THE CORNERSTONE HAS NO FOUNDATION: RELEVANT CONDUCT IN SENTENCING AND THE REQUIREMENTS OF DUE PROCESS

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I. INTRODUCTION

For many years, the United States used a system of indeterminate sentencing in which judges enjoyed wide discretion in calculating prison sentences. Once a judge determined the sentence, the Parole Board was empowered to determine how long the prisoner would actually serve before being released. Consequently, the indeterminate sentencing system created much disparity in sentencing for similar crimes. The Sentencing Guidelines were designed to change this system by providing a uniform, fair and predictable system of punishment. The Guidelines

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This article expresses my personal opinions and does not reflect the opinions of our court, my colleagues, or those who have practiced before me. This article has evolved through conversations with those applying the guidelines as well as with those to whom the guidelines have been applied. I have been greatly assisted by my law clerks over the last several years, but I wish to especially thank Barry Fields, Mark Seifert and Mark Pickrell who have assisted in the preparation of this article.

consider many factors pertaining to the defendant and the crime for which he was convicted, and aid judges in meting out equitable punishments. Among the factors considered are the defendant's relevant conduct, which includes crimes the state has failed to prove beyond a reasonable doubt and crimes dismissed pursuant to a plea bargain. Although there are many ways in which the Sentencing Guidelines may impinge upon due process, this article discusses only one: the burden of proof required to establish relevant conduct.[1]

II. HISTORICAL BACKGROUND

For nearly a century, the United States utilized a system of indeterminate sentencing in criminal cases. Although criminal statutes listed a specific penalty for each violation, most statutes also gave the sentencing judge broad discretion in determining all aspects of punishment such as whether an offender should be incarcerated and for what term and whether parole would be available.[2] Prior to the enactment of the United States Sentencing Guidelines, only the statutory minimum or maximum sentence for a given crime limited a judge's discretion in sentencing.[3]

Despite a judge's broad discretion in sentencing, the Parole Commission often determined the actual duration of imprisonment by determining when the offender would be released on parole.[4] The Parole Commission's determination was largely based upon subjective criteria concerning each prisoner, with an emphasis on returning the

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[1] The Due Process Clause reads: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

[2] Mistretta v. United States, 488 U.S. 361, 363 (1989). Prior to the Guidelines, sentencing and parole depended upon an offender's potential for rehabilitation. *Id.* The judge and parole officer determined their sentencing and release decisions based upon their individual assessment of whether the offender would resume criminal activity upon release from prison thereby placing society at risk. *Id.*

[3] *Id.*

[4] Zerbst v. Kidwell, 304 U.S. 359, 363 (1938); Criminal Proc. Project, 79 GEO. L.J. 957, 1089 n.2154 (1991) (observing that although statutes often established the parameters of a convicted defendant's term, the Parole Commission actually determined the sentence term because the commission decided when the prisoner would be released on parole); Sanford H. Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 MINN. L. REV 803, 812-13 (1961) [hereinafter *The Advocate and the Expert*].

prisoner to society if possible.[5] In states with sentencing procedures similar to the Federal system, the legislature often provided standards for parole.[6] In the Federal system, however, there were no statutorily-mandated standards for parole eligibility.[7]

The combination of broad discretion on the part of the sentencing judge and on the part of the Parole Board led to the perception that indeterminate sentencing created tremendous disparities in the length of sentences.[8] According to Professor Kadish, the sentencing system in 1962 permitted "the greatest degree of uncontrolled power over the liberty of human beings that one can find in the legal system."[9] A number of sentencing studies bolstered the argument that indeterminate sentencing was indeed capricious.[10] For example, in one study, fifty judges from the District Court for the Second Circuit were given files from twenty cases and asked to impose a sentence.[11] One judge

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[5] *See* Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 916 (1962)(noting "[t]he probation and parole decision is usually confined solely by legislative exclusion of certain classes of offenders and crimes and by the general adjuration to grant parole or probation when satisfied of a reasonable likelihood that the offender will be law-abiding and that the public welfare will be furthered.") [hereinafter *Legal Norm*]; *see also Mistretta*, 822 U.S. at 363-64 (citing Kadish, *The Advocate and The Expert*, *supra* note 4, at 812-813).

[6] *See* FLA. STAT. ANN. § 947.18 (West Supp. 1992) (granting parole when Parole Board determines that a prisoner "will live and conduct himself as a respectable and law-abiding person and . . . his release will be compatible with his own welfare and the welfare of society."); ARIZ. REV. STAT. ANN. § 31-412 (West Supp. 1992)(granting parole upon a determination that there is a "substantial probability that the applicant will remain at liberty without violating the law.").

[7] Criminal Proc. Project, *supra* note 4, at 1089 n.2154; Kadish, *Legal Norm*, *supra* note 5, at 916 (maintaining that sentencing judges and parole agencies have wide discretion, "free of substantive control or guidance[,]" when establishing the length of prison terms, parole, and probationary sentences.).

[8] Kadish, *The Advocate and the Expert*, *supra* note 4, at 812-13; *see also* United States Sentencing Commission, *Guidelines Manual* [hereinafter U.S.S.G.], § 1A3 (Nov. 1992).

[9] Kadish, *Legal Norm*, *supra* note 5, at 916.

[10] EXECUTIVE ADVISORY COMMITTEE ON SENTENCING, CRIME AND PUNISHMENT IN NEW YORK: AN INQUIRY INTO SENTENCING AND THE CRIMINAL JUSTICE SYSTEM XII (Report to Governor Hugh L. Carey, March 1979); TWENTIETH CENTURY TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); ABA COMMITTEE ON CORRECTIONAL FACILITIES AND SERVICES, RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, SENTENCING COMPUTATION LAWS AND PRACTICE, A PRELIMINARY SURVEY (Jan. 1974); *see also* M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972).

[11] Whitney North Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B. J. 163 (April, 1973).

imposed a sentence of eighteen years and a $5000 fine for a bank robbery while another judge sentenced the same bank robber to prison for only five years without a fine.[12] Likewise, the disparities among particular courts were as great as those among judges.[13] For example, the average sentence for forgery was 82 months in the District of Columbia Circuit but only 30 months in the Third Circuit.[14] Additionally, the average sentence for interstate transportation of stolen motor vehicles ranged from 22 months in the First Circuit to 42 months in the Tenth Circuit.[15]

In response to the perceived problems of indeterminate sentencing, Congress enacted the Sentencing Reform Act of 1984.[16] In the Act, Congress created a Commission to develop a system of sentencing guidelines.[17] The guidelines were to reflect, among other factors: (1) the seriousness of the particular offense; (2) the need to deter criminal conduct; (3) the need to protect the public; (4) the need for

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[12] *Id.* For example, the likelihood of a custodial sentence for violation of the Selective Service laws ranged from 100% to 0% between judges. *Id.* at 166. A similar disparity was observed in sentences for postal theft, where the chance of incarceration varied between a low of 4% to a high of 50%. *Id.* at 166-67.

[13] One commentator suggests that disparities reflect the competing principles of efficiency and fairness. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 31 (1988).

