] the Ninth Circuit held the Sentencing Reform Act to be a violation of the separation of powers doctrine.[83] The

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Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1, 8-12 (1988) for Judge Stephen Breyer's analysis of the differences between "real" and "charge" offense systems, various decision-making processes of the Commission and basic workings of the *Guidelines* [hereinafter Breyer].

75. *Guidelines* Commentary at 1.5.

76. *Id.* In addition to being too complex, the Commission observed that such a system would also risk a return to wide disparity in practice. The Commission experimented with a "modified real offense system" which it published in a Sept. 1986 preliminary draft. The Commission found this approach also to be too complex and mechanistic and decided that it could not find a fair and efficient way to implement either the "pure" or the "modified" system, and ultimately abandoned that approach. *Id.*

77. *Id.*

78. *See Guidelines* §§ 1B1.3(a)&(b). *See also* Breyer, at 11-12.

79. *See Guidelines* §§ 2B3.1(b) (1)-(5). Generally, aggravating and mitigating factors revolve around the offender's role in the crime, the status of the victim, the extent of the criminal enterprise, offender's criminal history, and the offender's acceptance of responsibility. *Id.* For drug offenses, aggravating factors include selling to persons under 21, to pregnant women, within 1000 feet of a school or college, sales as part of a continuing criminal enterprise, use of communication facilities in committing drug offenses, maintenance of or placing of dangerous devices to protect unlawful production, etc. *Guidelines* § 2D1.2-1.10.

80. *See Guidelines* § 3D1.2(d). These types of offenses generally involve drugs or money, or offenses ongoing or continuous in nature. *Id.*

81. *Guidelines* § 1B1.3, reproduced in relevant part, *supra* note 19.

82. 857 F.2d 1245, 1248 (9th Cir. 1988) *vacated sub nom* United States v. Chavez, 109 S. Ct. 859 (1989) *on remand* Gubienso-Ortiz v. Kanahele 871 F.2d 104 (9th Cir. 1989) [hereinafter *Gubienso*].

83. *Gubienso*, 857 F.2d at 1254.

court found that the Commission, by authorizing federal judges to promulgate substantive sentencing regulations,[84] performed a function political rather than judicial.[85] This impermissibly granted the judiciary power and authority properly belonging to the Executive or Legislative Branches.[86]

Subsequently, in *Mistretta v. United States*,[87] the United States Supreme Court held the Sentence Reform Act and the *Guidelines* neither violative of the separation of powers doctrine nor the nondelegation doctrine,[88] and thus overruled *Gubienso-Ortiz*.[89] The Court recognized that Congress, in certain circumstances, may confer rulemaking authority on the Judicial Branch.[90]

Acknowledging a similiarity between the Sentence Reform Act and the Rules Enabling Act of 1934,[91] the Court observed

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84. *Id.* at 1254-57. The court found the *Guidelines* have the force and effect of laws, that the Commission made important policy decisions finding support for its conclusion that the *Guidelines* are substantive rather than procedural in Miller v. Florida, 482 U.S. 423 (1987) in which the court found the *Guidelines* were substantive in an ex post facto challenge to Florida's similiar sentencing guidelines. *Gubienso*, 857 F.2d at 1257.

85. *Gubienso*, 857 F.2d at 1259.

86. *Id.* at 1254. The court went on to note that it need not decide whether the Commission's function is legislative or executive because:

> [I]t is easier to determine that a government function is nonjudicial than to state with certainty that the function is executive or legislative. Because any nonjudicial government function is likely to involve some executive and legislative aspects, judges should not exercise such functions even when it cannot be definitely stated that the functions are either executive or legislative.

Id. at 1259, n.8 (quoting Comment, *Separation of Powers and Judicial Service on Presidential Commission*, 53 U. CHI. L. REV. 993, 1007-08 n.80 (1986)).

87. 488 U.S. 361 (1988).

88. *Mistretta*, 488 U.S. at 379, 397.

89. *See* United States v. Gonzales-Sandoval, 894 F.2d 1043 (9th Cir. 1990) which determined, "On January 18, 1989, the Supreme Court effectively overruled the decision in *Gubineso-Ortiz* by declaring the Guidelines constitutional."
Id. at 1044.

90. *Mistretta*, 488 U.S. at 386-87 (citing Sibbach v. Wilson & Co., 312 U.S. 1 (1941)). *Sibbach* upheld a challenge to certain rules under the Rules Enabling Act of 1934 which gave the Judiciary power to promulgate federal rules of civil procedure. The *Mistretta* Court went on to note that pursuant to this power to delegate rulemaking authority to the Judiciary, Congress expressly has authorized the Supreme Court to establish rules for the conduct of its own business, to prescribe rules of procedure for lower federal courts in bankruptcy cases, in other civil cases, in criminal cases, and to revise the federal rules of evidence. *Mistretta* at 388.

91. *Mistretta*, 488 U.S. at 386-87. *See also* 28 U.S.C. § 2072 (1988).

that Congress undoubtedly has the power to regulate the practice and procedure of federal courts by delegating rulemaking authority to the Judicial Branch.[92] The Court noted that substantive judgment regarding sentencing practices has always been a function appropriate to the Judiciary[93] therefore, placement in the Judicial Branch of an independent commission to regulate sentencing practices does not violate the principle of separation of powers.[94]

In considering the nondelegation issue, the Court noted that if Congress provides an "intelligible principle" to which the body authorized to exercise the delegated authority must conform, there will be no forbidden delegation of power.[95] The Court found that Congress had provided the Commission with substantial guidance by establishing certain goals and purposes of the Act.[96] Moreover, Congress instructed the Commission to develop a system of sentence ranges using current average sentences as a starting point,[97] and that these ranges must con-

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92. *Mistretta*, 488 U.S. at 387 (citing *Sibbach*, 312 U.S. at 9-10). *See also supra* note 90.

