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The Sentencing Reform Act of 1984 and Sentencing Guidelines

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This Issue in Brief

YEARS FROM now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice. The Sentencing Reform Act of 1984 which brought about the sentencing guidelines sent ripples in the pool of the Federal court system that affected all who participate in the sentencing process. Certainly the day-to-day work of judges, both district and appellate, prosecutors, attorneys, probation officers, and correctional personnel has been altered significantly, and the course of careers has changed. This special issue of *Federal Probation* gives a voice to those who have been working in the midst of such historic change.

Federal Probation invited eminent jurists and prominent sentencing experts to prepare articles reflecting their thoughts and perspectives regarding the Sentencing Reform Act and the sentencing guidelines. The first three articles comprise thoughtful, varied perspectives from the bench. The articles that follow are by authors representing other critical roles in sentencing. The articles are organized by profession in the order that each author would typically become involved in the sentencing process.

Ever since the Federal sentencing guidelines went into effect, judges and commentators have criticized the guidelines for placing excessive restrictions on judicial discretion. The Honorable Gerald Bard Tjoflat, chief judge of the U.S. Court of Appeals for the Eleventh Circuit, asserts that critics fail to appreciate the significant discretion that the judge retains. In **"The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel,"** Judge Tjoflat addresses the failure of attorneys to appropriately exploit judicial discretion within the guidelines structure. Advice for attorneys is offered regarding how to develop proper arguments to guide the sentencing judge's discretion in a particular case. Providing substantial background information, the article describes the congressional purposes of the sentencing guidelines, the elements of guideline sentencing, and the scope of judicial discretion embedded in the guidelines.

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Looking at the Law

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Fact-Finding in Sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661.

This virtually unbridled authority to consider information in sentencing, while originally established to support a system of discretionary sentencing, has been upheld by the courts of appeals for use in sentencing under the new sentencing guidelines. But have the courts seriously considered the implications of using a procedure developed for a sentencing system that permitted virtually unlimited discretion, without modification, for a system that significantly limits that discretion? This article will attempt to describe the case law that has developed regarding fact-finding under the sentencing guidelines—the role of the presentence report, the burden of persuasion in challenging the presentence report, the role of negotiated stipulations, and the quality of evidence and standard of proof required to establish guideline-relevant facts. Our review of the case law suggests that, while the courts of appeals have determined generally that the fact-finding rules developed prior to guideline sentencing are constitutionally valid, a number of decisions show discomfort with the use of those standards. We believe that the central goals of sentencing reform cannot be fully accomplished using old evidentiary standards.

Fact-Finding in Sentencing: Origin and Adoption

The broad authority section 3661 gives to the district court to consider information for sentencing was first enacted in 1970 as 18 U.S.C. § 3577[1] and was carried forward and renumbered by the Sentencing Reform Act of 1984.[2] The provision continues to be cited regularly by courts of appeals when rejecting challenges that the informal sentencing procedures developed prior to the Sentencing Reform Act are inappropriate to sentencing under a guideline system of sentencing.

That the language of section 3661 was intended to complement a system of sentencing discretion is unquestionable. The legislative history regarding the passage of section 3577 is sparse but, nonetheless, instructive. The House report simply cites *Williams* v. *New York*, 337 U.S. 241 (1949), in support of the passage of this provision.[3] That case, of course, was decided in the heyday of individualized, rehabilitative sentencing. The Supreme Court stressed that this "modern" philosophy of penology demanded that the sentencing judge impose a sentence that "should fit the offender not merely the crime." According to this view, the sentencing court should not be bound by the rules of evidence governing the trial because the trial is to determine the narrow issue of guilt of the offense charged; the sentencing hearing is to establish the appropriate sentence within the range of sentences available for the offense of conviction established by the legislature.

> [The sentencing judge's] task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. (Footnote omitted.) And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

337 U.S. at 247. *Williams* was also cited as support for the provisions of Federal Rule of Evidence 1101(d)(3), which exempt criminal sentencing from the application of the rules. *See* Rule 1101, Advisory Committee note on the 1972 Proposed Rules.[4]

Accordingly, under the system of discretionary sentencing, the courts needed maximum flexibility to consider information in order to craft a sentence that would assist in the complex task of rehabilitating the offender. As the Court stated in *Williams*:

> To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.

337 U.S. at 249-50.

The Sentencing Reform Act largely rejected the sentencing philosophy expressed in *Williams* and still reflected in section 3661. The Senate report to S. 1762, the predecessor to the bill that became the Sentencing Reform Act, unambiguously announced the abandonment of the rehabilitation model:

> In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commis-

> sion is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 38 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3229-32 (hereinafter "Senate Report").

The Supreme Court, in *Mistretta* v. *United States*, 488 U.S. 361, 364-67 (1989), and several courts of appeals, in describing the purpose and intent of the Sentencing Reform Act, have cited the opinion in *Williams* as expressive of this now outmoded thinking. *See, e.g., United States* v. *Mejia-Orosco*, 867 F.2d 216, 218 (5th Cir.), *cert. denied*, 492 U.S 924 (1989). *See also, United States* v. *Denardi*, 892 F.2d 269, 280 n. 13 (3d Cir. 1989) (Becker J., concurring in part and dissenting in part).[5]

But in rejecting the sentencing policy articulated in *Williams*, the Sentencing Reform Act, at least as implemented by the United States Sentencing Commission, has also necessarily changed the manner in which sentences are determined and imposed. The guidelines promulgated by the Sentencing Commission establish a set of rules that may be applied only when specific factual determinations are made. Nearly every step of the nine-step application instructions at U.S.S.G. § 1B1.1 requires findings of fact. Accordingly, as the determination of facts and the application of those facts to the sentencing guidelines result in a particular guideline range, those issues are increasingly important and become the focus of litigation, resulting in a more adversarial sentencing process. *See, e.g.*, Committee on the Administration of the Probation System, Judicial Conference of the United States, Recommended Procedures for Guideline Sentencing and Commentary (1987). As the Sentencing Commission has recognized, a more adversarial process requires more formality:

> In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offenses and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.

U.S.S.G. § 6A1.3, comment (backgr'd).[6]

Where such formality and specificity is required, it is arguable that the *Williams* rationale is not applicable. Defendants have so argued, frequently citing *Specht* v. *Patterson*, 386 U.S. 605 (1967). In *Specht*, the Supreme Court held that more formal procedures were required when a defendant, convicted of certain sex offenses, was subject to a sentencing enhancement if the sentencing court found the defendant was a danger to the public or was a habitual offender and insane. The Court distinguished *Williams* on the ground that the sentencing enhancement at issue was based upon the making of a new charge after the defendant's conviction on another charge.

As will be discussed below, most courts have rejected any application of this holding to the sentencing guidelines. But there has been very little careful analysis of the impact upon procedures of the differences between indeterminate, discretionary sentencing and determinate, guideline sentencing. Most courts have simply relied upon *Williams* to answer due process challenges to the use of procedures developed for discretionary sentencing in sentencing under the Sentencing Reform Act. There remains, however, another difficulty that may be presented by use of the old procedures in this new context, unwarranted disparity.

A principal purpose of guideline sentencing is to reduce unwarranted disparity,[7] and the realization of that purpose demands a certain degree of accuracy in fact-finding. As Judge Becker suggests in his article elsewhere in this volume, fact-finding is a significant remaining area of discretion under guideline sentencing.[8] As one commentator has suggested, unreliable fact-finding can adversely impact on the operation of a guideline sentencing system.

> [I]n the war against disparity, the tacticians of the guidelines movement have paid insufficient attention to the procedures that develop the facts to which guidelines are applied. Tacking shiny, new sentencing guidelines onto the tail end of a system of criminal procedure which does an unreliable job of developing the facts . . . is a lot like putting a new coat of paint on an old clunker. The car looks good, but it still doesn't run much better. Ironically, sentencing guidelines may entrench a different kind of disparity — factual disparity.

Peter B. Pope, *How Unreliable Fact Finding Can Undermine Sentencing Guidelines*, 95 Yale L. J. 1258 (May 1986).