[14] Seymour, *supra* note 12, at 167. Further examples include sentences for Selective Service violations ranging from 14 months in the Southern District of New York to 48 months in the Northern District of New York. *Id.* at 168. Sentences for robbery ranged from 66 months in the Western District of New York to 152 months in the Eastern District of New York. *Id.*

[15] *Id.* at 167. Similar disparities were observed outside New York. Selective Service violations resulted in sentences ranging from 28 months in the Court of Appeals for the First Circuit to 48 months in the Court of Appeals for the Tenth Circuit. *Id.* at 168. Robbery sentences ranged from 106 months in the First Circuit to 330 months in the District of Columbia Circuit. *Id.*

[16] 28 U.S.C. § 991 *et seq.* (1991). By enacting the Sentencing Reform Act of 1984, Congress sought to accomplish three objectives. U.S.S.G § 1A3. First, the Act was intended to "combat crime through an effective, fair sentencing system." *Id.* Secondly, the Legislature sought to ensure "reasonable uniformity" in the sentencing of similar crimes committed by similar defendants. *Id.* Finally, the Act sought a system of sentencing that imposes proportionately different sentences for criminal activity depending on the severity of a criminal's conduct. *Id.*

[17] The United States Sentencing Commission is an independent agency in the judicial branch comprised of two non-voting and seven voting members. U.S.S.G. § 1A1. Its primary purpose is to establish and promulgate policies and procedures relating to sentencing for the federal criminal justice system. *Id.* The guidelines established by the Commission are issued pursuant to 28 U.S.C. § 994(a). *Id.*

rehabilitation; (5) the need for certainty; (6) the need for fairness; and, (6) the need for uniformity.[18] The United States Sentencing Commission's first guidelines became effective on November 1, 1987.[19]

In promulgating the Sentencing Guidelines, the Sentencing Commission attempted to combine consideration for the offense of which the defendant was convicted, as well as for "all identifiable conduct" that the defendant committed.[20] In examining "all identifiable conduct," a judge must look at "relevant conduct," which is defined in the Guidelines as all acts that occur during the offense, in preparation for the offense or to avoid responsibility for the offense.[21] Importantly, there is a special section for offenses which lend themselves to grouping of multiple offenses.[22] Relevant conduct for those offenses includes "all acts and omissions . . . that were part of the same course of conduct or

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[18] 28 U.S.C. § 991(b) (1991). For further information on the formation of the Guidelines, see Breyer, *supra* note 14. The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines to further "criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." U.S.S.G. § 1A2. The Act directs the Commission to create "categories of offensive behavior and offender characteristics." *Id.*

[19] The Commission submitted its initial guidelines to Congress on April 13, 1987. *Id.* After the prescribed period of Congressional review, the Guidelines took effect on November 1, 1987. *Id.* Every year between the beginning of a regular Congressional session and May 1, the Commission has the authority to submit amendments to Congress. *Id.* These amendments automatically take effect 180 days after submission unless Congress enacts a law to the contrary. *Id.* (citing 28 U.S.C. § 994(a)).

[20] U.S.S.G. § 1A4(a). In drafting the Guidelines, the Committee had to consider whether to base sentences on the "actual conduct in which the defendant engaged" ("real offense") or to base sentences simply on the elements of the offense for which the defendant was charged . . . and . . . convicted ("charge offense"). *Id.* "A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted." *Id.*

The Commission ultimately decided against a "real offense" system. *Id.* The Commission determined that a "real offense" system would contain many of the disparities that resulted from the old indeterminate system and instead adopted a system of sentencing based upon the conduct for which the defendant is charged and convicted, rather than upon his aggregate "identifiable conduct." *Id.*

[21] U.S.S.G. § 1B1.3(a). Judge William Wilkins, one of the principal architects of the Guidelines, has written that "relevant conduct" is the cornerstone of the guidelines. *See* William W. Wilkins, Jr. and John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 496 (1990). The authors consider relevant conduct crucial to the Guidelines because it allows a judge to look beyond the offense for which the defendant is convicted and look to "the actual criminal conduct of the defendant." *Id.* at 502.

[22] U.S.S.G. § 1B1.3(a)(2).

common scheme or plan as the offense of conviction . . . ."[23] The Sentencing Guidelines, therefore, greatly circumscribe the judges' discretion. The judge must impose a sentence within a relatively narrow band established in the guidelines unless aggravating or mitigating circumstances exist that the Sentencing Commission did not adequately consider when promulgating the Guidelines.[24] Unfortunately, the guidelines themselves provide that "all identifiable conduct," or, as Judge Wilkins calls it, "the actual criminal conduct of the defendant[,]"[25] is determined by a preponderance of the evidence standard rather than the beyond a reasonable doubt standard used in criminal proceedings.[26]

III. THE BURDEN OF PROOF UNDER THE FEDERAL SENTENCING GUIDELINES

Since judges are bound by the sentencing guidelines and must determine "all identifiable conduct," the Due Process Clause of the Fifth Amendment[27] is fully implicated in sentencing. Whether the Due Process Clause was implicated under the old indeterminate sentencing system is not my concern here. Once Congress creates a sentencing system which eliminates discretion and requires specific findings of "actual criminal conduct," it creates positive law which must abide by the

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[23] *Id.*

[24] 18 U.S.C. § 3553(b)(1991). "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.*

The Guidelines provide that generally, the government must carry the burden of persuasion by a preponderance of the evidence to establish aggravating sentencing factors, while the defendant bears the same burden when attempting to show mitigating factors. United States v. Wilson, 884 F.2d 1335, 1356 (11th Cir. 1989). For examples of aggravating and mitigating factors addressed in the Guidelines, see United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989) (holding defendant has the burden of establishing an acceptance of responsibility).

[25] *See* Wilkins and Steer, *supra* note 22, at 502.

[26] U.S.S.G. § 6A1.3, cmt. The Commission noted that "sentencing judges are not restricted to information that would be admissible at trial." *Id.* (citing 18 U.S.C.A. § 3661 (1992)). Among the information judges may consider includes "[a]ny information . . ., so long as it has 'sufficient indicia of reliability to support its probable accuracy." *Id.* (citations omitted). Reliable hearsay and out-of-court statements may also be considered. *Id.* (citation omitted).

[27] U.S. CONST. amend. V. *See supra* note 1 for the text of the Due Process Clause.

Due Process Clause.[28]

Any justice system worthy of the name must delineate the standard of proof for litigation. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[29] The standard of proof also allocates the risk of nonpersuasion between the litigants and serves to demonstrate the relative importance attached to the factfinder's ultimate decision.[30]

The American justice system primarily employs three standards of proof: (1) preponderance of the evidence; (2) clear and convincing

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[28] The Guidelines address the due process requirement, noting:

> The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the Guidelines to the facts of a case . . . .
>
> If sentencing factors are the subject of reasonable doubt the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

U.S.S.G. § 6A1.3 cmt. *See also* New York v. Silverman, 976 F.2d 1502, 1504 (6th Cir. 1992) ("[D]ue process requires that some evidentiary basis beyond mere allegation in an indictment be presented to support consideration of such conduct as relevant to sentencing."). United States v. Guerra, 888 F.2d 247, 251 (2d Cir. 1989) ("[T]he preponderance of the evidence standard satisfies the requisite due process in determining relevant conduct pursuant to the Sentencing Guidelines.").

[29] Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)) (holding a clear and convincing standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital). *See generally*, Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

[30] *Addington*, 441 U.S. at 423. When preponderance of the evidence is the burden of proof, such as in monetary disputes between private parties, the litigating parties share rather equally in the risk of non-persuasion. *Id.* At the other end of the spectrum is proof beyond a reasonable doubt, which requires society to impose almost the entire risk of non-persuasion upon itself, so as to greatly diminish the likelihood that the defendant will suffer an erroneous judgment. *Id.* The middle ground of clear and convincing evidence arises for example, in civil cases of fraud. *Id.* This type of case involves more substantial interests than those requiring the preponderance standard, and thus, some courts may increase the plaintiff's burden of proof. *Id.*

evidence; and, (3) beyond a reasonable doubt.[31] The preponderance of the evidence standard is the least-exacting standard of proof.[32] To prevail under this standard, a plaintiff must show that, more likely than not, he or she is correct in the allegations or assertions set forth. Thus, the risk of nonpersuasion is marginally on the plaintiff.[33] Courts use this standard in most civil actions because society has only a minimal concern with the outcome of most actions between private litigants.[34]

The clear and convincing evidence standard requires a plaintiff to produce more proof to support his or her claim than does the preponderance standard.[35] Also, as compared to the preponderance of the evidence standard, the clear and convincing evidence standard places the risk of nonpersuasion more heavily on the plaintiff.[36] Courts usually use this standard of proof in civil cases involving allegations of fraud or

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[31] *Id.* at 426 (The Fourteenth Amendment requires a clear and convincing standard of proof in a civil proceeding brought under state law to confine an individual involuntarily for an unspecified time to a state mental hospital.); U.S. v. Matlock, 415 U.S. 164 (1974) (holding that the controlling burden of proof at suppression hearings imposes proof by a preponderance of evidence); In re Winship, 397 U.S. 358 (1970) (recognizing that, in criminal cases, due process requires that defendant be proven guilty beyond a reasonable doubt.). *See also* Neil Orloff and Jerry Stedlinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard,* 131 U. PA. L. REV. 1159 (1983); Debra J. Madsen & Karen E. Gowland, *Santosky v. Kramer: Clear and Convincing Evidence—In Whose Best Interest?,* 20 IDAHO L. REV. 343 (1984); *Some Rules of Evidence,* 10 AM. L. REV. 642 (1976); Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule,* 55 B.U. L. REV. 507 (1975).