93. *Mistretta*, 488 U.S. at 396. The Court also referred to the legislative history of the Act, saying that placement of the Commission in the Judicial Branch reflected a strong feeling by Congress that sentencing has and should remain primarily a judicial function. *Id.* at 390 (citing S. REP. No. 98-225 at 159).

94. *Mistretta*, 488 U.S. at 397.

95. *Id.* at 372. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Id.* (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 at 409 (1928)).

96. *Mistretta*, 488 U.S. at 374. Congress charged the Commission with three goals: (1) to assure the purposes of sentencing as set forth in this Act; (2) to provide for certainty and fairness, and to avoid unwarranted disparity in sentencing while maintaining flexibility to permit individualized sentences and (3) to reflect the advancement in knowledge of human behavior as it pertains to the criminal justice system. *Id. See also* 28 U.S.C. 991(b)(1) (1988). Congress also charged the Commission with four purposes: (1) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment; (2) to afford adequate deterrance to criminal conduct; (3) to protect the public from further crimes of the defendant and (4) to provide the defendant with needed correctional treatment. *Mistretta* 488 U.S. at 374. *See also* 18 U.S.C. § 3553(a)(2) (1988).

97. *Mistretta*, 488 U.S. at 375 (citing 28 U.S.C. § 994(m) (1988)). Congress further mandated that the *Guidelines* include:

> (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;
>
> (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

form to existing statutory provisions.[98] In addition, Congress specifically enumerated factors for the Commission to consider when formulating offense categories[99] and categories of defendants.[100] The Court concluded that the guidance provided by Congress was wholly adequate,[101] therefore Congress had not impermissibly delegated authority to the Commission.[102]

2. Due Process

While the Supreme Court has not yet expressly addressed whether the *Guidelines* violate a defendant's right to due process under the fifth amendment of the Constitution,[103] the Ninth Circuit has directly addressed the issue in *United States v. Brady*.[104]

In *Brady*, the Ninth Ciruit held that the *Guidelines* do not

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(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release, and, if so, the appropriate length of such term; and

(D) a determination whether multiple sentences to terms of imprisonment should run concurrently or consecutively.

28 U.S.C. § 994(a)(1) (1988).

98. *Mistretta*, 488 U.S. at 375 (citing 28 U.S.C. § 994(b) (1988)). Congress also required that for terms of imprisonment, "the maximum of range should not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum of the range is 30 years or more, the maximum may be life imprisonment." 28 U.S.C. § 994(b)(2) (1988).

99. *See* 28 U.S.C. § 994(c)(1)-(7) (1988). The factors to be considered are: the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and the degree of harm caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and the current incidence of the offense. *Id.*

100. *Mistretta*, 488 U.S. at 376-77. Congress listed 11 different considerations: the offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood. 28 U.S.C. §(d)(1)-(11) (1988).

101. *Mistretta*, 488 U.S. at 379.

102. *Id.* at 412.

103. *See* United States v. Brady, 895 F.2d 538 (9th Cir. 1990). "The Supreme Court has upheld the constitutionality of the Guidelines over challenges based on alleged violations of separation of powers and improper delegation of legislative authority. . .but has not yet addressed whether the Guidelines violate due process." *Id.* at 539. The fifth amendment reads in relevant part: "No person shall be . . . deprived of life. liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

104. 895 F.2d 538 (9th Cir. 1990) [hereinafter *Brady*].

facially violate due process.[105] The court began by noting that the Supreme Court had recently upheld the constitutionality of the *Guidelines* over challenges based on violation of separation of powers and improper delegation of legislative powers.[106] The court further noted that other circuits have unanimously concluded that the *Guidelines* do not violate substantive or procedural due process rights.[107]

The court observed that judicial weighing of sentencing factors does not "rest at the core of due process."[108] Rather, "*consideration* of those factors is the key to individualized sentencing,"[109] which has never included the right to challenge the weight given to various sentencing factors.[110] In a previous Ninth Circuit case, *United States v. Barker*[111] the importance of individualized sentencing was also stressed, but the court in *Brady* interpreted *Barker* as being less concerned with the appropriateness of a given sentence, than the "propriety of the process through which the sentence was imposed."[112] Specifically, *Barker* required that factors[113] be considered to insure that the

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105. *Brady*, 538 F.2d at 540.

106. *Id.* at 539 (citing Mistretta v. United States, 488 U.S. 361 (1989)). *See also supra* notes 87-102 and accompanying text.

107. *Id.* at 539-40 (citing United States v. Thomas, 884 F.2d 540, 542- 44 (10th Cir. 1989); United States v. Harris, 876 F.2d 1502, 1504-06 (11th Cir.), *cert. denied*, 110 S. Ct. 417 (1989); United States v. Bolding, 876 F.2d 21, 23 (4th Cir. 1989); United States v. Pinto, 875 F.2d 143, 145-46 (7th Cir. 1989); United States v. Allen, 873 F.2d 963, 966 (6th Cir. 1989); United States v. Seluk, 873 F.2d 15, 17 (1st Cir. 1989) (per curiam); (United States v. Brittman, 873 F.2d 827, 828 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989); United States v. Vizcaino, 870 F.2d 52, 53-56 (2d Cir. 1989); United States v. White 869 F.2d 822, 825 (5th Cir.) (per curiam,) *cert. denied*, 109 S. Ct. 3172 (1989); (United States v. Frank, 864 F.2d 992, 1009-10 (3d Cir) (decided only on substantive due process grounds), *cert. denied*, 109 S. Ct. 2442 (1989)).