A procedure for finding facts that permits great discretion on the part of the fact-finder may result in similar sentences for defendants who face overwhelming proof of conduct that is relevant to guideline sentencing and defendants for whom there is only minimal evidence of such conduct. For example, a defendant with no prior record who was seized attempting to sell five kilograms of cocaine to a Government agent could be subject to a guideline range of 121 to 151 months in prison. U.S.S.G. § 2D1.1(a)(3). A similar defendant who was apprehended in the sale of 200 grams of cocaine, who would ordinarily be subject to a range of 33 to 41 months, could be subject to the

same range as the first defendant if the defendant's estranged girlfriend produced another five kilograms of cocaine that she convincingly claimed the defendant intended to sell. Under pre-guideline law, the court would have wide discretion to adjust the sentence of the second defendant to account for the reliability and amount of evidence. Under guideline sentencing, however, the three-fold increase in the prison sentence would be mandatory if the girlfriend's testimony was found to meet the minimal fact-finding standards that have been held applicable to guideline sentencing. While the old system may not have been ideal, it is arguable that requiring these two defendants to be sentenced within the same guideline range results in far more disparate treatment than would have resulted under the pre-guideline system.

Furthermore, too much fact-finding discretion may result in uncertainty in sentencing. One of the purposes for the establishment of guidelines and elimination of parole was to reduce uncertainty and establish predictability in sentencing.[9] If fact-finding is not subject to greater standards of accuracy, the resulting discretion could reintroduce sentencing uncertainty.

While a degree of fact-finding discretion is appropriate, the nearly unfettered discretion of pre-guideline fact-finding, as is true with other areas of sentencing, could result in the reintroduction of disparity. Lack of standards of fact-finding could also permit manipulation of the sentencing guidelines by permitting use of stipulations that contain misleading information. Neither Congress, in reenacting section 3661, nor the courts have seriously considered whether the revolutionary change in sentencing philosophy resulting from adoption of the guideline system should also result in changes in the fact-finding procedures developed to serve the repudiated philosophy.[10]

The Role of the Presentence Report

As indicated above, guideline sentencing creates a more adversarial process for the determination of the sentence. Yet the Sentencing Reform Act did not change the sentencing hearing into a trial-like proceeding in which each party presents its version of the factual circumstances with the court making the ultimate findings of fact and conclusions of law. Instead, Congress amended Rule 32(c), Federal Rules of Criminal Procedure, to provide that the presentence report contain not only information regarding the offense and the offender but also:

> the classification of the offense and of the defendant under the categories established by the Sentencing Commission; the kinds of sentences and the sentencing range suggested for such a category offense committed by such a category of defendant as set forth in the guidelines . . .; and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances . . . .[11]

The purpose of this amendment was to provide notice to the parties of the sentencing factors under consideration by the court, to insure that the court had sufficient information to impose sentence, and to provide a structure to the sentencing hearing.[12]

Rule 32(c) and 18 U.S.C. § 3552(d) require the disclosure of the presentence report to the parties at least 10 days prior to sentencing. If the presentence report has been carefully and accurately prepared, its disclosure will alert the parties to the issues before the court and will permit them to prepare any response. The importance of notice was recently reiterated by the Supreme Court in *Burns* v. *United States*, __U.S.__, 111 S. Ct. 2182 (1991), which held that a court may not depart upward from the applicable sentencing guideline range unless the grounds for that departure have been previously disclosed to the parties. The Court indicated that Rule 32 contemplates "full adversary testing of the issues relevant to a guidelines sentence and mandates that the parties be given an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." 111 S. Ct. at 2186. A meaningful right to comment demands notice of matters that may be relied upon in imposing sentence. The best, although not the only, form of such notice is the presentence report.[13] The Administrative Office of the United States Courts has suggested, therefore, that a section of the presentence report specifically identify any factors that may warrant departure. *See* Administrative Office of the United States Courts, Presentence Reports Under the Sentencing Reform Act of 1984, Publication 107, 46-47 (1987) (hereinafter "Publication 107"), and *Looking at the Law*, 54 Federal Probation 65 (March 1990).

The presentence report, if unchallenged, should constitute sufficient evidence to support a sentence under the sentencing guidelines. And, in setting forth a tentative guideline range, the report serves to structure any challenges by the defendant or the Government and to focus the issues for a determination at the sentencing hearing. *See* U.S.S.G. § 6A1.1 and Publication 107 at 1-2.

In *United States* v. *Wise*, 881 F.2d 970, 971-72 (11th Cir. 1989), the Eleventh Circuit described this practice in detail. In preparing the presentence report the probation officer sets out the details of the offense and the defendant's criminal history. The probation officer then applies the sentencing guidelines to those facts. Under the procedures established in many districts, the Government and the defendant may make objections to the report prior to the sentencing hearing. After consideration of these objections, the probation officer makes any corrections to the report and pre-

pares an addendum that identifies remaining issues to be determined by the court at the hearing. *See* Committee on the Administration of the Probation System, Judicial Conference of the United States, Model Local Rule for Guideline Sentencing (1987). At this stage, under this procedure, the sentencing hearing may proceed in a reasonably orderly manner.

> The presentence report and addendum thus serve the same purpose as a pretrial stipulation in a civil bench trial, the report establishing the factual and legal backdrop for the sentencing hearing and the addendum enumerating the disputed factual and legal issues that the court must resolve.

See also, United States v. *Prescott*, 920 F.2d 139 (2d Cir. 1990), and Judge Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Discretion*, 28 Am. Crim. L. Rev. 161, 168-175 (1991) (hereinafter "Heaney").

Burden of Persuasion

Amended Rule 32(c), which requires the presentence report to tentatively establish a guideline range, has simplified the process of establishing guideline relevant facts at the sentencing hearing. Any adjustments to those facts may be asserted by the parties. The courts of appeals have held uniformly that the party seeking to adjust the sentence in its favor bears the burden of proving the relevant facts in support of that adjustment. Consequently, any mitigating factors must be proved by the defendant and any aggravating factors proved by the Government. *United States* v. *Prescott*, 920 F.2d at 143 (2nd Cir. 1990); *United States* v. *Alfaro*, 919 F.2d 962 (5th Cir. 1990); *United States* v. *Blanco*, 888 F.2d 907, 908-9 (1st Cir. 1989); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1238 (4th Cir.), *cert. denied*, ___U.S.___, 110 S. Ct. 346 (1989); *United States* v. *Howard*, 894 F.2d 1085, 1089 (9th Cir. 1990); *United States* v. *Kirk*, 894 F.2d 1162, 1163-64 (10th Cir. 1990); and *United States* v. *McDowell*, 888 F.2d 285, 290-91 (3rd Cir. 1989).[14]

In practice, as noted above, the sentencing proceeding begins with the presentence report. When a party challenges a fact in the presentence report, the fact must be supported by the preponderance of the reliable evidence, as will be discussed below. If the challenge does not include information that undermines the accuracy of the presentence report, the report may still be sufficient to sustain a finding by the court. If, however, the challenge calls into question the accuracy or sufficiency of the factual assertion in the report, the Government must bear the burden to establish an aggravating sentencing factor and the defendant must bear the burden of proving a mitigating factor.

Quality of Evidence at Sentencing

Prior to the sentencing guidelines, the courts had firmly established the principle that sentencing judges could consider evidence at sentencing that would not be admissible at trial. *See, e.g., Williams* v. *New York*, 337 U.S. at 246-47. But regardless of the sentencing judge's discretion to consider a broad range of information, the introduction of evidence at sentencing has been subject to a due process standard of reliability. In *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948), the Supreme Court held that the defendant's right to due process in sentencing requires that a defendant not be sentenced on the basis of "materially untrue" information. In *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959), the Supreme Court, relying on *Williams* v. *New York*, indicated that due process permitted consideration of "*responsible* unsworn or 'out-of-court' information." (Emphasis added.) This principle was also applied to forbid sentencing on the basis of "misinformation of constitutional magnitude," such as a felony conviction obtained without opportunity for assistance of counsel in *United States* v. *Tucker*, 404 U.S. 443, 447 (1972).