[32] *Addington,* 441 U.S. at 426 (holding that a preponderance of the evidence was too low a standard to adequately protect a defendant in an indefinite commitment case but clear and convincing evidence did provide adequate safeguards.).

[33] Pond v. Braniff Airways, Inc., 500 F.2d 161 (5th Cir. 1974) (pointing out that an "employer must prove his reasons by a preponderance of the evidence so that the risk of nonpersuasion on those factual questions lay on him.").

[34] Santosky v. Kramer, 455 U.S. 745 (1982) (maintaining that the termination of parental rights encroached on a significant right rendering the fair preponderance of the evidence standard inappropriate and at a minimum required clear and convincing evidence).

[35] In Re Church, 69 B.R. 425, 429 (1987) (recognizing that the clear and convincing evidentiary standard has been described by the United States Supreme Court as an intermediate standard, between a preponderance of the evidence and proof beyond a reasonable doubt, requiring of the unbiased trier of fact a firm belief or conviction in the truth of the matters allegedly shown by the evidence. (citing Oriel v. Russell, 278 U.S. 358 (1929)). The *Church* court also directly compared the two standards and referred to the latter as "the more exacting standard of clear and convincing evidence." *Id.* at 430).

[36] *Id.*

quasi-criminal activity,[37] deportation or denaturalization,[38] termination of parental rights[39] and civil commitment proceedings.[40] These cases involve interests that "are deemed to be more substantial than mere loss of money"[41] and therefore worthy of a more exacting standard of proof.

The most exacting standard of proof is the beyond a reasonable doubt standard.[42] Courts have almost exclusively reserved this standard

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[37] Hagaman v. Commissioner of the IRS, 958 F.2d 684, 696 (6th Cir. 1992) (holding that the Commissioner of the IRS has the burden of proving tax fraud by clear and convincing evidence); Smith v. Commissioner of the IRS, 926 F.2d 1470, 1475 (6th Cir. 1991) (same); Bulloch v. Pearson, 768 F.2d 1191, 1193 (10th Cir. 1985) ("Fraud on the court must be proven by clear and convincing evidence . . . ."); Collins Sec. Corp. v. SEC, 562 F.2d 820, 824 (D.C. 1977) ("Our research indicates that an even more common standard applied to cases involving civil fraud is that of 'clear and convincing evidence' to sustain the burden of proof."); *Cf.* Grogan v. Garner, 111 S.Ct. 654 (1991) (holding that preponderance of evidence standard, rather than clear and convincing evidence standard, applies to all exceptions from dischargeability of debts contained in Bankruptcy Code § 523(a), including nondischargeability for fraud provision.).

[38] INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (deportation); Delikosta v. Califano, 478 F.Supp. 640, 643 (S.D.N.Y. 1979) (recognizing that in a deportation hearing, the government is required to establish its allegations by "clear, unequivocal, and convincing evidence."); Woodby v. INS, 385 U.S. 276, 277 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 353 (1960) (deportation); Nowak v. United States, 356 U.S. 660, 663 (1958) (denaturalization); Schneiderman v. United States, 320 U.S. 118, 158 (1943) (denaturalization).

[39] Santosky v. Kramer, 455 U.S. 745-50, n.3 (1982) ("[A]llegations supporting parental rights termination must be proven by clear and convincing evidence." (citing Sims v. State Dept. of Public Welfare, 438 F.Supp. 1179, 1194 (S.D. Tex. 1977), *rev'd on other grounds sub. nom.* Moore v. Sims, 442 U.S. 415 (1979); Alsager v. District Ct. of Polk County, 406 F.Supp. 10, 25 (S.D. Iowa 1975), *aff'd on other grounds*, 545 F.2d 1137 (8th Cir. 1976))).

[40] *See* Goetz v. Crosson, 967 F.2d 29, 31 (2d Cir. 1992) ("There are two prerequisites to involuntary civil commitment, which, as a matter of federal constitutional law must be proven by clear and convincing evidence."); United States v. Sahhar, 917 F.2d 1197, 1200 (1990) ("If the Court finds by clear and convincing evidence that defendant's condition satisfies the section 4246(a) criteria, it shall commit the defendant to the custody of the Attorney General pursuant to section 4246(d)."); Addington v. Texas, 441 U.S. 418, 431-32 (1979) (Due process requires the use of the clear and convincing evidence standard in cases involving the involuntary confinement of a person in a mental hospital.).

[41] Addington v. Texas, 441 U.S. 418, 424 (1979).

[42] Coylan v. Third Judicial Dist. Court, 469 F. Supp. 424, 433 (D. Utah 1979); United States v. Fatico, 458 F.Supp. 388, 405-06 (E.D.N.Y. 1978), *aff'd* 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); In re Ballay, 482 F.2d 648, 656 (D.C. Cir. 1973); In re Winship, 397 U.S. 358, 361 (1970).

for criminal proceedings because in criminal proceedings the government seeks to deprive a defendant of life or liberty.[43] In criminal proceedings, the interests of the defendant "are of such magnitude that historically and without any explicit constitutional requirement [the interests] have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."[44] Because of the magnitude of the interests, the beyond a reasonable doubt standard places the risk of non-persuasion almost entirely on the government.[45]

Prior to the implementation of the sentencing guidelines, courts traditionally heard evidence and made findings of fact at sentencing without any prescribed standard of proof.[46] A proposed version of the federal sentencing guidelines would have required sentencing courts to use the preponderance of the evidence standard.[47] However, when the Sentencing Commission enacted the guidelines in 1987, it failed to specify what standard of proof should be applied at sentencing.[48] In fact, in a supplemental report to the guidelines, the Sentencing Commission stated that sentencing courts would have to resolve standard of proof questions themselves.[49]

Shortly after the guidelines took effect, almost all federal courts adopted the preponderance of the evidence standard.[50] The courts

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[43] *See, e.g.*, U.S. v. Restrepo, 946 F.2d 654, 659 (9th Cir. 1991); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1302 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989); Jackson v. Virginia, 443 U.S. 307, 315 (1979), *reh'g denied*, 444 U.S. 890 (1979).

[44] *Addington*, 441 U.S. at 423 (footnote omitted).

[45] *See* Bullington v. Missouri, 451 U.S. 430, 441 (1981); *Fatico*, 458 F.Supp. at 406.

[46] *See* McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (for complete discussion *see infra* note 86); *see also* United States v. Murphy, 899 F.2d 714, 716-17 (8th Cir. 1990); United States v. Gooden, 892 F.2d 725, 728 (8th Cir. 1989), *cert. denied*, 496 U.S. 908 (1990); United States v, Shret, 885 F.2d 441, 444 (8th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); United States v. Harris, 882 F.2d 902, 906 (4th Cir. 1989); United States v. Urrego-Linares, 879 F.2d 1234, 1237 (4th Cir. 1989), *cert. denied*, 493 U.S. 943 (1989).

[47] *See* United States Sentencing Commission, Preliminary Draft of Sentencing Guidelines for the United States Courts, 51 Fed. Reg. 35080, 35085 (1986).

[48] *See* U.S.S.G., § 6A1.3(a).

[49] United States Sentencing Commission, Supplementary Report of the Initial Sentencing Guidelines and Policy Statement 47 n.79 (June 1987).