108. *Brady*, 895 F.2d at 541 (citing United States v. Ortega-Lopez 684 F. Supp. 1506 (C.D. Cal. 1988) (en banc)). In *Ortega-Lopez*, the district court found the *Guidelines* highly mechanistic, and determined the formulas and narrow ranges of sentences prescribed by the *Guidelines* violated defendant's rights to due process under the fifth amendment by divesting the court of discretion to impose individualized sentences. The district court did note that the *Guidelines* allowed consideration of certain individualized factors, but concluded that the *Guidelines* prevented judges from "weighing" the factors, and that this "weighing" rests at "the core of due process." *Ortega-Lopez* at 1513.

109. *Brady*, 895 F.2d at 541 (emphasis in original).

110. *Id.* at 543.

111. 771 F.2d 1362 (9th Cir. 1985) [hereinafter *Barker*].

112. *Brady*, 895 F.2d at 541 (citing *Barker*, 771 F.2d at 1365-66).

113. *Barker* suggested these factors may include considerations of the past life and habits of the defendant, the particular defendant's culpability and all the circumstances

defendant was "assessed and sentenced *as* an individual."[114] The court in *Brady* stated that because the *Guidelines* require just such an assessment, they are in accord with the principles enunciated in *Barker*.[115] Therefore, the court concluded that the *Guidelines* do not infringe upon a defendant's right to individualized sentencing.[116]

The court emphasized that although the *Guidelines* do not facially violate due process, a defendant is not foreclosed from bringing due process challenges to the *Guidelines* in individual cases.[117] An applied due process claim would be appropriate if the defendant claimed that the *Guidelines* were being applied without opportunity to contest the factors relevant to sentencing.[118] In short, a defendant may challenge a court's consideration of relevant factors, but may not challenge the weight given to them.[119]

The Ninth Circuit has also addressed due process in view of the evidentiary standard to be applied at the sentencing hearing.[120] In *United States v. Fernandez-Vidana*,[121] a pre-*Guidelines* case, the Ninth Circuit held that using a preponderance of the evidence standard to sentence a defendant for distributing cocaine does not violate due process.[122] In a post-*Guidelines* case, *United States v. Howard*,[123] the Ninth Circuit relying on

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of the crime. See *Barker*, 771 F.2d at 1365.

114. *Brady*, 895 F.2d at 541 (citing *Barker*, 771 F.2d at 1365-66) (emphasis in original)).

115. *Brady*, 895 F.2d at 541. *See also* United States v. Kidder, 869 F.2d 1328 (9th Cir. 1989). In *Kidder* the mandatory minimum sentencing provision was upheld in the face of a due process challenge, "[N]othing in *Barker* suggests that sentencing judges must be free to impose whatever sentence they believe is appropriate . . . . *[B]arker* merely requires that, in choosing a sentence *within* the statutory limits, a trial judge must make an individual assessment of the defendant's culpability." *Id.* at 1334-35 (emphasis in original).

116. *Brady*, 895 F.2d at 539.

117. *Id.* at 543 (citing United States v. Brittman, 872 F.2d 827 at 828).

118. *Id.*

119. *Brady*, 895 F.2d at 543.

120. *See* United States v. Fernadez-Vidana, 857 F.2d 673 (9th Cir. 1988); United States v. Howard, 894 F.2d 1085 (9th Cir.1990). *See also infra* notes 129-36 and accompanying text.

121. 857 F.2d 673 (9th Cir. 1988).

122. *Fernandez-Vidana*, 857 F.2d at 673. The issue of whether a lesser standard might be sufficient was not before the court, so the court held only that applying the preponderance standard was not in error. *Id.* at 675.

123. 895 F.2d 1085 (9th Cir. 1990).

Fernandez, again upheld the use of the preponderance standard.[124] The court noted that this holding was consistent with the recent Supreme Court opinion, *McMillan v. Pennsylvania*,[125] which held that a preponderance of the evidence standard satisfied due process in state court sentencing.[126] Consequently, while a separation of powers challenge to the *Guidelines* has been foreclosed by the Supreme Court,[127] and a facial due process challenge has been foreclosed by the Ninth Circuit,[128] defendants in the Ninth Circuit can still bring an as applied due process challenge,[129] and may also challenge the court's application of the *Guidelines* on statutory grounds.[130]

C. The View of Other Circuits

After explicitly discussing the relationship between the Relevant Conduct section and the Multiple Counts section, the First,[131] Seventh[132] and Eleventh Circuits,[133] have held that drugs not included in the offense of conviction, but part of the "same course of conduct or common scheme or plan"[134] as the offense of conviction may be properly considered in determining

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124. *Howard*, 895 F.2d at 1090.

125. 477 U.S. 79 (1986).

126. *McMillan* 477 U.S. at 80. *See also supra* note 37.

127. *See* Mistretta v. United States, 488 U.S. 361, 412 *See also supra* note 17, and *supra* notes 87-94 and accompanying text.

128. *See Brady*, 895 F.2d at 539-43. *See also supra* notes 105-17 and accompanying text.

129. *See Brady*. 895 F.2d at 543. *See also supra* notes 118-20 and accompanying text.

130. *See* 18 U.S.C. § 3742(d) (providing that courts of appeal in reviewing imposed sentence shall determine whether it (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the *Guidelines*; or (3) unreasonably departs from the prescribed *Guideline* range).

131. *See e.g.* United States v. Blanco, 888 F.2d 907 (1st Cir. 1989) (defendant pleaded guilty to possession of 125 grams but was sentenced based on finding that he attempted to possess, or did possess, between 500 grams and 1.9 kilograms); United States v. Gerante, 891 F.2d 364 (1st Cir. 1989) ($68,000 cash found in defendant's home properly treated as equivalent to estimated quantity of cocaine).