The question of what evidence may be considered — the "quality" of evidence — is different than, but related to, the question of how much evidence is needed to prove a fact — the "quantity" of the evidence. As will be demonstrated below, some evidence may be so unreliable that to use it would deprive a defendant of due process. On the other hand, a quantity of information that might be of questionable reliability could cumulatively meet a preponderance of the evidence test. As discussed below, the preponderance standard of proof has been held to require sufficient evidence to convince the trier of fact that the fact at issue is true. Under this standard, naturally, the issues of the quality and quantity of proof tend to merge. Nonetheless, it is useful to consider the issues separately.

Reliability

Despite the articulation of the "materially untrue" standard for sentencing fact-finding in *Townsend* v. *Burke* and other cases, a higher standard of reliability has been required than a demonstration that the information is "materially untrue." In *United States* v. *Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972), for example, the Ninth Circuit remanded for resentencing a case in which the district court had relied upon an unsubstantiated charge made by a Government agent and included in the presentence report. The court held that, although not materially untrue, the charge was completely unverified and without support. Nor was there any attempt

to show that the agent was reliable. The court declared that it was not rejecting *Williams* v. *New York*, but that *Williams* did not present a situation in which the defendant challenged the accuracy of unverified information.

In *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979), the court determined that hearsay testimony by a confidential informant was admissable to enhance the defendant's sentence but only if corroborated by other evidence.[15] In *United States v. Baylin*, 696 F.2d 1030 (3d Cir. 1982), the court remanded for resentencing a case in which the sentencing court had inferred defendant's involvement in a crime from the mere fact that the Government had promised not to prosecute the crime. No other information of defendant's involvement was presented. The Third Circuit established the standard that such information must contain "minimum indicia of reliability beyond mere allegation." 696 F.2d at 1040.

The Sentencing Commission has recommended a standard of reliability that may be somewhat higher than that articulated in *Baylin* in U.S.S.G. § 6A1.3. That section suggests that information relied upon in sentencing should have "sufficient indicia of reliability to support its probable accuracy." While this standard could result in more accurate fact-finding and has been cited with approval by a number of courts of appeals, the section is a policy statement, and policy statements are not fully binding on the courts.[16] *See* 18 U.S.C. § 3572. In addition, it is questionable that the Sentencing Commission has authority to prescribe standards and procedures for sentencing.[17]

Thus, although section 3661, as well as *Williams* and its progeny, permit consideration of a broad range of information in sentencing, and although Rule 1101(d)(3) of the Federal Rules of Evidence provides that the rules of evidence do not apply to sentencing proceedings, the cases establish that evidence relied upon in sentencing must meet only a poorly articulated, but clearly minimum standard of reliability. *See, e.g., United States* v. *Kikumura*, 918 F.2d 1084, 1099-1100 (3d Cir. 1990); *United States* v. *Beaulieu*, 893 F.2d at 1181, and *United States* v. *Silverman*, 889 F.2d 1531 (6th Cir. 1989).[18]

Consistent with these principles, several courts have indicated that the presentence report may be sufficiently reliable without any additional corroboration because the report is based upon investigatory reports, interviews with the defendant and codefendant, and, where available, trial testimony.[19] Accordingly, the use of the presentence report to establish sentencing facts has been approved so long as it is sufficiently reliable. *See, e.g., United States* v. *Alfaro*, 919 F.2d 962, 966 (5th Cir. 1990); *United States* v. *Murillo*, 902 F.2d 1169, 1173 (5th Cir. 1990); and *United States* v. *Blanco*, 888 F.2d 907, 909 (1st Cir. 1989). *But see United States* v. *Fortier*, 911 F.2d 100 (8th Cir. 1990), discussed *infra*.[20]

In *United States* v. *Kikumura*, 918 F.2d at 1102-04, the Third Circuit cautioned that under certain circumstances a higher standard of reliability might be required than that articulated in *United States* v. *Baylin*. In a situation in which the court departs dramatically from the sentencing guideline range, the sentencing proceeding becomes nearly as important as the trial. In such a case, due process principles may require a greater standard of reliability since the amount of process due increases with the importance of the liberty interest involved in the proceedings. Accordingly, the Third Circuit established an intermediate test of reliability to be used in a case involving a substantial departure:

> The sentencing court must examine the totality of the circumstances, including other corroborating evidence, and determine whether the hearsay declarations are reasonably trustworthy.

918 F.2d at 1103.[21]

Admissibility of Information From Other Proceedings

These principles of admissibility have also been relied upon to permit use of information from other proceedings, such as the trial of a codefendant. The general rule appears to be that such information may be used, without more, in determining facts relevant to sentencing. The use of such information, however, must be preceded by notice to the defendant that it will be used. *See, e.g., United States* v. *Notrangelo*, 909 F.2d 363, 365 (9th Cir. 1990), and *United States* v. *Beaulieu*, 893 F.2d at 1180. In *United States* v. *Castellanos*, 904 F.2d 1490, 1496 (11th Cir. 1990), however, the Eleventh Circuit concluded that testimony from a trial of a codefendant may not, without more, be used in determining a defendant's sentence if the defendant has objected. The opinion seems to imply that the information must be corroborated in order to be used in the circumstances. Naturally, if a defendant disputes the accuracy of facts testified to in another proceeding, the court may be required to analyze that testimony to ensure that it contains sufficient indicia of reliability to support its accuracy. It is unclear from the opinion, but it is likely that the Eleventh Circuit would not require corroborating evidence outside of the testimony if such indicia of reliability is present in the testimony itself and the objections of the defendant do not call that indicia into question.

Right of Confrontation at Sentencing

Another issue regarding the use of information at sentencing is whether the right to confront adverse witnesses as guaranteed by the sixth amendment ap-

plies to the sentencing stage of the criminal proceedings and, accordingly, whether hearsay evidence may not be used to enhance the sentence unless it falls into one of the traditional exceptions to the hearsay rule. Most courts that have considered this issue have held that the Confrontation Clause does not apply at sentencing. *See United States* v. *Kikumura,* 918 F.2d at 1202; *United States* v. *Castellanos,* 904 F.2d at 1496; *United States* v. *Byrd,* 898 F.2d 450, 452-53 (5th Cir. 1990); *United States* v. *Beaulieu,* 893 F.2d at 1180-81.

The Sixth and the Eighth Circuits, however, have held that when a factual assertion in the presentence report is challenged, the court must undertake an analysis of whether the Confrontation Clause should be considered. *See United States* v. *Silverman,*___ F.2d____, 1991 WL 179608 (6th Cir. 1991), and *United States* v. *Fortier,* 911 F.2d 100 (8th Cir. 1990). The Sixth Circuit, finding that the *Williams* rationale for fact-finding discretion must be applied differently to guideline sentencing, held that, if the defendant disputes a fact material to the guideline sentencing decision, the Confrontation Clause requires a greater standard of reliability than was required under discretionary sentencing.[22] What that standard of reliability is and whether it precludes use of hearsay evidence is not clear from the opinion.

The Eighth Circuit in *Fortier* also held that the Confrontation Clause is applicable at sentencing when the defendant challenges a factual assertion. These holdings clearly reflect the Sixth and the Eighth Circuits' concern about the use of evidence to enhance a sentence without providing the defendant a meaningful opportunity to challenge the accuracy of the evidence.

Effect of Exclusionary Rule on Admissibility at Sentencing

Three circuits have held that the exclusionary rule does not apply to guideline sentencing as the rule's central objective, to deter unlawful police conduct, cannot efficiently be achieved by excluding evidence at sentencing. *United States* v. *McCrory,* 930 F.2d 63 (D.C. Cir. 1991), *petition for cert. filed,* No. 91-5973 (Oct. 1, 1991); *United States* v. Torres, 926 F.2d 321 (3d Cir. 1991); *United States* v. *Lynch,* 934 F.2d 1226 (11th Cir. 1991). "Generally, law enforcement officers conduct searches and seize evidence for purposes of prosecution and conviction—not for the purpose of increasing a sentence in a prosecution already pending. . . ." *United States* v. *Lynch* at 1236, quoting *United States* v. *Lee,* 540 F.2d 1205, 1211 (4th Cir.), *cert. denied,* 429 U.S. 894 (1976). Moreover, these courts have found that any slight benefit from exclusion of illegally seized evidence at sentencing is greatly outweighed by the mandate of 18 U.S.C. § 3661 that no limitation be placed on sentencing information.