[50] *See, e.g.*, United States v. Wilson, 900 F.2d 1355, 1356 (11th Cir. 1990) (holding that proof of underlying facts by preponderance of the evidence satisfied due process); United States v. Frederick, 897 F.2d 490, 492 (10th Cir.), *cert. denied*, 498 U.S. 863 (1990) (maintaining that due process is not violated by Federal Sentencing Guidelines requirement that trial court utilize the preponderance of the evidence standard); United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989) (holding that government had only to

generally reasoned that preponderance of the evidence was the appropriate standard because due process did not require a more stringent standard.[51] Eventually, the Sentencing Commission amended the commentary in section 6A1.3 of the Guidelines to reflect its approval of the preponderance of the evidence standard.[52] Thus, the current law makes clear that sentencing issues under the Guidelines, including relevant conduct, are governed by the preponderance standard. Notwithstanding the adoption of the preponderance of the evidence standard, some members of the federal judiciary, including myself, have recently expressed the view that use of this low standard of proof does not meet the requirements of due process in cases where the relevant conduct provision is used to sentence the defendant based on additional uncharged or unconvicted criminal activity.[53] Although our voices are

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prove facts used in imposition of guidelines sentence by preponderance of evidence); United States v. Guerra, 888 F.2d 247, 251 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990) (holding that due process was satisfied in the determination of "relevant conduct" under Sentencing Guidelines through use of the preponderance of the evidence standard); United States v. McDowell, 888 F.2d 285, 291 (3d Cir. 1989) (recognizing that a sentencing court considering modification of offense level need only base its decision on the preponderance of evidence); United States v. Vinson, 886 F.2d 740, 741-42 (4th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990) (stating that due process only requires sentencing court to determine facts underlying sentence by preponderance of the evidence); United States v. Burke, 888 F.2d 862, 869 (D.C. Cir. 1989) (proving facts necessary for sentencing by preponderance of evidence satisfied due process).

[51] *See* United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989) (concluding that there is no reason to mandate the application of a standard greater than that established in McMillan v. Pennsylvania, 477 U.S. 79 (1986)).

[52] The revised commentary states: "The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." U.S.S.G. § 6A1.3, cmt. (1993).

[53] *See* United States v. Silverman, 945 F.2d 1337 (6th Cir. 1992) (en banc) (Martin, J., dissenting) ("Today, the majority has endorsed a system under which the government can convict a defendant of uncharged criminal conduct by simply demonstrating to the court that, more likely than not, the defendant has engaged in the criminal activity. Thus, the majority has proclaimed to society just how little the federal courts value an individual's liberty. This is not a proclamation that we need to issue to a society in which millions of Americans already strongly question the fairness and legitimacy of the criminal justice system."); United States v. Restrepo, 946 F.2d 654, 664 (9th Cir. 1991) (en banc) (Norris, J., dissenting) (if the relevant conduct provision allows a defendant to receive a greater sentence based on additional criminal sales for which the defendant was not convicted, then due process requires the use of a standard greater than preponderance of the evidence); United States v. Townley, 929 F.2d 365 (8th Cir. 1991) (questioning whether the preponderance of the evidence standard satisfies due process when it is applied to prove uncharged criminal conduct); United States v. Brady, 928

few among many,[54] we hope that in the future other federal judges will unite with us.

The position that most aspects of relevant conduct analysis should involve a higher standard of proof than preponderance of the evidence has a legitimate basis—the Due Process Clause of the United States Constitution.[55] Although some individuals have suggested that due process only requires the use of the clear and convincing evidence standard,[56] I believe that at times, the Due Process Clause, as interpreted by the United States Supreme Court in the following cases, requires the use of a reasonable doubt standard at sentencing.

In 1970, in *In re Winship,*[57] the United States Supreme Court considered the standard of proof required in juvenile proceedings. In *Winship,* a 12-year-old boy, who stole $112 from a women's pocketbook, was charged with delinquency under a New York statute.[58] Since this act would have constituted the crime of larceny if the boy had been an adult, a judge of the Family Court decided that the boy a delinquent.[59] The lower court acknowledged that the state might not have established guilt beyond a reasonable doubt, but nonetheless rejected the appellant's

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F.2d 844 (9th Cir. 1991) (refusing to follow other circuits which have allowed conduct, of which a defendant has been acquitted, to be introduced for the purpose of increasing the defendant's sentence).

[54] For further criticism of the Guidelines, see Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentences,* 101 YALE L.J. 1681 (1992); Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation,* 101 YALE L.J. 1755 (1992); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation,* 58 U. CHI. L. REV. 901 (1991); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity,* 28 AM. CRIM. L. REV. 161 (1991).

[55] *See supra* note 1 for the text of the Due Process Clause.

[56] *See* Richard Husseini, Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof,* 57 U. CHI. L. REV. 1387 (1990).

[57] 397 U.S. 358 (1970).

[58] *Id.* at 359. The statute provides:

> A 'Juvenile delinquent' means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by a adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law.

Id. (quoting N.Y. FAM. CT. ACT. § 301.2).

[59] *Winship,* 397 U.S. at 359-60.

argument that the Due Process Clause of the Fourteenth Amendment required such a stringent level of proof.[60]

The United States Supreme Court was faced with the question of whether the Due Process Clause required the prosecution to prove beyond a reasonable doubt that the boy had committed a crime. In analyzing the question, the Court stated:

> The requirement of proof beyond a reasonable doubt has . . . [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction . . . .
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> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.[61]

The Court held that the Due Process Clause protects all defendants against conviction unless the state proved beyond a reasonable doubt every element necessary to establish the crime with which the defendant was accused.[62] In a concurring opinion, Justice Harlan opined that he viewed the proof beyond a reasonable doubt requirement in criminal cases "as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[63]

Five years later in *Mullaney v. Wilbur*,[64] the Supreme Court further defined when due process required the adoption of the beyond a reasonable doubt standard. *Mullaney* involved a Maine law which provided that any intentional or criminally reckless killing was a

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[60] *Id.* at 360. In rejecting the contention that proof beyond a reasonable doubt is required, Justice Brennan instead relied on § 744(b) of the New York Family Court Act. *Id.* This statute provides that "[a]ny determination following the conclusion of a hearing that a juvenile did a certain act must be based on a preponderance of the evidence." *Id.*

[61] *Id.* at 363-64.

[62] *Id.* at 364.

[63] *Id.* at 372 (Harlan, J., concurring).

[64] 421 U.S. 684 (1975).

felonious homicide, absent justification or excuse.[65] Under Maine law, felonious homicides were punishable as murder because malice aforethought was presumed unless the defendant showed, by a preponderance of the evidence, that the killing occurred in the heat of passion.[66] If the defendant proved that the killing resulted from the heat of passion, the state then punished the felonious homicide as manslaughter.[67] On the other hand, if a defendant could not satisfy this burden, then the state punished the homicide as murder.[68]

In *Mullaney,* the prosecution argued that Wilbur, who was convicted of murder, attacked his victim in a "frenzy" triggered by the victim's homosexual advance toward him.[69] The defense argued that since Wilbur lacked criminal intent, the homicide was not unlawful, or, alternatively, that the homicide was manslaughter because it had been committed in the heat of passion.[70] The jury convicted Wilbur of murder.[71] Wilbur appealed to the Maine Supreme Judicial Court, alleging he had been denied due process because the law required that he prove that he acted in the heat of passion to negate the requirement of malice aforethought.[72] Wilbur argued that *Winship* mandated that the state prove malice aforethought beyond a reasonable doubt.[73]

The supreme court of Maine, in rejecting Wilbur's contention, held that murder and manslaughter are merely separate degrees of the offense of felonious homicide.[74] Upon Wilbur's petition for a writ of habeas corpus, the District Court for the District of Maine held that

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[65] *Id.* at 691. The Maine murder statute provides: "[w]hoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." *Id.* at 686, n.3 (quoting ME. REV. STAT. ANN., TIT. 17, § 2651 (1964)).

The Maine manslaughter statute provides in pertinent part: "[w]hoever unlawfully kills a human being in the heat of passion, on sudden provocation without express of implied malice aforethought . . . shall be punished by a fine of not more than 1,000 or by imprisonment for not more than 20 years . . . ." *Id.* (quoting ME. REV. STAT. ANN. tit. 17 § 2551 (1964)).

[66] *Id.* at 691-92.