132. *See e.g.* United States v. White, 888 F.2d 490 (7th Cir. 1989) (entire 302 grams of cocaine base sent to defendant through mail required to be considered even though defendant only received 1.88 grams); United States v. Vopravil, 891 F.2d 155 (7th Cir. 1989) (negotiations for sale of one kilogram of cocaine clearly related to offense of conviction).

133. *See e.g.* United States v. Alston, 895 F.2d 1362 (11th Cir. 1990) (total quantity of cocaine allegedly involved in conspiracy properly considered).

134. *Guidelines* § 1B1.3(a)(2).

the base offense level.[135] In *United States v. Blanco*,[136] the First Circuit stated that the reference to the Multiple Counts section in the Relevant Conduct section specifically relates to "fungible item" crimes, such as those involving drugs and money, and observed that only these crimes allow consideration of conduct not included in the offense of conviction, but part of the same course of conduct as the convicted offense.[137]

Without discussing the relationship between the Multiple Counts section and the Relevant Conduct Section, the Second,[138] Fifth,[139] Sixth[140] and Eighth Circuits[141] have allowed aggregation of quantities of drugs not included in the offense of conviction.[142]

The First,[143] Second,[144] Third,[145] Fourth,[146] Sixth,[147] Eighth,[148] Tenth[149] and Eleventh Circuits[150] have all held that

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135. *See Blanco*, 888 F.2d at 909-11; *Gerante*, 891 F.2d at 369 (drugs may also be aggregated when government alleges only one count); *White* 888 F.2d at 496-97; *Vopravil* 891 F.2d at 157; *Alston* 895 F.2d at 1371-72.

136. 888 F.2d 907 (1st Cir. 1989).

137. *Blanco*, 888 F.2d at 911. Judge Breyer, writing for the court, noted that for crimes such as murder or bank robbery, the court will not use the Relevant Conduct section to look to acts that are part of the same course of conduct unless the government separately charges and obtains convictions for those acts. *Id.* at 911. *See also infra* note 199.

138. *See e.g.* United States v. Guerrero, 863 F.2d 245 (2d Cir. 1988) (698 grams of cocaine involved in two counts dismissed pursuant to plea agreement properly considered).

139. *See e.g.* United States v. Taplette, 872 F.2d 101 (5th Cir.), (drugs involved in three counts dismissed pursuant to plea agreement properly considered), *cert. denied*, 110 S. Ct. 128 (1989).

140. *See e.g.* United States v. Smith, 887 F.2d 104 (6th Cir. 1989) (ten grams of cocaine involved in one count dismissed pursuant to plea agreement properly considered).

141. *See e.g.* United States v. Mann, 877 F.2d 688 (8th Cir. 1989) In *Mann*, a defendant turned informant was arrested with 82.09 grams of cocaine and informed DEA agents that he obtained the cocaine from Mann. Subsequently, Mann was arrested with 60.04 grams. Mann's sentence was found to be properly based on total of 142.2 grams. *Mann*, 877 F.2d at 689.

142. *See Guerrero*, 863 F.2d at 250; *Taplette*, 872 F.2d at 106; *Sailes*, 872 F.2d at 738-39; *Smith*, 887 F.2d at 106-08; *Mann*, 877 F.2d at 690.

143. *E.g.* United States v. Wright, 873 F.2d 437 (1st Cir. 1989).

144. *E.g.* United States v. Guerra, 888 F.2d 247 (2d Cir. 1989).

145. *E.g.* United States v. McDowell, 888 F.2d 285 (3d Cir. 1989).

146. *E.g.* United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir), *cert. denied*, 110 S. Ct. 346 (1989).

147. *E.g.* United States v. Silverman, 889 F.2d 1531 (6th Cir. 1989).

148. *E.g.* United States v. Gooden, 892 F.2d 725 (8th Cir. 1989).

the preponderance of the evidence standard satisfies due process in sentencing defendants under the *Guidelines*.[151]

The Second,[152] Sixth[153] and Tenth Circuits[154] have held that the 1988 amendments are merely a clarification of the original version of the *Guidelines*, and do not present an ex post facto violation.[155] The Eleventh Circuit has held that there is no substantive difference between the two versions.[156] The Fifth Circuit, while not directly addressing the possibility of an ex post facto violation, observed that it was not absolutely plain that under the pre-1988 *Guidelines* relevant conduct could be considered.[157]

IV. THE COURT'S ANALYSIS

A. Majority Opinion

1. Application of the Guidelines

The Ninth Circuit majority stated that the Sentencing

149. *E.g.* United States v. Frederick, 897 F.2d 490 (10th Cir. 1990).

150. *E.g.* United States v. Alston, 895 F.2d 1362 (11th Cir. 1990). *See also supra* note 134.

151. *See Wright*, 873 F.2d at 441-42 (preponderance standard satisfies due process); *Guerra*, 888 F.2d at 251 ("preponderance of the evidence standard satisfies the requisite due process in determining relevant conduct [under the]. . .*Guidelines.*"); *McDowell*, 888 F.2d at 290-91 ("[D]efendant's rights in sentencing are met by a preponderance of evidence standard."); *Urrego-Linares*, 879 F.2d at 1237 (due process satisfied by application of preponderance standard); *Silverman*, 889 F.2d at 1535 ("The preponderance of the evidence standard applies to contested facts in sentencing proceedings."); *Gooden*, 892 F.2d at 727-28 ("We . . . are satisfied that the preponderance of the evidence standard used here by the District Court does not violate the Due Process Clause."); *Frederick*, 897 F.2d at 492 ("[W]e hold that the correct standard is the preponderance of the evidence."); *Alston*, 895 F.2d at 1372-73 (disagreeing that due process requires proof beyond a reasonable doubt, and approving of other cases upholding use of preponderance standard).