Each of these circuits has expressed reservations as to whether its conclusions would be the same if there were a showing that the illegally seized evidence was gathered specifically for sentencing enhancement. *United States* v. *McCrory,* 930 F.2d at 69; *United States* v. *Torres,* 926 F.2d at 325; *United States* v. *Lynch,* 934 F.2d at 1237. Judge Silberman, in his concurrence in *McCrory,* went a good deal further and argued that sentencing guidelines, by making predictable the impact of additional evidence of criminality, increase the Government's incentive to illegally seize evidence solely for use at sentencing:

> If the police and prosecution know beforehand that they can get a conviction on a relatively minor offense, which has a broad statutory sentencing range and that they can guarantee a sentence near the maximum by seizing other evidence illegally and introducing it at sentencing, there is nothing to deter them from seizing the evidence immediately without obtaining a warrant, especially when a conviction on a "greater" crime would lead to a similar sentence.

United States v. *McCrory,* 930 F.2d at 71. Thus, Judge Silberman suggested the deterrence of the prophylactic exclusionary rule is needed rather than a subjective inquiry at sentencing as to what may have motivated police conduct in an individual case. However, Judge Silberman declined to dissent in recognition of the Supreme Court's recent hesitancy to extend the exclusionary rule.

The Role of Negotiated Stipulations

While 18 U.S.C. § 3661 provides that no limitation shall be placed on the information the court can consider at sentencing, in light of the "fact driven" nature of the guidelines a discernable trend has arisen whereby, with varying degrees of success, the prosecutor and defendant seek to control the facts available to the court at sentencing by agreeing to a factual stipulation as part of a plea agreement.

Controlling the facts through the use of stipulations demonstrates the fundamental tension between the goals of sentencing reform and the plea agreement process. Sentencing reform in part was intended to reduce unwarranted sentencing disparity and provide the public and the offender with "truth in sentencing"—sentences that provide retribution and deterrence because the public and the offender alike know in advance that real punishment will be imposed even-handedly and will not be eroded by significant good time awards or early release on parole.[23] Plea agreements, by contrast, are basically intended to allow the parties to avoid the uncertainty and risk of a trial by striking a bargain for a sentence or sentence exposure that both can accept in an individual case. Congress recognized that the plea process could undermine the

purposes of sentencing reform by substituting prosecutorial discretion in plea bargaining for judicial discretion in sentencing.[24] To avoid such consequences, Congress directed at 28 U.S.C. § 994(a)(2)(E) that the Sentencing Commission issue policy statements concerning acceptance of plea agreements.

But policing the plea agreement process with policy statements is no easy matter. Under Rule 11(e)(1) of the Federal Rules of Criminal Procedure, there are three types of plea agreements, often used in combination: (A) agreements to dismiss charges (hereinafter "charge bargains"), (B) agreements to make non-binding sentence recommendations (hereinafter "sentence recommendations"), and (C) agreements to a specific sentence (hereinafter "sentence bargains"). These types of agreements overlay the often widely varying criminal charges and penalties that can apply to the same or similar criminal behaviors. How much time in prison an offender is exposed to is initially controlled by how the charges are drawn up. Added to this mix is the recent proliferation of mandatory minimum sentences for drug offenses and mandatory consecutive sentences for some firearm offenses. Thus, where plea bargains used to be driven by a desire to control maximum statutory exposure, now such agreements are often driven as much by a desire to avoid mandatory minimums or consecutive statutory sentences.

The interplay of varying statutory maximum penalties and mandatory minimums makes plea bargaining complicated. The addition of sentencing guidelines can make it a labyrinth. The guidelines are not solely based on the real underlying criminal behavior, but on a combination of real behavior and the charged behavior,[25] and thus, as the statutory penalties can vary depending on the specific charges pleaded to, so can the guidelines vary regardless of the underlying behavior.[26] Furthermore, the guidelines are always intricate and technical. They are also often subjective, particularly as to adjustments for acceptance of responsibility and role in the offense. The motivation for a defendant to engage in plea negotiations is, at least in part, the desire to predict the sentence or the sentence exposure, but despite appearing to increase predictability, the sentencing guidelines often present the unwary with surprises at sentencing. These surprises are most frequently the result of the discovery of guideline-relevant facts in the presentence report that were not considered in the plea negotiations.

Negotiated factual stipulations are one method used to attempt to lessen the possibility of surprise under guideline sentencing by setting forth the agreed upon facts that in turn drive the guidelines. Some stipulations also attempt to control legal conclusions from the facts, such as whether an offense involved more than minimal planning or whether the defendant accepted responsibility.[27] Such stipulations can be detailed and lengthy and hotly negotiated, which can understandably give rise to expectations that they will have some significant impact. What is the legal significance of such stipulations—are they binding on the court or are they merely a recommendation?

The courts of appeals have differed in resolving these questions. Several have found that the stipulations are merely recommendations, while others have held that stipulations are a binding part of the plea agreement requiring that the plea can be withdrawn if the sentence does not reflect the agreement. The differences in these cases seem not to turn so much on different legal theories as on the level of expectation given the defendant regarding the stipulation. When the facts show that the defendant was informed by way of the plea agreement itself or at the plea colloquy that the court was not bound by the stipulation, then the stipulation is generally held to be merely a recommendation and the plea cannot be withdrawn notwithstanding that the court may find the facts to be different from those stipulated by the parties. But where the parties entered into an agreement that provides that the defendant will be allowed to withdraw the plea if the stipulation is not accepted, or there was an understanding by the court and the parties that if the agreement including the stipulation was accepted, it would control, courts have sentenced in compliance with the stipulation.

United States v. *Rutter*, 897 F.2d 1558 (10th Cir.), *cert. denied*, __U.S.__, 111 S. Ct. 88 (1990), is typical of those cases finding stipulations not binding on the court. Rutter pleaded guilty to one count of distribution in excess of 500 grams of cocaine. As part of a plea agreement, the parties stipulated that the defendant's base offense level was 26 and that he had accepted responsibility for the offense justifying a two-level reduction to offense level 24. Relying on information in the presentence report, the court found that the offense involved more than two kilograms of cocaine and that the base offense level was 28, that the defendant had a supervisory role in the offense justifying a two-level increase but that he had also accepted responsibility justifying a two-level decrease. The defendant argued that the district court should adhere to the facts as set forth in the stipulation. Rejecting this argument, the Tenth Circuit noted that the plea agreement expressly provided that the stipulation was not binding on the court and noted further that U.S.S.C. § 6B1.4(d) provides that "the court is not bound by the stipulation, but may, with the aid of the presentence report, determine the facts relative to sentencing." In accord is *United States* v. *Garcia*, 902 F.2d 324 (5th Cir. 1990) (citing U.S.S.C. § 6B1.4(d)), which rejected the

argument that the district court's acceptance of a plea agreement to dismiss a count of an indictment in exchange for a guilty plea constituted an acceptance of the factual stipulation to the amount of drugs involved in the offense. *See also United States* v. *Medina-Saldana*, 911 F.2d 1023 (5th Cir. 1990).

United States v. Torres, 926 F.2d 321 (3rd Cir. 1991), is factually very similar to *Rutter*. In *Torres*, the defendant made a bargain to plead guilty to a drug offense and agreed to a stipulation that would limit the amount of drugs involved, but that also explicitly provided that the stipulation did not bind the court. Relying in part on illegally obtained evidence, the court at sentencing found that more drugs were involved in the offense than those set forth in the stipulation. The court stated that "generally speaking, if the courts reject stipulations, defendants may not withdraw their pleas, particularly when they have been forewarned." *Id.* at 326. However, the court in *Torres* did allow the defendant to withdraw his plea, finding the case unusual as it presented a legal issue of first impression in the circuit—whether illegally seized evidence could be considered at sentencing—and that the defendant, prosecutor, and the court all reasonably believed at the time the plea was entered that illegally seized evidence would not be considered. Thus, the Third Circuit appears to establish a general rule that stipulations are not binding, except in extraordinary circumstances.