[67] *Id.*

[68] *Id.* at 691 n.3.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 687.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 688.

under *Winship*, the prosecution was required to prove the malice aforethought element of the crime of murder beyond a reasonable doubt, and could not "rely on a presumption of implied malice . . . ."[75]

The Court of Appeals for the First Circuit affirmed.[76] After a decision in which the Maine supreme court again held that manslaughter and murder are merely separate degrees of the crime of felonious homicide under Maine law,[77] the Supreme Court granted certiorari and remanded the case to the First Circuit Court of Appeals for reconsideration.[78] On remand, the appeals court again applied *Winship* and mandated that the prosecution was required to prove that the defendant had not acted "in the heat of passion on sudden provocation" beyond a reasonable doubt in order to establish murder.[79] The Supreme Court granted certiorari and affirmed.[80]

The state maintained that the Supreme Court should not apply the *Winship* holding because the absence of heat of passion was not a element of the crime of crime of felonious homicide.[81] The state argued that *Winship* was distinguishable because in *Winship* the fact at issue was "*essential*" to establish guilt, whereas in *Mullaney* the issue of the absence of heat of passion did not come into play until after the jury determined that the defendant was guilty of at least the crime of manslaughter.[82] In short, Maine wanted to limit the *Winship* holding to those facts which, if not proved by the prosecution, would wholly exonerate the defendant.[83] In rejecting Maine's argument, the Supreme Court stated:

> [Maine's] analysis fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who

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[75] *Id.*

[76] *Id.* at 689.

[77] State v. Lafferty, 309 A.2d 647 (Me. 1973). The *Lafferty* court held that if the state proved felonious homicide, the defendant then had the burden of proving "he acted in the heat of passion on sudden provocation in order to receive the lesser penalty prescribed for manslaughter." *Mullaney*, 421 U.S. at 670-71.

[78] *Id.* at 689.

[79] *Id.* at 690.

[80] *Id.*

[81] *Id.* at 696-97.

[82] *Id.* at 697 (emphasis added).

[83] *Id.*

> kill in the heat of passion from those who kill in the absence of this factor. Because the former are less 'blameworth[y]' . . ., they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*.
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> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. . . .
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> . . . .
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> Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.[84]

The Supreme Court held that when the issue is properly presented in a homicide case, the Due Process Clause requires that the absence of heat of passion be proved by the prosecution beyond a reasonable doubt.[85]

Two years after its decision in *Mullaney*, the Supreme Court of the United States considered whether requiring a defendant to prove the existence of an affirmative defense violated Due Process in the case of *Patterson v. New York*.[86] This case involved a New York statute which provided that a person was guilty of murder in the second degree if he intended to cause the death of another person and, in fact, had caused the death of that person or a third person.[87] Unlike the statute

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[84] *Id.* at 697-98.

[85] *Id.* at 704. By placing the burden of proof upon the defendant to prove that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter, the Court noted that "a defendant can be given a life sentence when the evidence indicates that is *as likely as not* that he deserves a significantly lesser sentence." *Id.* at 703 (emphasis in original).

[86] 432 U.S. 197 (1977).

[87] *Id.* at 198-99 n.2. Under New York law, an individual is guilty of second-degree murder when:

> 1. With the intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this

examined in *Mullaney*, malice aforethought was not an element of New York's crime of murder in the second degree.[88] The New York law provided, however, that a defendant accused of murder could raise as an affirmative defense the fact that he "acted under the influence of extreme emotional disturbance."[89] If the defendant could prove that he "acted under the influence of extreme emotional disturbance" by a preponderance of the evidence, he could be found guilty of manslaughter in the first degree rather than murder in the second degree.[90]

The appellant in *Patterson*, Gordon Patterson, Jr., was estranged from his wife.[91] His wife then resumed associating with a man, John Northrup, to whom she had been engaged before her marriage.[92] Patterson borrowed a rifle from a friend and went to his father-in-law's home, where he saw his wife in a semi-undressed state in Northrup's

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subdivision, it is an affirmative defense that:

> a) the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to the prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

Id. (quoting N.Y. PENAL LAW § 125.25(1) (McKinney 1975)).

[88] *Id.* at 198.

[89] *Id.*

[90] *Id.* at 200. Under New York law, a person is guilty of manslaughter in the first degree when:

> 2. With intent to cause the death of another person, he causes the death of such person or of a third person under the circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

Id. at 199 n. 3 (quoting N.Y. PENAL LAW § 125.20 (2) (McKinney 1975)).

[91] *Id.* at 198.

[92] *Id.*

presence.[93] He then shot Northrup twice in the head.[94] Patterson confessed that he had killed Northrup prior to the trial, but at trial raised the affirmative defense of extreme emotional disturbance.[95]

The jury convicted Patterson of murder, and Patterson appealed, arguing that the Supreme Court's decision in *Mullaney* required reversal.[96] The New York Court of Appeals rejected Patterson's argument, and the United States Supreme Court affirmed on appeal.[97]

The Supreme Court held that under New York's definition of second-degree murder, the state had to prove only two elements beyond a reasonable doubt: that the defendant intended to kill another person and that the defendant actually killed that person or a third person.[98] The Court stated that New York's definition of murder in the second degree satisfied due process if the state was required to prove these two elements beyond a reasonable doubt and that due process was not violated simply because the defendant was burdened with proving the existence of the affirmative defense of extreme emotional disturbance.[99] The Court then distinguished its holding in *Mullaney*, stating that the Maine law involved in *Mullaney* contained malice aforethought, in the sense of absence of provocation, as part of the *definition* of murder and the Maine law presumed the existence of malice of afterthought unless the defendant could prove by a preponderance of the evidence that he acted under provocation.[100] The Court stated that Maine's decision to shift the burden of proof on a fact that Maine found so important was

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[93] *Id.*

[94] *Id.*

[95] *Id.* at 199.

[96] *Id.* at 200-01. Patterson argued that the murder statute in New York was the functional equivalent of the Maine Statute struck down in *Mullaney*. *Id.* at 201.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 205-06. In upholding the New York murder statute against the defendant's due process challenge, the Court adhered to the precedents set forward in Leland v. Oregon, 343 U.S. 790 (1952) and Rivera v. Delaware, 429 U.S. 877 (1976), and concluded that the affirmative defense of extreme emotional disturbance is an issue which is separate and distinct from proving the elements of the murder itself and on which the defendant carries the burden of persuasion. *Id.* at 206-07. Under *Leland* and *Rivera*, after the prosecution proves all elements of a crime beyond a reasonable doubt, it may refuse to sustain a defendant's "affirmative defense of insanity unless demonstrated by a preponderance of the evidence." *Id.* at 206.

[100] *Id.* at 215-16 (emphasis added).

a violation of due process.[101] The Court found that New York's statute defining the crime of murder in the second degree, unlike the Maine statute, did not presume or imply any element of the crime and required the *state* to prove all elements of the crime beyond a reasonable doubt.[102] Hence, the Court held that New York's provision did not violate due process.[103]

With these legal precedents in force, the case of *McMillan v. Pennsylvania*[104] came before the United States Supreme Court and presented the Court with a due process challenge to the Pennsylvania Mandatory Minimum Sentencing Act.[105] The Act imposed a five-year minimum sentence on any defendant who was convicted of certain enumerated felonies and who had visibly possessed a firearm during the

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[101] *Id.* at 216.

[102] *Id.*

[103] *Id.* For a discussion of the Court's reasoning in *Patterson*, see Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30 (1977). *See also* Eule, *The Presumption of Sanity: Bursting the Bubble*, 24 U.C.L.A. L. REV. 637, 677-683 (1978); Celian Foldwag, Note, *The Constitutionality of Affirmative Defenses After Patterson v. New York*, 78 COLUM. L. REV. 655 (1988); James B. Talley, Jr., Note, *Burden of Proving Affirmative Defenses Can be Placed on Defendant*, 29 MERCER L. REV. 875 (1978); Theodore L. Hecht, Note, *Criminal Law—Affirmative Defenses—Burden of Proof—Patterson v. New York*, 23 N.Y.U. L. REV. 802 (1978); Mark R. Adams, Note, *Affirmutive Criminal Defenses—The Reasonable Doubt in the Aftermath of Patterson v. New York*, 39 OHIO ST. L. REV. 393 (1978); Lawrence M. Ward, Note, *Criminal Law: Affirmative Defenses in Criminal Trials: What Are the Limits after Patterson v. New York*, 31 OKLA. L. REV. 411 (1978).

[104] 477 U.S. 79 (1986).