152. *See Guerrero*, 863 F.2d 245 (2d Cir. 1988).

153. *See Smith*, 887 F.2d 104 (6th Cir. 1989).

154. *See Frederick*, 897 F.2d 490 (10th Cir. 1990).

155. *See Guerrero*, 863 F.2d at 250 ("[W]e agree with the Commission that its change in the commentary . . . only clarif[ies] a meaning that was fairly to be drawn from the original version."); *Smith*, 887 F.2d at 106-08 (amendment to section 1B1.3 was a mere clarification of original version); *Frederick*, 897 F.2d at 494 (changes were a "permissable clarification . . .").

156. *See* United States v. Scroggins, 880 F.2d 1204 (11th Cir. 1989). "We note that as applied to the facts of this case, there is no substantive difference between the October 1987 and January 1988 versions of guideline 1B1.3." *Id.* at 1211, n.19.

157. *See Taplette*, 872 F.2d at 106. *See also supra* note 139.

Commission clearly intended that quantities of drugs calculated on the basis of conduct of which the defendant was neither charged nor convicted may be considered in determining the base offense level if that conduct was part of the same course of conduct or common scheme as the conviction offense.[158] The majority reasoned that such a determination reflects the Sentencing Commission's compromise between "real offense" sentencing and "charge offense" sentencing.[159] It also noted that their decision is consistent with the pre-*Guidelines* practice of sentencing judges, who regularly considered conduct of which the defendant was not convicted.[160]

The majority held that the quantities of drugs were properly aggregated under the Relevant Conduct section of the *Guidelines*,[161] noting that commentary to the Relevant Conduct section specifically states "convictions are not required."[162] The court reasoned that to rule otherwise would be to ignore the commentary, which could lead to an incorrect application of the *Guidelines*, and subject the sentence to possible reversal on appeal.[163]

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158. United States v. Restrepo, 903 F.2d at 653.

159. *Restrepo II*, 903 F.2d at 653. *See also supra* notes 74-81 and accompanying text; *and see generally* Breyer *supra*, note 74, at 8-12.

160. *Restrepo II*, 903 F.2d at 653. *See also* United States v. Blanco 888 F.2d 907 (1st Cir. 1989). The court in *Blanco* found that an analysis of pre-*Guidelines* sentencing revealed that with respect to drug and money crimes, the actual time the offender served reflected the amount of money or drugs actually involved, not simply the amount shown in the indictment, and concluding that to this extent, pre-*Guideline* sentencing represented "real" offense sentencing. *Blanco* 903 F.2d at 909-10. *See also* United States v. White, 888 F.2d 490 (7th Cir. 1989). "Before the *Guidelines*, judges routinely took into account other bad acts of which the defendant had not been convicted. The use they made of this information was all but unreviewable on appeal." *White*, 888 F.2d at 498; *and see* United States v. Smith 887 F.2d 104 (6th Cir. 1989) in which the Sixth Circuit discussed pre-*Guideline* practice. "[B]efore making [the sentencing] determination, a judge may conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it came."). *Smith*, 887 F.2d at 108, n.5 (quoting United States v. Tucker, 404 U.S. 443, 446).

161. *Restrepo II*, 903 F.2d 652. *See also supra* notes 21-32 and accompanying text.

162. *Restrepo II*, 903 F.2d at 652. *See also Guidelines* § 1B1.3 (Application Note 2 at 1.19). In addition, the commentary provides that in drug distribution cases, quantities of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct as the count of conviction. *Guidelines* at 1.20 (Background notes).

163. *Restrepo II*, 903 F.2d at 652. "The Commentary that accompanies the guideline sections may serve a numnber of purposes. First, it may interpret the guideline or explain how it is to be applied. *Failure to follow such commentary could constitute an incorrect application of the Guideline, subjecting the sentence to possible reversal on*

2. The Standard of Proof and Due Process

The majority held that when using the preponderance standard at a sentencing hearing to increase the period of confinement, the evidence must be of sufficient weight to "convince a reasonable person of the probable existence of the enhancing factor."[164] The court noted that in so holding, its decision was supported by the *Guidelines*,[165] which provide that at sentencing, the court may consider relevant information "provided that the information has sufficient indicia of reliability to support its probable accuracy."[166]

The majority cited the Supreme Court's holding in *McMillan v. Pennsylvania* to find that a preponderance standard satisfies due process for post-conviction determinations,[167] and that the sentencing court's lack of discretion does not require a higher standard of proof.[168] The majority also noted that a recent Ninth Circuit opinion held that the Constitution requires district courts to make factual determinations at sentencing only by a preponderance of the evidence,[169] and other circuits agree.[170]

While observing that the preponderance standard is widely

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appeal. Second, the commentary may suggest circumstances which, in view of the Commission, may warrant departure from the guidelines. *Such commentary is to be treated as the legal equivalent of a policy statement.*" *Id.* (quoting *Guidelines* § 1B1.7 (Significance of Commentary) (emphasis in original).

164. *Restrepo II*, 903 F.2d at 654-55. The majority observed that because the issue was not presented, they would not define the preponderance of the evidence standard as applied in sentencing when the defendant had the burden of proof, i.e. when used to prove mitigating factors. *Id.* at 655, n.6.

165. *Restrepo II*, 903 F.2d at 655.

166. *Id.* (quoting *Guidelines* § 6A1.3(a)). The court further noted that while section 6A1.3(a) does not specify the quantity of evidence required, it does require that the quality of evidence be such that the information is "*probably* accurate . . . ." *Restrepo II* 903 F.2d at 655 (emphasis in original).

167. *Restrepo II*, 903 F.2d at 654 (citing McMillan v. Pennsylvania, 477 U.S. 79 (1986)). *See also supra* note 37.