The direction from the Eleventh Circuit is not so clear. In *United States* v. *Jefferies*, 908 F.2d 1520 (11th Cir. 1990), a pre-guidelines case, the parties stipulated as part of a plea agreement that the offense involved 13 grams of cocaine, and they removed references in an earlier version of the agreement to imposition of a fine after an oral agreement that no fine would be imposed. The court ordered a presentence report, which showed that the offense involved a far greater amount of drugs, and the district court made a finding that 15 kilograms of cocaine were involved in the offense. The amount of drugs was relevant for parole consideration. The district court also imposed a $100,000 fine. The Eleventh Circuit held that both the prosecutor and the district court violated Rule 11(e)(3), which provides that if the court accepts the agreement, the agreement shall be embodied in the judgment and sentence. The court vacated the fine and ordered that the finding regarding the amount of drugs be modified and the modification communicated to the Parole Commission.

On the same day that the opinion in *Jefferies* was issued, a panel of the Eleventh Circuit consisting of two of the same judges who sat on *Jefferies* issued a per curiam opinion in *United States* v. *Munio*, 909 F.2d 436 (11th Cir. 1990), *cert. denied*, __U.S. __, 111 S. Ct. 1393 (1991). *Munio* held that a charge bargain, which included a prosecutor's recommendation for a reduction for acceptance of responsibility if the defendant cooperated in preparation of the presentence report, was not binding on the district court when the agreement clearly stated that the court could impose a sentence up to the statutory maximum and, in fact, the defendant had failed to cooperate. The court distinguished *Jefferies* by saying that case involved a "Rule 11(e)(3) agreement," and that *Munio* by contrast involved a non-binding recommendation pursuant to Rule 11(e)(1)(B). *Id.* at 440.

The Sixth Circuit has dealt with cases where the parties expressly and without contradiction from the district court sought to enter into binding stipulations. The Sixth Circuit has held that such stipulations are part of the plea agreement and once accepted by the district court are enforceable. However, the court's definition of what properly constitutes "acceptance" of a plea agreement has evolved in such a way as to substantially limit the ability of the parties to control the facts. In *United States* v. *Mandell*, 905 F.2d 970 (6th Cir. 1990), the defendant pleaded guilty to distribution of 150 pounds of marijuana in exchange for the dismissal of other charges. The plea agreement also provided that the defendant could withdraw his plea if the court departed from offense level 20, or if he was sentenced outside the range of 33 to 87 months. The district court accepted the agreement but, after review of the presentence report, found that the defendant was involved with an additional 73 kilograms of marijuana and that his offense level was 26 and sentenced him to 70 months. The court found that although the 70-month sentence was within the 33 to 87 month range, it was not based on the bargained-for offense level of 20. Citing *United States* v. *Holman*, 728 F.2d 809, 813 (6th Cir.), *cert. denied*, 469 U.S. 983 (1984), for the proposition that "once the district court accepts the plea agreement, it is bound by the agreement," *id* at 972, the court found that the agreement had been accepted and breached. Therefore, the defendant was entitled to withdraw the plea.

A few months later in *United States* v. *Kemper*, 908 F.2d 33 (6th Cir. 1990), another panel of the Sixth Circuit was faced with a similar case where the parties entered into a charge bargain with a stipulation that the offense involved 99 grams of cocaine, which would yield a guideline range of 27 to 33 months. The district court accepted the plea, then ordered a presentence investigation. The presentence report indicated that 102.09 grams of cocaine were involved, which increased the guideline range to 33 to 41 months. After review of the presentence report, the district court then rejected the stipulation and sentenced the defendant on the basis of the larger amount of drugs. The

Sixth Circuit rejected arguments from both the defendant and the prosecution that *United States* v. *Holman, supra,* required that once the plea agreement was accepted, it was binding on the court. Finding that *Holman* was overruled by amendments to Rule 11 and implementation of the sentencing guidelines, the court held that a plea agreement that included a factual stipulation could be characterized as a binding sentence bargain under Rule 11(e)(1)(C), but that before the district court could accept this type of agreement, U.S.S.C. § 6A1.1 required that the court consider the presentence report. In this case, although the district court stated that the plea was accepted prior to preparation of the presentence report, such an "acceptance" was contingent upon review of the presentence report. Once the report was considered with its showing that the facts in the stipulation were incomplete, the plea and its binding stipulation must be rejected and the defendant given the opportunity to withdraw the plea pursuant to U.S.S.C. § 6B1.2, which prohibits acceptance of a sentence bargain that is not within the applicable guideline range or departs without adequate justification.

In *United States* v. *Burns,* 893 F.2d 1343 (D.C. Cir. 1990), *rev'd other grounds,* __U.S.__, 111 S. Ct. 2182 (1991), the court was not squarely faced with the issue of whether a stipulation was binding, but rather dealt with a stipulation that was incomplete, which allowed the district judge to comply with the stipulation as far as it went, but still imposed a sentence that greatly exceeded the parties' expectations. Like the Sixth Circuit cases cited above, Burns entered into a plea agreement and factual stipulation that set forth a guideline range and provided that if the district court reached a different guideline range, the plea would be null and void. The district court agreed with the guideline range as bargained for by the parties, but departed upward so that the sentence imposed was twice the base of the guideline range.

After holding that there was no requirement that a sentencing court notify the parties of an intention to depart,[28] the District of Columbia Circuit noted that it was troubled, not by the parties' attempt to make a binding agreement, but by the ambiguity of the agreement. The court urged that prosecutors ensure that plea agreements either inform defendants of the possibility of departures or provide that defendants be allowed to withdraw their pleas if the sentencing court departs. The court thereby seems to be encouraging the use of binding stipulations, so long as they are unambiguous.

Part of the problem the parties and the courts may be having with factual stipulations is that they are not mentioned in Rule 11, leaving their legal effect unclear. Rule 11(e)(2) does provide that a plea agreement must be disclosed, and that the court may accept or reject a charge bargain or sentence bargain, or defer a decision on these types of bargains until consideration of the presentence report. As to a sentence recommendation, Rule 11(e)(2) provides that the court must warn the defendant that if the recommendation is not accepted, the defendant cannot withdraw the plea. The rule simply does not contemplate the impact or effect of a factual stipulation on guideline sentencing.

The Sentencing Commission's policy statements on plea agreements at U.S.S.G. § 6B1.1-4 attempt to fill the gaps left in Rule 11. The policy statements provide a relatively comprehensive procedure for dealing with pleas and stipulations to accomplish the congressional goal of preventing the plea process from circumventing the guidelines. Section 6B1.1 repeats the Rule 11 requirement that all plea agreements be disclosed to the court and that the court warn the defendant that any sentence recommendation is nonbinding and cannot be withdrawn. However, this policy statement goes beyond Rule 11 by providing that acceptance of charge and sentence bargains be delayed in the vast majority of cases until after review of the presentence report.[29] Section 6B1.2 makes it clear why such delayed acceptance is necessary by providing that the court should not accept plea agreements that undermine the guidelines. The court cannot know whether a bargain will undermine the guidelines until an independent investigation is conducted.[30] Section 6B1.3 provides that when a charge or sentence bargain is not accepted, the plea may be withdrawn. Finally, section 6B1.4 provides that stipulations not be misleading,[31] identify facts in dispute, and most importantly that they are nonbinding on the court. The commentary explains the Commission's approach:

> . . . it is not appropriate for the parties to stipulate to misleading or non-existent facts, even when both parties are willing to assume the existence of such "facts" for purposes of the litigation. Rather, the parties should fully disclose the actual facts and then explain to the court the reasons why the disposition of the case should differ from that which such facts ordinarily would require under the guidelines.
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> * * *
>
> Even though stipulations are expected to be accurate and complete, the court cannot rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence. Rather, in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information.

These policy statements are either not much understood or they are being disregarded.[32] The cases discussed above indicate that stipulations often omit the "actual facts"—the cases involving amount of drugs are perhaps the most glaring, but drug amount is by no means the only misstated fact. Further, there is

ambiguity, which sometimes appears to be intentional, as to whether stipulations are binding. To say the least, there is still turbulence between sentencing reform and the plea bargain process, and fact-finding at sentencing is the eye of the storm.