[105] *See* PA. STAT. ANN. tit. 42, § 9712 (1982). Section 9172 provides in pertinent part:

> (a) Mandatory sentence—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i),(ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1)(relating to aggravated assault), or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

Id. PA. STAT. ANN. TIT. 42, § 9712 (1982)

commission of the felony.[106] At sentencing, the trial court was required to determine whether the government had established by a preponderance of evidence that the defendant had visibly possessed a firearm during the commission of the felony.[107] If the court so found, it was required to sentence the defendant to a term of at least five years.[108]

The defendants argued that due process precluded Pennsylvania from punishing "visible possession of a firearm" unless the prosecution proved visible possession beyond a reasonable doubt.[109] In analyzing this due process challenge, the Court first explained that under *Winship* the state must prove every element of a crime beyond a reasonable doubt.[110] The Court, however, went on to uphold the use of the preponderance of the evidence standard under Pennsylvania law, finding that *Patterson* rather than *Mullaney* was controlling.[111] The Court reasoned that because Pennsylvania had expressly provided that visible possession was not an element of the crimes enumerated in the mandatory sentencing statute, visible possession was a sentencing factor which came into play only after a jury had found beyond a reasonable doubt that the defendant was guilty of one of the enumerated crimes.[112]

The court acknowledged that a legislature's definition of the elements of an offense is usually dispositive but cautioned that there are constitutional limits to a state's power to define offenses.[113] In finding that the Pennsylvania legislature had in fact not surpassed the constitutional limits, the court pointed out:

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[106] *McMillan*, 477 U.S. at 81.

[107] *Id.* at 89-90.

[108] *Id.* at 81. There were three defendants in *McMillan*; they were joined into one case because of the similarity of the circumstances under which they were charged. *Id.* at 83. The named defendant was arrested for aggravated assault during which the defendant used a firearm. *Id.*

[109] *Id.*

[110] *Id.* at 84.

[111] *Id.* at 85.

[112] *Id.* at 85-6.

[113] *Id.* at 86. The Court noted that *Patterson* did not establish clear constitutional limits which petitioners argued Pennsylvania had exceeded. *Id.* Nevertheless, the statute did not "create a presumption of the existence of all the facts essential to guilt." *Id.* (citing *Patterson v. New York*, 432 U.S. 197, 210 (1977)) (quoting Tot v. United States, 319 U.S. 463, 469 (1943)). Nor did the statute alleviate the state's burden of proving guilt beyond a reasonable doubt. *McMillan*, 477 U.S. at 87.

> [The Act] neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. [The Act] 'ups the ante' for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. The statute gives no impression of having been tailored [by the legislature] to permit the visible possession finding to be a tail which wags the dog of the substantive offense.[114]

The court also rejected the defendants' claim that the Pennsylvania legislature's visible possession enhancement had evaded the due process dictates of *Winship*.[115] The court drew a distinction between *crime elements*, which go toward establishing the existence of the substantive offense, and *sentencing factors*, which go only toward determining the amount of punishment for the crime.[116]

After reading and analyzing these four Supreme Court cases, none of the cases leads to the conclusion that due process requires the use of the reasonable doubt standard in sentencing involving the relevant conduct provision. However, reading the cases together produces several propositions that help us eventually reach this conclusion, anyway. First, there is an important distinction between a crime element and a sentencing factor. Proof of a crime element helps establish the existence of the substantive criminal offense, while a sentencing factor comes into play only after a jury has found the defendant guilty of a particular substantive offense beyond a reasonable doubt. Therefore, sentencing factors only help the court determine the extent of the punishment that the defendant will receive for his crime. Second, due process requires the government to prove all crime elements beyond a reasonable doubt.[117] Nonetheless, if a sentencing factor is involved, due process is not violated simply because the prosecution is allowed to show the existence of a sentencing factor by a preponderance of the evidence. Third, the legislature's definition of its criminal offenses will usually determine whether or not a particular fact is a crime element or a sentencing factor. When the legislature has tried to evade the dictates

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[114] *Id.* at 88.

[115] *Id.* at 89-90.

[116] *Id.* at 89-90 (emphasis added).

[117] *See* In re Winship, 397 U.S. 358 (1970).

of *Winship* by treating a crime element as a sentencing factor, due process requires proof beyond a reasonable doubt.

IV. USE OF THE BEYOND A REASONABLE DOUBT STANDARD IN RELEVANT CONDUCT ANALYSIS

With these propositions in mind, I now turn to determine whether due process requires the use of the reasonable-doubt standard in many aspects of relevant-conduct analysis. A good example is the application of the sentencing guidelines to a standard drug case.

Under the guidelines, after a jury convicts a defendant of a crime the court must then determine the defendant's base offense level, which also contains a corresponding sentencing range.[118] For drug crimes, the total

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[118] U.S.S.G. § 1B1.2(a). The system created by the Sentencing Guideline Commission assigns an offense for every federal criminal statute; offense levels range between one (the lowest level) and forty-three (the highest offense level). U.S.S.G. § 1B1.1(b). Each offense level contains a range of months to which convicted defendants are sentenced. U.S.S.G. § 1B1.2(a). Convictions pursuant to federal statutes are assigned a "base offense level." U.S.S.G. For example, if a defendant with no prior drug convictions is convicted for possession of an illegal controlled substance pursuant to 21 U.S.C. § 841(b)(1)(A), the proper base offense level is 38. U.S.S.G. § 2D1.1(a)(2).

The "base level" may subsequently be altered pursuant adjustment provisions contained in the guidelines. *See generally* U.S.S.G. § 1B1.1. The guidelines mandate that the "base level" be adjusted in light of: the specific characteristics of the offense (e.g. defendant's relevant conduct), U.S.S.G. § 1B1.1(b); the role, victim, and defendant's acceptance of responsibility (Chapter Three), U.S.S.G. § 1B1.1((c), (e); the defendant's criminal history and any multiple counts (Chapter Four), U.S.S.G. § 1B1.1(f); and whether the facts of the case or the defendant's condition warrant an upward or downward departure in the guidelines (Chapter Five), U.S.S.G. § 1B1.1(g)-(i). Proper determination of the defendant's base level is, therefore, of paramount importance because all subsequent adjustments made to the defendant's sentence are made to that particular base level.

A convicted defendant cannot have a greater offense level than 43, even where there are multiple offenses. § 2D1.1(a)(1). Where a defendant is convicted of multiple offenses, the court must first group offenses that are closely related. U.S.S.G. § 3D1.2. Then, the court merges offenses in closely related groups with lower offense levels into the offense with the highest offense level. U.S.S.G. § 3D1.3. The court must next compare the offense levels of the various groups of offenses. U.S.S.G. § 3D1.4. The offense Group with the highest offense level becomes a benchmark and is termed one Unit. *Id.* Against this unit, the severity of the lesser Group offense levels is measured. *Id.* The highest Group offense level will be raised if the lesser offense Groups are within a specified range of the most serious offense Group level. U.S.S.G. § 3D1.4(a) and (b).

Drawing on the foregoing example, assume a defendant is convicted of: (a) narcotics possession for the first time (level 38); (b) assault with intent to murder a Federal Officer using a legally possessed handgun (level 28 for assault with intent to kill, U.S.S.G. § 2D1.1(a)(2), which will be adjusted upward 3 levels because a Federal Officer

amount of the contraband determines the base offense level.[119] To understand the calculation of the drug amount, we must examine the interplay of two provisions: sections 1B1.3 and 3D1.2 of the guidelines.[120] Section 1B1.3 of the guidelines provides that if a

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was the victim of the defendant's assault, U.S.S.G. § 3A1.2(b); and (c) illegal entry into the United States (level 8, U.S.S.G. § 2L1.2). First, the Court must combine all related offenses into groups. The first related Group is assault with intent to kill a federal officer, with a Group level of 31. The second related group is narcotics possession and entering the United States illegally, U.S.S.G. § 3D1.2(d); the Group carries the offense level of the highest offense in the Group, or in this example, 38.