168. *Restrepo II*, 903 F.2d at 654 (citing *McMillan*, 477 U.S. at 92).

169. *See* United States v. Wilson, 900 F.2d 1350 (1990). "We hold . . . that District Courts are constitutionally required to make factual determinations underlying application of the *Guidelines* by at least a preponderance of the evidence." *Id.* at 1354.

170. *Restrepo II*, 903 F.2d at 654. *See also supra* notes 143-51 and accompanying text.

accepted for proving factors used to enhance sentences,[171] the majority noted that when used for that purpose, the standard has not been specifically defined.[172] The majority rejected a literal interpretation of the standard, which would call for no more than a weighing of the evidence, a preponderance being only a slight tip of the scales.[173] According to the majority, the severe consequences of sentence enhancement necessitated a more demanding interpretation of the preponderance standard.[174]

3. Ex Post Facto

The majority held the application of the amended *Guidelines* did not disadvantage Restrepo because substantial personal rights were not altered,[175] thus no ex post facto violation occurred.[176] Accordingly, a criminal law is ex post facto if it applies retrospectively to events occurring before its enactment,[177] and it disadvantages the defendant affected by it.[178]

The majority cited to the Relevant Conduct section's commentary which provides that the section's amendments "clarify the intent underlying . . . [the section] as originally promulgated."[179] The majority noted that if it deferred to the Commission's interpretation that the amendments are merely clarifications and not substantive changes, then their retrospective application presented no ex post facto issue.[180] The majority noted, however, that the Relevant Conduct section would have dictated an identical result before the amendments;[181] the 1988

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171. *Restrepo II*, 903 F.2d at 654. *See also supra* notes 143-51.

172. *Restrepo II*, 903 F.2d at 654.

173. *Id.*

174. *Id.* (citing Addington v. Texas, 441 U.S. 418 (1979) (quantum of proof required increases with relative importance of ultimate decision)).

175. *Restrepo II*, 903 F.2d at 655 (citing Miller v. Florida, 482 U.S. 423 (1987)). The court in *Restrepo II* noted the law must alter " 'substantial personal rights', not merely change 'modes of procedure which do not affect matters of substance.' " *Restrepo II*, 903 F.2d at 655 (quoting *Miller*, 482 U.S. at 430).

176. *Restrepo II*, 903 F.2d at 656.

177. *Id.* at 655 (citing *Miller*, 482 U.S. at 430).

178. *Id.*

179. *Id.* at 656 (quoting *Guidelines* Commentary at 1.21).

180. *Restrepo II*, 903 F.2d at 656. The majority cited several cases that have disposed of the issue on these grounds. *See supra* notes 152-55 and accompanying text.

181. *Restrepo II*, 903 F.2d at 656. *See also Guidelines* § 1B1.3 (Oct. 1987).

amendments merely made this more explicit.[182]

B. DISSENT

Judge Pregerson, dissenting, argued that the *Guidelines* are ambiguous because the Multiple Counts section requires convictions but the Relevant Conduct section does not.[183] He conceded that under pre-*Guideline* practice, judges did have wide discretion,[184] but under the *Guidelines* that discretion is very limited;[185] the existence of certain factors demand mandatory increases in the sentence.[186] He concluded that the majority wrongly contended that its approach was consistent with pre-*Guideline* sentencing practice.[187]

In addition, he observed that under the majority's interpretation, the government could charge and prosecute only those counts that are easily provable.[188] The prosecution would still be able to punish for all related criminal conduct in more serious offenses proved only by a preponderance of the evidence.[189] Moreover, the Government could reach plea agreements on minor charges in exchange for dropping all other counts, then use the conduct underlying the dropped counts to dramatically increase the defendant's sentence.[190] According to Judge Pregerson, very serious consequences will result from the majority's approach, thus, at the very least, a clear and convincing standard should be adopted for factual findings at sentencing hearings.[191]

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182. *Restrepo II*, 903 F.2d at 656. *See also Guidelines* § 1B1.3 (1988) (Application Note 2).

183. United States v. Restrepo, 903 F.2d 648, 657 (1990) (Pregerson, J., dissenting). *See also Restrepo I*, 883 F.2d at 786.

184. *Restrepo II*, 903 F.2d at 657.

185. *Id.*

186. *Id.*

187. *Id.* Judge Pregersen noted that trial judges have long taken into account related conduct in determining sentences, but under the *Guidelines*, they must apply factors with fixed weights applicable to all cases without allowing for adjustments to reflect differing degrees of certainty.

188. *Restrepo II*, 903 F.2d at 658.

189. *Id.*

190. *Id. See also infra* note 206.

191. *Restrepo II*, 903 F.2d at 658.

V. CRITIQUE

Regardless of the controversies surrounding the *Guidelines*, the Supreme Court[192] and the Ninth Circuit[193] have declared them constitutional.[194] It remains to be seen, however, whether the *Guidelines* will withstand a due process challenge in the Supreme Court.[195] Rather than challenging the *Guidelines* on broad constitutional grounds, defendants in the Ninth Circuit will be limited to applied due process challenges,[196] and challenges to the court's application of the *Guidelines*.[197]

It is clear that the Ninth Circuit's analysis and interpretation of the *Guidelines* in *Restrepo II* is correct. The court's interpretation of the *Guidelines* in *Restrepo I* was directly criticized by other circuits,[198] and clearly contradicted the majority of other circuit decisions.[199] Moreover, when the commentary to the *Guidelines* is considered,[200] it is difficult to find logic in the analysis of *Restrepo I*.[201] The commentary singles out drug distribution cases, and states that quantities of drugs not specified in conviction counts may be used in determining the base offense level if the additional drugs are part of the same course of conduct as the conviction counts.[202]

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192. *See* Mistretta v. United States, 488 U.S. 361 (1989). *See also supra* notes 87-102 and accompanying text.