Although somewhat beyond the scope of an article on fact-finding at sentencing, it is worthwhile at least to note that there is another line of cases involving defendants' claims of surprise at the sentencing which follows plea agreements. These cases involve arguments that due process requires that the court inform the defendant of the guideline range before acceptance of a plea and seek withdrawal of a plea when the sentence is higher than the defendant expected. All circuits that have considered these claims have rejected them, holding that due process requirements are met when the defendant is informed of the statutory minimum and maximum. *See United States* v. *Fernandez*, 877 F.2d 1138 (2d Cir. 1989); *United States* v. *Henry*, 893 F.2d 46 (3d Cir. 1990); *United States* v. *Pearson*, 910 F.2d 221 (5th Cir. 1990), *cert. denied*, ___ U.S.___, 111 S. Ct. 977 (1991); *United States* v. *Salva*, 902 F.2d 483 (7th Cir. 1990); *United States* v. *Turner*, 881 F.2d 684 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989); *United States* v. *Rhodes*, 913 F.2d 839 (10th Cir. 1990), *cert. denied*,___U.S.___, 111 S. Ct. 1079 (1991).[33]

These courts recognize that certainty of outcome for defendants is not constitutionally required. As one court succinctly put it, "pleading guilty generally is not a trial voyage to test the sentencing waters for acceptable leniency." *United States* v. *Rutter*, 897 F.2d at 1564. While entry of a plea should not merely be a fishing expedition for leniency, the sentencing guidelines, by giving the appearance of predictability, raise expectations that the defendant will have a good idea of the sentence range when he enters the plea. Several courts have suggested that it would be helpful to the process whenever possible for either the prosecution or the court to estimate the guidelines for the defendant. *See United States* v. *Fernandez*, 877 F.2d at 1143; *United States* v. *Salva*, 902 F.2d at 488. The Second Circuit, particularly, has expressed its frustration at the escalating number of claims of unfair surprise under guideline sentencing:

> While these defendants may have entered their pleas "knowingly and voluntarily" in the constitutional sense, we are, given our own struggles with the guidelines, not unsympathetic to their claims that they did not appreciate the consequences of their pleas. . . . The net result is a steady parade of appeals that squander scarce judicial resources and waste the government lawyer's time.

United States v. *Pimentel*, 932 F.2d 1029, 1032-33 (2d Cir. 1991). Two members of the panel in *Pimentel* urge that increased use of sentence bargains may be a fair and efficient mechanism to avoid claims of surprise and the resulting litigation, then go on to urge that at the very least the prosecutor inform the defendant of the likely guideline range, and that the district court explain the likely sentence before acceptance of the plea.

Effective December 1, 1989, Rule 11(c)(1) was amended to require that the sentencing court advise the defendant prior to acceptance of a plea that the court will consider any applicable sentencing guidelines, but may depart from those guidelines in appropriate circumstances. The court is not, however, required to specifically advise the defendant of what guidelines will be applied in imposing sentence. The notes of the Advisory Committee to this amendment recognize that this is an imperfect means of satisfying all the defendant's information needs, but suggest it is an adequate way to insure that the defendant enters an intelligent plea:

> The advice that the court is required to give cannot guarantee that a defendant who pleads guilty will not later claim a lack of understanding as to the importance of guidelines at the time of the plea. No advice is likely to serve as a complete protection against post-plea claims of ignorance or confusion. By giving the advice, the court places the defendant and defense counsel on notice of the importance that guidelines may play in sentencing and of the possibility of a departure from those guidelines.

As demonstrated by the many cases claiming unfair surprise at sentencing (*Pimentel* gives a long list of such cases just in the Second Circuit), the compromise position represented by the 1989 amendment to Rule 11(c)(1) may not have accomplished the Advisory Committee's goal of meaningfully notifying defendants of the importance of guidelines and reducing the risks of uncertainty in guideline sentencing.

Surprise at sentencing, whether as the result of a factual stipulation that was found to be non-binding or other factors, serves no one and is the antithesis of truth in sentencing. If sentencing reform is to work as Congress intended it, and not merely be a shift of sentencing discretion from the judiciary to the prosecution, the defense counsel and prosecutor have to ensure that the facts relevant to sentencing are fully and fairly presented and not try to make an end run around the guidelines only to have the court upset the deal when the full facts are revealed. The practice of permitting the parties to stipulate to facts, without close review by the court to determine the accuracy of the stipulation, undermines the purposes of sentencing reform. Inaccurate facts, no matter how they are determined, lead to inaccurate guideline ranges and inappropriate sentences.

Courts can aid in the sentencing process by eliciting full and accurate facts at the plea colloquy when appropriate and, as suggested by the Sentencing Commission policy statements, by not accepting pleas until the presentence report is reviewed and the court is

assured that the plea will not undermine the guidelines.

Standard of Proof

Prior to the advent of guideline sentencing, the issue of the appropriate standard of proof to be used in sentencing did not receive a great deal of attention. As the Supreme Court noted in *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91 (1986), "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."[34] In a sentencing system in which a court could fashion a sentence weighing a number of different facts, the determination of a single factual issue was not generally as important as it is under guideline sentencing. Because guidelines are applied based on the unique factual circumstances of each offense and of each offender, the establishment of each of these facts has become a more prominent part of the sentencing process. In addition, the application of the guidelines to the facts of a case are subject to appellate review, 28 U.S.C. § 3742, although the courts of appeals have held that review of the factual determinations of the district court will only be reversed if "clearly erroneous." *See, e.g., United States* v. *Mejia-Orosco*, 867 F.2d at 220-21 (5th Cir. 1989). It is inevitable, therefore, that the issue of the standard of proof required to prove these facts at sentencing has become a much litigated matter under sentencing guidelines.

The Sentencing Reform Act provides for no specific standard of proof, nor do the sentencing guidelines.[35] In resolving the issue, therefore, most courts have relied upon *McMillan* v. *Pennsylvania*, in which the Supreme Court determined that a Pennsylvania sentencing enhancement for the visible possession of a weapon during the commission of an offense, which provided a statutory preponderance of the evidence standard for proof of possession, met minimal constitutional standards of due process. The Court reasoned that, once guilt had been established beyond a reasonable doubt, the state may deprive the defendant of liberty up to the statutory maximum. The only determination remaining for the court at the sentencing stage of the proceedings is where within the permissible zone the sentence will fall. Such a determination may be based on a much lesser standard than the one required to establish guilt.[36] The Court noted that to apply even a clear and convincing standard of proof would "significantly alter criminal sentencing," thus requiring extended sentencing hearings that would resemble the trial of the guilt of the defendant.

Every circuit to have considered this issue has generally agreed that this minimum due process standard of preponderance of the evidence is a sufficient and appropriate standard of proof for guideline sentencing. *United States* v. *Kikumura*, 918 F.2d at 1098-1102 (3d Cir. 1990); *United States* v. *Frederick*, 897 F.2d 490, 493 (10th Cir.), *cert. denied*, ___U.S. ___,111 S. Ct. 171 (1990); *United States* v. *Guerra*, 888 F.2d 247, 250-51 (2d Cir. 1989), *cert. denied*, ___U.S. ___, 110 S. Ct. 1833 (1990); *United States* v. *Ehret*, 885 F.2d 441, 444 (8th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-38 (4th Cir.), *cert. denied*, ___U.S. ___,110 S. Ct. 346 (1989); and *United States* v. *Wright*, 873 F.2d 437, 441 (1st Cir. 1989). As noted above, an amendment to the commentary to U.S.S.G. § 6A1.3, effective November 1, 1991, expresses the view of the Sentencing Commission that a preponderance of the evidence standard is sufficient to meet due process requirements and policy concerns. U.S.S.G. § 6A1.3, comment (backgr'd).

Naturally, defendants have argued that the preponderance of the evidence standard may be insufficient where, as in guideline sentencing, the court's discretion is limited. Where the establishment of certain facts acts to deprive the defendant of his liberty, it is claimed that due process requires a higher standard of proof. This argument is particularly compelling when applied to facts regarding the defendant's involvement in criminal activity for which he has not been convicted, so-called relevant conduct, which must be considered pursuant to U.S.S.G. § 1B1.3 of the sentencing guidelines. *See generally*, Heaney. Indeed, in *McMillan* the Supreme Court specifically recognized that there could be circumstances in which the sentencing hearing could be characterized as the "tail which wags the dog of the substantive offense." 477 U.S. at 88.