Once establishing the offense levels of the two offense Groups used in this hypothetical, the Court then considers the higher offense level as one Unit. U.S.S.G. § 3D1.4. The Court must then subtract from the higher Group offense level, the first Unit, the lesser Group offense level (level 38 minus level 31). *Id.* The extent of the difference between the two offense levels determines how much the first Unit will be increased. In the instant example, the difference is seven, which falls under the purview of § 3D1.4(b), and which would add one half of a Unit to the first Unit, for a total of 1 and 1/2 units. Thus, pursuant to the chart set forth in § 3D1.2, one level would be added to the highest offense level, 38, for a final offense level of 39.

[119] § 2D1.1. Assuming there are no other relevant factors or charges in the case, where a defendant has been convicted with possession of a certain quantity of one type of drug, the judge need only look to the drug quantity table set forth in § 2D1.1(c). U.S.S.G. § 2D1.1, cmt.10. For example, a defendant convicted of possessing 10kg of heroin falls under the sentencing range of level 36. U.S.S.G. 2D1.1(c)(4).

Where a defendant is convicted of possessing more than one type of drug, however, the various substances must be "converted" into marihuana for purposes of determining the appropriate guideline level. U.S.S.G. 2D1.1, cmt.n.10. For example, where a defendant is convicted of possessing 10 kg of cocaine (which alone would equate to a level 32, U.S.S.G. 2D1.1(c)(6)), and 500 kg of marihuana (which alone would equate to a level 28, U.S.S.G. 2D1.1(c)(8)), the cocaine possessed by the defendant must first be converted into marihuana using the conversion table set forth in the Advisory Comment of § 2D1.1(c). The Drug Equivalency Table instructs than 1 gm of cocaine is equivalent to 200 gm of marihuana. Thus, in the foregoing hypothetical, the defendant's 10 kg of cocaine would be equivalent to 2000 kg of marihuana, which, pursuant to § 2D1.1(c)(6), equates to a level 32 offense level. The cocaine now "converted" into marihuana, the judge must compute the total amount of "marihuana" possessed by the defendant- in this case 2,000 kg of the "converted" cocaine *plus* the 5000 kg of marihuana, for a total of 2,500 kg of marihuana. Once the total amount of drugs possessed has been determined, the judge must then resort back to the Drug Quantity Table set forth in § 2D1.1(c). The offense level assigned to possessing 2,500 kg of marihuana is 32, pursuant to § 2D1.1(c)(6).

[120] As later discussed, the interplay between § 1B1.3 and § 3D1.2 permits a judge to consider "other relevant conduct" of the defendant, even if the defendant was not ultimately charged with or convicted of that conduct. U.S.S.G. § 1B1.3, cmt.3; *see also infra* notes 124-127 and accompanying text. Thus, for purposes of determining the amount of drugs a defendant possessed, pleas or dropped charges which would have charged the defendants with possession of certain quantities of drugs may be considered

convicted defendant engaged in, but was not convicted of, conduct part of the "same course of action or common scheme" which could be aggregated pursuant to section 3D1.2, the court must then consider that conduct as part of the defendant's sentence.[121] Section 3D1.2 sets forth the conditions under which the court must aggregate charges;[122] drug

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by the judge during sentencing.

[121] The relevant conduct provision of § 1B1.3, reads, in pertinent part:

> 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 . . . 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 what were part of the same course of conduct or common scheme or plan of the offense of conviction . . . .

U.S.S.G. §1B1.3

[122] As previously discussed, U.S.S.G. § 3D1.2 provides four instances where charges, or "Counts," may be aggregated by the sentencing court. *See supra* note 120. Section 3D1.2 reads:

> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
>
> (a) When counts involve the same victim or transaction [e.g., ". . . the defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping . . . . " U.S.S.G. § 3D1.2, cmt.3, ex. 2].
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> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan [e.g., "[t]he defendant is convicted of mail fraud and wire fraud in furtherance of a single fraudulent scheme . . ." U.S.S.G. § 3D1.2, cmt. 4, ex. 2].
>
> (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts [this section was promulgated to prevent double counting, e.g., a count of bodily injury must be aggregated into an assault count where bodily injury is itself an element of proving assault. U.S.S.G. § 3D1.2, cmt. n.5].
>
> (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of the substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written

charges must be aggregated pursuant to § 3D1.2(d).[123] The relevant conduct provision provides that if a convicted defendant's crime would qualify for aggregation under section 3D1.2, the court should then consider all actions part of the same course of conduct in determining the base offense level.[124] Thus, for a sentencing court to determine the base offense level for drug crimes, the court must consider all actions that were part of the same course of conduct which would include considering amounts of drugs associated with criminal counts that the government, via a plea agreement, agreed to dismiss.[125] The fact that the defendant was not convicted beyond a reasonable doubt for these additional amounts of drugs is irrelevant; under current jurisprudence the government need only prove the additional criminal conduct by a preponderance of the evidence.[126]

The best way to demonstrate the operation of the sentencing

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to cover such behavior.

U.S.S.G. § 3D1.2.

[123] As previously intimated, drug counts are aggregated pursuant to U.S.S.G. § 3D1.2(d), because drug offenses are "determined largely... by the quantity of substance involved." U.S.S.G. § 3D1.2(d). Specifically, the drug offenses which may be aggregated pursuant to that section include: §§ 2D1.1 (unlawful manufacturing, importing, trafficking, exporting, and/or possession to commit these offenses); 2D1.2 (drug offenses involving underage persons, pregnant women, or occurring in or near a protected area); 2D1.5 (continuing drug enterprise); 2D1.11 (unlawfully distributing, exporting, importing, or possessing a Listed Chemical); and 2D1.13 (structuring a chemical trade or transaction to evade reporting or recordkeeping requirements). *See* U.S.S.G. § 3D1.2(d).

Drug offenses which may not be aggregated under U.S.S.G. § 3D1.2(d) are: U.S.S.G. §§ 2D2.1 (unlawful possession); 2D2.2 (acquiring controlled substance by fraudulent means); and 2D2.3 (operating or directing the operation of a common carrier while under the influence of alcohol or drugs).

[124] U.S.S.G. § 1B1.3(a)(2). Comment 3 to § 1B1.3 bluntly affirms this point: "Application of [the relevant conduct] provision does not require the defendant, in fact, to have been convicted of multiple counts." U.S.S.G. § 1B1.3, cmt.3.

[125] The United States Supreme Court has determined that facts in sentencing proceedings need only be demonstrated by a preponderance of the evidence. *See supra* note 106-118 & accompanying text discussing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), where the Court determined this standard. Under the current guidelines, conduct for which the defendant was acquitted may be considered "relevant conduct" for purposes of sentencing. U.S.S.G. § 1B1.3 cmt. 3. This is because even if that conduct could not have been proven by the exacting beyond a reasonable doubt standard, the sentencer may nevertheless determine that such conduct was demonstrated by at least a preponderance of the evidence. *Id.*

[126] *See supra* notes 106-118 and accompanying text for a discussion of *McMillan V. Pennsylvania*, 477 U.S. 79 (1986), for the standard of proof in sentencing determinations.

guidelines in such a drug case is to use a hypothetical situation. Assume a federal grand jury issues a three-count indictment against Defendant "A", who is a first-time offender, charging him with: (1) distributing 100 grams of cocaine on Monday, in violation of 21 U.S.C. § 841(a)(1)[127]; (2) distributing 400 grams of cocaine on Tuesday, in violation of 21 U.S.C. § 841(a)(1)[128]; and (3) distributing five kilograms of cocaine on Wednesday, in violation of 21 U.S.C. § 841(a)(1)[129]. A jury finds Defendant "A" guilty beyond a reasonable doubt of distributing 100 grams of cocaine on Monday but acquits him on the remaining two counts. In other words, the jury has reasonable doubts about whether Defendant "A" was guilty of the crimes on Tuesday and Wednesday.

At sentencing, the judge makes the following findings of fact: the Monday distribution, which was the basis of Defendant A's conviction, involved 100 grams of cocaine; even though the jury acquitted Defendant A on the Tuesday distribution count, a *preponderance of the evidence* demonstrated that he had, in fact, distributed 400 grams of cocaine on Tuesday; and even though the jury acquitted Defendant A on the Wednesday distribution count, a *preponderance of the evidence* demonstrated that he had, in fact, distributed five kilograms of cocaine on Wednesday.