193. *See* United States v. Brady, 895 F.2d 538 (9th Cir. 1990). *See also supra*, notes 103-16 and accompanying text.

194. *See Mistretta*, 488 U.S. at 412, *Brady* 895 F.2d at 539.

195. *See Brady*, 895 F.2d at 539.

196. *Id.* at 543. *See also supra* notes 117-19.

197. *See* 18 U.S.C. § 3742(d) (1988). *See also supra* note 130 and accompanying text.

198. *See e.g.*, United States v. Blanco, 888 F.2d 907 (1st Cir. 1989) The First Circuit observed that while most circuits read the *Guidelines* as they did, the Ninth Circuit did not. The court went on to directly criticize the reasoning of the Ninth Circuit in *Restrepo I*. The First Circuit observed that in *Restrepo I*, the Ninth Circuit apparently believed that the Multiple Counts section made consideration of the added drugs inappropriate. The First Circuit went on to note that it is "the relevant conduct rules, however, not the multiple count rules" that made consideration of the added drugs relevant to sentencing. *Blanco*, 888 F.2d at 910. *Accord* United States v. White, 888 F.2d 490 (7th Cir. 1989); United States v. Vopravil, 891 F.2d 155 (7th Cir. 1989); United States v. Gerante, 891 F.2d 364 (1st Cir. 1989); United States v. Alston, 895 F.2d 1362 (11th Cir. 1990); United States v. Rutter 897 F.2d 1558 (10th Cir. 1990).

199. *See supra*, note 199. *See also supra* notes 131-42.

200. *See supra* notes 162-63 and accompanying text.

201. *See supra* notes 161-63 and accompanying text.

202. *See Guidelines* Commentary to § 1B1.3 at 1.20. "[I]n drug distribution cases, quantities and types of drugs not specified in the count of conviction are to be included

While Judge Pregerson's interpretation of the *Guidelines* in his dissenting opinion in *Restrepo II* rests on faulty reasoning,[203] his fear of the detrimental affect the majority's holding may have on plea bargaining[204] deserves serious consideration.[205] Judge Pregerson observed that under the majority's holding, the government could reach plea agreements with defendants on minor charges, then use the conduct underlying the dropped counts to increase the defendant's sentence.[206] Indeed, several circuits have lent credibility to Judge Pregerson's concerns by holding that conduct in counts dropped pursuant to plea agreements could still be considered at sentencing.[207] While the Commission intended that the current status of plea bargaining remain unchanged,[208] at least one commentator has suggested

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in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction."

203. *See supra* notes 161-63 and accompanying text, *see also supra* note 198.

204. *Restrepo II*, 903 F.2d at 658, *see also supra* notes 188-90 and accompanying text.

205. *Restrepo II*, 903 F.2d at 656-57. In his concurring opinion, Judge Noonan wrote separately to state that while he concurred in the majority's opinion, he wished to note that "Pregerson's misgivings deserve serious consideration." *Id.* at 656.

206. *Restrepo II*, 903 F.2d at 658.

207. *See e.g.*, United States v. Scroggins, 880 F.2d 1204 (11th Cir. 1989). The Eleventh Circuit held that the Government's agreement to drop certain theft charges in exchange for a guilty plea did not preclude the district court from considering evidence of dropped charges at the sentencing hearing. *Id.* at 1214. Also, in United States v. Taplette, 872 F.2d 101 (5th Cir.), *cert. denied* 110 S. Ct. 128 (1989), the Fifth Circuit held that three drug sales that were dismissed pursuant to a plea agreement and that were part of the same course of conduct as the count to which the defendant pled guilty, could be considered as a basis for upward departure. *Taplette*, 872 F.2d at 106-07. Further, in United States v. Fox, 889 F.2d 357 (1st. Cir. 1989), the First Circuit held that a bank officer's plea agreement to one fraudulent loan charge, in which the Government agreed not to prosecute for other defalcations, was not breached by the Government when information about other fraudulent loans was provided to the probation office either by the Government or the bank and used to determine defendant's base offense level. The ultimate result was that the defendant received the exact same sentence he would have received had the Government prosecuted him, and the court convicted him, of all incidents of defalcation which occurred while defendant worked at the bank. *Fox*, 899 F.2d at 362-63.

208. *See Guidelines* § 6B, introductory comments at 6.5. "[B]ecause of the difficulty in anticipating problems in this area, and because the sentencing guidelines are to some degree experimental, substantive restrictions on judicial discretion [regarding plea agreements] would be premature at this stage of the Commission's work." *Id. See also Panel V: Equality Versus Discretion in Sentencing*, 26 AMER. CRIM. L. REV. 1813 (1989). In a panel discussion with Ilene H. Nagel, a member of the Sentencing Commission, and Terence MacCarthy, Chairman of the American Bar Association Criminal Justice Section, Judge Breyer, another member of the Commission, discussed policy decisions in respect to plea bargaining. He observed that half of the people believed that plea bargaining was "the most terrible thing they had ever heard of," while the other half believed that

there may be a shift from "charge" bargaining to "sentence" bargaining.[209]

In cases of drug trafficking, the sentences ultimately arrived at under the *Guidelines* will usually be a "real offense" sentence.[210] Since such sentencing is based on the total amount of drugs seized rather than only the amount involved in the charge, a defendant has less incentive to enter into a "charge" bargain[211] whereby the defendant pleads guilty in exchange for the prosecutor's promise to drop more serious charges.[212] More desirable to a defendant in a drug distribution case would be a "sentence" bargain, whereby the defendant pleads guilty in exchange for the prosecutor's promise to recommend a specific, agreed upon sentence.[213] Because judges will sometimes find it necessary to depart from the *Guidelines* to effectuate a plea bargain,[214] it is significant that the Commission has been careful not to take away judicial discretion in the plea bargaining context.[215] As a result, under the *Guidelines*, charge bargaining may no longer

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eighty-five percent of the system runs on it. In the end, he stated, the Commission said "We are not going to change the [plea bargaining] system at the present time." *Id.* at 1838.