This argument has been rejected by most circuits in which it has been considered, although a few have shown concern over the use of unconvicted conduct determined under the preponderance standard. In *United States* v. *Frederick*, 897 F.2d at 492-93, for example, the Tenth Circuit noted that the Supreme Court in *McMillan* had also considered a sentencing provision that limited the sentencing court's discretion. The Supreme Court disposed of the argument as follows:

> We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance. Nor is there merit to the claim that a heightened burden of proof is required because visible possession is a fact "concerning the crime committed" rather than the background or character of the defendant. *Ibid.* Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, *e.g., Proffitt* v. *Florida*, 428 U.S. 242 (1976), without suggesting that those facts must be proved beyond a reasonable doubt.

477 U.S. at 92.

The Third Circuit, however, has suggested that in the case of an extreme departure, the sentencing hearing does, in fact, become the tail that wags the dog of the substantive offense and requires a clear and convincing standard of proof. In *United States* v. *Kikumura,* the defendant's guideline range for transporting explosives for a destructive purpose was between 27 and 33 months. Because of the nature of the offense and the risk it presented, the court departed from the guideline range and imposed a sentence of 30 years imprisonment. The court held that under these circumstances, where the sentence imposed was 10 times the applicable guideline range, the sentencing hearing became as important as the guilt phase of the proceeding in terms of the defendant's liberty interest and that certain of the procedural safeguards applicable at sentencing should be increased. Among these, the fact-finding underlying such an extreme departure must be established "at least by clear and convincing evidence." 918 F.2d at 1101. As noted earlier, *Kikumura* also established that in such extreme cases, the evidence used to support the departure might also be required to be more reliable. The Eighth and the Tenth Circuits have suggested that they might consider the *Kikumura* enhanced standard of proof in appropriate cases. *United States* v. *Townley,* 929 F.2d 365, 369-370 (8th Cir. 1991), and *United States* v. *St. Julian,* 922 F.2d 563, 569 n. 1 (10th Cir. 1990).

The difficulty of forcing the square peg of pre-guideline fact-finding procedures into the round hole of guideline sentencing is further illustrated by the tortured history of the Ninth Circuit's determination of the appropriate standard of proof. The case of *United States* v. *Restrepo,* 883 F.2d 781 (9th Cir. 1989) (*Restrepo I*), was originally decided on the issue of the interpretation of the sentencing guidelines' multiple count rules, U.S.S.G. §§ 3D1.2(d) and 1B1.3(a)(2). The court held that the guidelines required only consideration of offense conduct involved in the count of conviction. The court, relying on *McMillan* v. *Pennsylvania,* dismissed defendant's argument that the preponderance standard was constitutionally deficient under guideline sentencing. That opinion was withdrawn, however, and a petition for rehearing granted. 896 F.2d 1228 (9th Cir. 1990).

In the next opinion, the same panel of the Ninth Circuit reversed itself and held that the sentencing guidelines did require the aggregation of drug amounts involved in unconvicted criminal conduct in calculating the applicable guideline range. *United States* v. *Restrepo,* 903 F.2d 648 (9th Cir. 1990) (*Restrepo II*). Although the court had briefly dismissed in a footnote in *Restrepo I* the standard of proof issue, it greatly expanded the treatment of the issue in *Restrepo II.* The reason for the more serious consideration, of course, was that consideration of unconvicted criminal conduct under the holding of *Restrepo II* would seriously affect the length of the defendant's sentence. Under the holding of *Restrepo I* that unconvicted criminal conduct was not relevant to determining the guideline range, the sufficiency of a preponderance test was not of such great concern. But given the impact of this information under *Restrepo II,* the court attempted to define a special preponderance standard to be used "in criminal sentencing to increase the period of confinement."

Most courts of appeals, after having decided that the preponderance standard is sufficient to comply with due process, have not defined that standard.[37] The Ninth Circuit in *Restrepo II,* however, held that, for the determination of facts that could increase a defendant's sentence, preponderance "means a sufficient weight of evidence to convince a reasonable person of the probable existence of the enhancing factor." This standard, the court reasoned, was more consistent with the sentencing guidelines at U.S.S.G. § 6A1.3(a), which indicate that information used in guideline sentencing must have "sufficient indicia of reliability to support its probable accuracy." But in requiring the evidence to be sufficient to establish its probable truth, it appeared that the Ninth Circuit was establishing a new standard of proof that approached the clear and convincing standard.[38]

But the Ninth Circuit again withdrew its decision and granted a rehearing, this time *en banc.* 912 F.2d 1568 (9th Cir. 1990). In *United States* v. *Restrepo,*__ F.2d__, 1991 WL 195100 (9th Cir. 1991) (*Restrepo III*), the court reaffirmed the constitutional adequacy of the preponderance standard but eliminated the special definition. Nonetheless, the court warned that the preponderance standard does not simply require an abstract weighing of the evidence to determine which side has produced the greater quantum of evidence. It requires sufficient evidence to convince the trier of fact of the truth of the proposition asserted. The court also noted the caution in *McMillan* that a higher standard might be required in circumstances in which a sentencing factor has an extremely disproportionate effect on the sentence relevant to the offense of conviction.

In a notable dissent, Judge Norris, joined by three other judges (two of whom would have required a beyond a reasonable doubt standard), strongly argued that *McMillan* does not support a preponderance standard under guideline sentencing. The dissent urged that the guidelines create a liberty interest in a sentencing range determined by the base offense level corresponding to the offense of conviction. When a sentencing range above that level is proposed, it was

argued that due process requires more than a preponderance to justify the additional loss of liberty.

Conclusion

A number of courts of appeals have expressed their discomfort in using sentencing procedures developed under a now rejected system that stressed the need for flexibility to devise sentences that were individualized to rehabilitate the offender and at the same time to protect society. While the courts of appeals have held that these procedures are constitutional as applied to guideline sentencing, it does not necessarily follow that the reasons supporting their use apply to a new system that establishes penalties not primarily for rehabilitation, but rather for the combined purposes of punishment, deterrence, protection of the public, and, finally, correctional treatment. 18 U.S.C. § 3553(a)(2).

Underlying the reasoning for the continued use of pre-guideline fact-finding procedures has been the well justified concern that more formalized fact-finding could result in a greatly increased workload for every entity within the criminal justice system. As courts have noted:

> [T]he adoption of a clear and convincing standard of proof "would significantly alter criminal sentencing," a change which the [Supreme] Court determined would be unnecessary and burdensome.

United States v. *Urrego-Linares*, 879 F.2d at 1238, quoting with approval *McMillan* v. *Pennsylvania*, 477 U.S. at 92. *See also United States* v. *Guerra*, 888 F.2d at 251, and Judge Norris' dissent in *Restrepo III*.

But the relaxed standard of proof developed in the age of discretionary sentencing does not well serve a system in which the determination of specific facts has specific, predetermined sentencing consequences. The adoption of the outmoded fact-finding system could result in the failure of the guideline sentencing system to accomplish its objectives, including the reduction of uncertainty in sentencing and the elimination of unwarranted disparity.

Nonetheless, at the present time, it is safe to say that the procedures that existed prior to the Sentencing Reform Act continue to be applicable to guideline sentencing in most circuits. Exceptions currently exist in the Sixth and Eighth Circuits, where the Confrontation Clause has been held to require additional safeguards in fact-finding and in the Third Circuit, where fact-finding must be supported by more proof in cases of significant departures. Workload aside, the concern that has been expressed by some courts about using fact-finding procedures developed for a repudiated sentencing system is well founded. Serious consideration should be given not only to the fairness of such procedures, but also to whether the continued use of these procedures significantly compromises the realization of the objectives of the new sentencing system.

NOTES

[1]The original provision was enacted as part of the Organized Crime Control Act of 1970 (Pub. L. No. 91-452, Title 10, section 1001(a), 84 Stat. 951 (Oct. 15, 1970)).

[2]Pub. L. No. 98-473, Title II, section 212(a)(1), 98 Stat. 1987 (Oct. 12, 1984).

[3]H.R. Rep. No. 91-1549, 91st Cong., 2nd Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4040. The enactment of section 3577 has been characterized as a codification of existing law. *See, e.g., United States* v. *Baylin*, 535 F. Supp. 1145, 1151 (D. Del), *rev'd other grounds*, 696 F.2d 1030 (3d Cir. 1982).