In order to determine Defendant "A"'s base offense level, the court would refer to section 2D1.1(a)(3) and the Drug Quantity Table.[130] The Drug Quantity Table reveals that, if the sentencing court considered only the amount of drugs associated with the convicted count, then Defendant "A"'s base offense level would be an 18.[131] This offense level, combined with Defendant A's criminal history category would

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[127] 21 U.S.C. § 841 reads in pertinent part:

> (a) except as authorized by this subchapter, 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 . . . .

Id.

[128] *Id.*

[129] *Id.*

[130] U.S.S.G. § 2D1.1(c); *see supra* note 121.

[131] U.S.S.G. § 2D1.1(c). The example provided in note 104 assumes that the defendant was participated in, charged with, and convicted of only one act of criminal conduct.

subject the defendant to a prison term of 27-33 months.[132] However, because of the sentencing court's findings associated with the Tuesday and Wednesday distribution counts, section 1B1.3(a)(2) requires the court to aggregate all of the cocaine sales and sentence Defendant "A" based on five and one-half kilograms of cocaine.[133] Five and one-half kilograms of cocaine combined with a criminal history category of I would produce an offense level of 32, which would subject Defendant "A" to a sentence of 121-151 months.[134] Thus, under the current sentencing guidelines, the district court would have to sentence Defendant "A" to at least an additional 94 months in prison based on findings that were supported only by a preponderance of the evidence.

In my analysis of the due process implications of this district court's sentence, we first classify each of the hypothetical facts found by the district court. Under *McMillan* and its predecessors the court's finding that the convicted count involved 100 grams of cocaine is a sentencing factor because the statutory provision establishing the penal consequences for various amounts of cocaine is 21 U.S.C. § 841(b), which is entitled "penalties."[135] Because the amount of cocaine associated with the convicted count is a sentencing factor rather than an element of a crime, the preponderance-of-the-evidence standard suffices to satisfy due process.[136]

Next we turn to the court's findings that Defendant "A" engaged in additional cocaine sales. Section 841(a)(1) states that it is unlawful to knowingly manufacture, distribute, or dispense, or possess with intent to

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[132] *Id.* The guidelines impose heavier punishments on recidivists by placing repeat offenders in "Criminal History" categories. *See generally* U.S.S.G. § 4A1.1(a)-(f). For purposes of criminal history, the amount of increase assigned to a base offense level will depend upon: the seriousness of the prior offense, U.S.S.G. §4A1.1(a)-(c); whether the prior offense for which the defendant was convicted was a crime of violence, U.S.S.G. §4A1.1(f); the time lapse between the prior and current offense, U.S.S.G. §4A1.1(e); and whether the current offense occurred while the defendant was on probation, parole, or other form of supervised release, *Id.* The parameters of, and any modifications to, these general premises are listed in § 4A1.2(a)-(p). In the instant hypothetical, Defendant "A" has no prior criminal history, and thus, Defendant "A"'s base level offense remains 18.

[133] U.S.S.G. § 1B1.3(a)(2); *see supra* note 121.

[134] U.S.S.G. § 2D1.1(c); *see supra* note 121.

[135] *See also* United States v. Acevedo, 891 F.2d 607, 611 (7th Cir. 1989) (court indicating that "section 841(b) has nothing to do with the substantive elements of the underlying offense because the quantity of the controlled substance is a sentencing issue unrelated to a defendant's underlying guilt").

[136] *McMillan v. Pennsylvania*, 477 U.S. 79, 90-91 (1986); *see supra* notes 106-118 and accompanying text.

manufacture, distribute, or dispense, a controlled substance.[137] Section 841(a)(1) is violated each time a defendant manufactures or distributes a controlled substance.[138] Thus, if a defendant distributes cocaine on five separate occasions during a 24-hour period, he could be indicted and convicted for five violations of section 841(a)(1).

Under the current interpretation of the relevant-conduct provision, once the government has proved a defendant guilty beyond a reasonable doubt of one drug sale, then the government can prove additional, closely related criminal conduct by a preponderance of the evidence and use this conduct to serve as the basis of additional punishment. This to me is wrong. Because each and every sale of a controlled substance violates section 841(a)(1), it is impossible to see how a finding that a defendant has engaged in additional distributions of a controlled substance is a sentencing factor rather than the dispositive element necessary to establish a violation of federal law. When the relevant conduct provision is used to aggregate drug amounts not associated with a convicted count, this to me violates the due-process mandate of *Winship*, which mandates proof of every element of a crime beyond a reasonable doubt.

Moreover, the relevant-conduct provision's ability to enhance a defendant's sentence based on additional drug activity is a "tail which wags the dog of the substantive offense."[139] In any sentencing regime which comports with due process, the substantive offense must primarily control the punishment decisions associated with the offense. With the relevant-conduct provision, the "sentencing factors" (i.e., the additional drug activity) can play such a dominant role in punishment decisions that the substantive offense becomes merely an excuse for imposing a long prison sentence.

Supporters of the guidelines argue that additional drug sales are sentencing factors that do not violate due process because in most cases the sentences distributed using the relevant-conduct provision do not exceed the maximum penalty that Congress has authorized in the United States Code for the convicted conduct. Thus, the argument goes, like in *McMillan*, the relevant conduct analysis does not alter the maximum

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[137] *See supra* note 129.

[138] *See supra* note 129.

[139] *McMillan*, 477 U.S. at 88. The Court's analogy in *McMillan* to the "tail wagging the dog" refers to circumstances where the main issue in a case becomes subverted to secondary, off-shoots of the main issue. The Court observed that imposing a five year minimum prison term for possession of a firearm during the commission of an assault was not a sentence which dominated the punishment for the substantive conduct of which the defendant was convicted (aggravated assault). *Id.*

penalty in the United States Code for the crime committed and proven beyond a reasonable doubt; it merely "ups the ante" for the defendant. This argument is no longer supportable now that the sentencing guidelines are completely binding on the district courts. Even though the Code theoretically establishes the maximum penalty for the commission of a given substantive offense, the sentencing guidelines supply the maximum penalty because a federal court must impose the sentence "recommended" by the guidelines unless the court can find aggravating or mitigating circumstances that were not considered by the Sentencing Commission.[140] These aggravating or mitigating circumstances often do not exist; accordingly, a federal court has no authority to impose a sentence other than the sentence contained in the narrow sentencing guidelines range.

Even though Congress, by the sentencing guidelines, has declared that relevant conduct analysis only requires the use of the preponderance-of-the-evidence standard, the Constitution requires more. Given that the relevant-conduct provision with respect to additional drug sales is used, in essence, to convict the defendant of crimes for which he is not charged and for which the government has not proven him guilty beyond a reasonable doubt, in my opinion the only way to follow the Constitution is to find that, when applied in these circumstances, relevant conduct must be proven beyond a reasonable doubt.

V. CONCLUSION

One final point is in order. Even though this article has concentrated on what I believe to be the unconstitutionality of the burden of proof in the relevant-conduct provision, the problem with the sentencing guidelines goes much deeper than one provision. Congress and the Sentencing Commission had noble goals in mind when they decided to implement an elaborate system of sentencing *guidelines*. Notwithstanding those goals, the guidelines have become rigid mandates with little if any discretion for the sentencing court. Moreover, in many areas of sentencing, the guidelines have disregarded the basic notions of due process on which this country depends and have created a sentencing system that appears to thrive on the maximization of prison sentences, uniform though they may be. Indeed, "[t]he best we can say about [the sentencing guidelines] is what Herbert Hoover said of Prohibition: that this has been a 'great . . . experiment, noble in motive

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[140] 28 U.S.C. § 994(a). This section, located in the Chapter promulgating the Sentencing Guidelines Commission, stipulates the duties of the commission.

[and] far reach in purpose.' But like that earlier experiment, this one has failed."[141] The sentencing guidelines have failed as guidelines. Only when Congress admits that the sentencing guidelines have failed will there be progress toward eliminating the guidelines' failings, or toward eliminating the guidelines themselves. Until then it is our duty to ensure constitutional due process in all federal sentences.

[141] *United States v. Silverman*, 976 F.2d 1502, 1535 (Martin, J., dissenting) (quoting Cabranes, *A Failed Utopian Experiment*, Nat. L. J., July 27, 1992, at 17, 18)).