209. *See* Breyer and Feinberg, *The Federal Sentencing Guidelines: A Dialogue*, 26 CRIM. L. BULL. 5 (1990). After noting that in a thousand count indictment, if the client pleads guilty to one, he will still be sentenced on the basis of all thousand, Breyer suggests bargaining for a lower sentence under FED. R. CRIM. P. 11(e)(1)(B) instead of charge bargaining under Rule 11(e)(1)(a). Specifically he stated, "I would expect to see the pattern of plea bargaining changing from charge to sentence bargaining." *Id.* at 30.

210. *See* United States v. Fernandez, 877 F.2d 1138, 1142 (2d Cir. 1989). *See also supra* notes 77-81 and accompanying text.

211. *See* FED. R. CRIM. P. 11(e)(1)(A) which reads in pertinent part:

> (1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon entering of a plea of guilty or nolo contendere to a charged offense or to a lesser related offense, the attorney for the government will do any of the following:
>
> (A) move for dismissal of the other charges . . . .

212. *Fernandez*, 877 F.2d at 1144.

213. *See* FED. R. CRIM. P. 11(e)(1)(B) which reads in pertinent part: "(B) make a recommendation or agree not to oppose the defendant's request for a particular sentence with the understanding that such recommendation or request shall not be binding upon the court . . . ."

214. Departure would be necessary to effectuate a plea bargain wherein the sentence agreed upon pursuant to the bargain was lower than the applicable sentence range prescribed by the *Guidelines*.

215. *See Fernandez*, 877 F.2d at 1145. "Significantly, the Commission has been careful not to foreclose broad judicial discretion in plea bargaining situations. *See also supra* note 208.

prove valuable to defendants in drug cases.[216]

It is clear that the benefit of plea bargaining will be undermined if defendants do not receive the benefits that they reasonably expected from the agreement.[217] The solution to Judge Pregerson's concerns lies not in adopting a clear and convincing standard as suggested, but in ensuring that defendants are fully apprised of the consequences of entering into a plea agreement.[218] Neither the court nor the prosecutor has an obligation to fully advise the defendant of all ramifications of sentencing under the *Guidelines*,[219] so that duty must be with the defense attorney.

VI. CONCLUSION

The future status of the *Guidelines* is uncertain. The Federal Courts Committee has recommended that Congress consider changing them from compulsory rules to general standards that identify merely a presumptive sentence.[220] One commentator has suggested that it may be five to ten years before we know if the

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216. *Fernandez*, 877 F.2d at 1145.

217. *See* United States v. Ykema, 887 F.2d 697, 699 (6th Cir. 1989).

218. *Ykema*, 887 F.2d at 699. The court stated that federal courts should be "especially careful" in advising defendants of the ramifications of sentencing under the *Guidelines*, and that prosecutors should avoid any behavior that may be constituted as trickery. The court noted that in time, plea bargaining under the *Guidelines* will become more commonplace, but until then, defendants should have the opportunity to fully understand how their plea agreements will be given effect. *Id.*

219. *See Fernandez*, 877 F.2d at 1143. The court held that the fact that the government's attorney did not explain the applicable *Guidelines* sentence range to defendant violated no duty the government owed to him. The court further held that under FED. R. CRIM. P. 11(c)(1), the court must apprise defendant of the range of punishment to which he may be sentenced, but this imposes upon the courts only a duty to inform defendant of the maximum and minimum sentences provided by law. *Id.* The court did note, however, that in some circumstances, the applicable *Guideline* sentence will be easily ascertainable, and in those situations, the district court has "full discretion to — and where feasible, should — explain the likely *Guideline* sentence to the defendant before accepting the plea." *Id.* at 1144.

220. *See Report of The Federal Court Study Committee*, April 2, 1990, *reprinted in relevant part*, 2 FED. SENT. R. 232-37 (1990). This suggestion of the Committee was publicly attacked by Judge Wilkins, chairman of the Sentencing Commission. Wilkins suggested that such an approach would result in a return to the irrational sentencing disparities that the *Guidelines* were supposed to correct. Wilkins' comments are reported in NAT'L L.J., *Proposals on Courts Debated: Some Reforms Threaten to Re-ignite Firestorms*, Feb. 12, 1990, pg. 1.

Guidelines are adequately serving their purpose.[221] One thing is certain: the *Guidelines* will remain subject to review and revision by the Commission.[222] Regardless of the future of the *Guidelines*, the Ninth Circuit's decision in *Restrepo II* presents a clear move toward uniformity among the circuits in interpreting the Relevant Conduct Section of the *Guidelines*.

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221. *See Panel V: Equality Versus Discretion in Sentencing*, 26 AMER. CRIM. L. REV. 1813 (1989) Judge Breyer states that the new law "brings about one of the most significant changes in the criminal law in this century. . . . Is the game worth the candle? . . . We can begin to answer five or ten years from now." *Id.* at 1830.

222. *See* 28 U.S.C. § 994(o), providing that the Commission shall periodically review and revise the *Guidelines* in consideration of data and comments coming to its attention. The section also provides that authorities on, individuals and institutional representantives of, various aspects of the Federal criminal justice system may submit observation, comments or questions to the Commission regarding the *Guidelines*. These representantives must at least anually, submit written reports to the Commission suggesting changes, and otherwise assessing the Commission's work. *See also* 28 U.S.C. § 994(p), giving Commission authority to amend and modify the *Guidelines*.

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