[4]Only minimal changes were made to this proposed rule by Congress. Pub. L. No. 93-595, 88 Stat. 1926 (Jan. 2, 1975). *See* H.R. Rep. No. 93-650, 93d Cong., 2d Sess. 17 (1973), *reprinted in* 1973 U.S. Code Cong. and Admin. News 7051, 7090.

[5]Ironically, *Williams*, while cited by some courts as reflective of outmoded penology, is cited by others in support of the use of the liberal pre-guideline fact-finding standards. *See, e.g., United States* v. *Beaulieu*, 893 F.2d 1177, 1180 (10th Cir.), *cert. denied*, __ U.S. __, 110 S. Ct. 3302 (1990).

[6]The Commission has not suggested, however, that any significant change in the pre-guidelines methods of establishing facts is warranted. In its 1991 amendments, in fact, the Commission suggests that the pre-guidelines standard of proof applies to guideline sentencing. *See* U.S.S.G. § 6A1.3, comment (backgr'd) and 56 Fed. Reg. 22762 (May 16, 1991), *reprinted in* U.S.S.G. App. C, amendment 387.

[7]*See* 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1), and Senate Report at 52, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3235.

[8]Judge Edward R. Becker, *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, 55 Federal Probation __ (December 1991).

[9]Senate Report at 50-60.

[10]A notable exception is *United States* v. *Silverman*, 945 F.2d 1337 (6th Cir. 1991). *See also* Judge Norris' perceptive dissent in *United States* v. *Restrepo*, __ F.2d __, 1991 WL 195100 (9th Cir. 1991).

[11]Pub. L. No. 98-473, Title II, section 215(a), 98 Stat. 2014 (Oct. 12, 1984).

[12]*See* Senate Report at 71-72 and 157, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3254-55 and 3340; and Administrative Office of the United States Courts, Presentence Reports Under the Sentencing Reform Act of 1984, Publication 107, 1-2 (1987).

[13]The Supreme Court noted in *Burns* that the Government could meet the notice requirement by filing a prehearing submission listing factors that might warrant departure. It is possible that other forms of notice would also be adequate so long as the defendant has a meaningful opportunity to respond. *See Looking at the Law*, 54 Federal Probation 65 (March 1990).

[14]It should be noted that at least one district court has questioned this allocation of the burden of proof. In *United States* v. *Dolan*, 701 F. Supp. 138 (E.D. Tenn. 1988), *aff'd sub nom. United States* v. *Barrett*, 890 F.2d 855 (6th Cir. 1989), the court found that the Government should bear the burden of showing that a defendant should not receive a reduction in the sentencing guideline range for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. The court reasoned that the criteria for the reduction were fairly objective and that the Government had as much access as the defendant to the relevant evidence. Accordingly, the court placed the burden on the Government.

[15]The *Fatico* cases are probably the most cited cases on the issue of reliability of sentencing information. *United States* v. *Fatico*, 579 F.2d 707 (2nd Cir. 1978) (*Fatico I*), on remand, 458 F.Supp. 388 (E.D. N.Y. 1978), *aff'd*, 603 F.2d 1053 (2nd Cir. 1979) (*Fatico II*), *cert. denied*, 444 U.S. 1073 (1980). For cases citing the *Fatico* decisions as authority for guideline sentencing standards of reliability, *see, e.g.*, *United States* v. *Zuleta-Alvarez*, 922 F.2d 33 (1st Cir. 1990), *cert. denied sub nom Ramirez-Fernandez* v. *United States*, ___ U.S.___, 111 S.Ct. 2039 (1991), and *United States* v. *Beaulieu*, 893 F.2d 1177 (10th Cir. 1990). In *Fatico I*, the Government appealed the lower court's order that excluded evidence at the sentencing hearing. The evidence consisted of testimony of F.B.I. agents that confidential informants had linked the defendant with organized crime. The Second Circuit reversed because the district court has refused to permit the Government to produce corroboration of the hearsay evidence. The court of appeals held that out-of-court declarations by unidentified informants may be used if there is good reason for the nondisclosure of the informants' identity and there is sufficient corroboration by other means.

On remand, the Government produced a number of witnesses who corroborated the testimony, and the district court, finding that the corroboration established sufficient reliability, used the information to enhance the defendant's sentence. The court of appeals upheld the sentence in *Fatico II*, sustaining the district court's finding of reliability and also rejecting the defendant's claim that the evidence should have been established beyond a reasonable doubt. The district court had required the Government to produce evidence to meet a clear and convincing evidence standard, but the court did not comment on the district court's use of that standard. 458 F. Supp. at 402-412.

[16]The weight of policy statements is discussed in "Looking at the Law," 55 *Federal Probation* 69 (June 1991).

[17]Although the Sentencing Commission's views regarding sentencing procedures are entitled to deference as emanating from the agency Congress entrusted to develop sentencing guidelines, the Commission's authority to establish sentencing procedures under the provisions of 28 U.S.C. § 994(a) is far from clear. *But see United States* v. *Lynch*, 934 F.2d 1226, 1235 (11th Cir. 1991), *petition for cert. filed*, No. 91-5972 (Sept. 26, 1991), which seems to interpret 28 U.S.C. § 994(d) (providing the Sentencing Commission with authority to determine what factors will be relevant for sentencing) to authorize the Commission to establish a standard for reliability.

[18]*United States* v. *Silverman* was back before the Sixth Circuit recently to determine the applicability of the Confrontation Clause at sentencing. *See* discussion in this article under "Right of Confrontation at Sentencing."

[19]See Volume X, *Guide to Judiciary Policies and Procedures* (Probation Manual), Chapt. II, Part C. (1990). *But see* Heaney at 173, which concludes that most of the information used by probation officers in the presentence report comes from Government sources.

[20]Other kinds of information have also been permitted to be used in the sentencing so long as the defendant has had an opportunity to review and object. In *United States* v. *Curran*, 926 F.2d 59, 63 (1st Cir. 1991), the court considered certain letters that had been sent to it regarding the defendant. Although the letters were provided to the probation office, they were not mentioned in the presentence report. The court of appeals indicated that the defendant should have had a full opportunity to consider and object to the use of those letters. *See also United States* v. *Berzon*, 941 F.2d 8 (1st Cir. 1991).

[21]As discussed below, the Third Circuit, and perhaps the Sixth and Eighth Circuits, have also established a higher standard of proof in such circumstances.

[22]In *Silverman*, the Sixth Circuit prescribed a procedure to handle enhancements based on unconvicted criminal conduct. If the Government decides to urge the enhancement of a defendant's sentence for unconvicted criminal conduct, it should first proffer the conduct. Upon receipt of the proffer, the district court should determine whether the conduct, if proved, would result in an increased sentence. If the conduct would be immaterial to the sentence, the court should sentence the defendant without consideration of the conduct. If, on the other hand, the court determines that the conduct would result in an enhancement of the sentence, it must conduct an evidentiary hearing "in accordance with the Confrontation Clause."

[23]Senate Report at 50-60.

[24]Senate Report at 63, 167.

[25]*See* U.S.S.G. § 1A4(a).

[26]For an example of the guideline impact of the difference in charges, *see United States* v. *Stanley*, 928 F.2d 575 (2d Cir.), *cert. denied*, __ U.S.__ , 112 S.Ct. 141 (1991).

[27]Factual stipulations can also be used to attempt to create predictability as to statutory exposure when a factual matter is a sentencing factor that controls the statutory penalty, as with drug offense penalties that are based on the amount of drugs. *See, e.g.*, 21 U.S.C. §§ 841(b), 960(b). All circuits that have considered the matter agree that the amount of drugs in such offenses is a sentencing factor that need only be proven by a preponderance of the evidence, not an element of the offense that must be proven beyond a reasonable doubt. *United States* v. *Madkour*, 930 F.2d 234 (2d Cir.), *cert. denied*, __ U.S. __, 1991 WL 185999 (1991); *United States* v. *Gibbs*, 813 F.2d 596 (3rd Cir.), *cert. denied*, 484 U.S. 822 (1987); *United States* v. *Moreno*, 899 F.2d 465 (6th Cir. 1990); *United States* v. *McNeese*, 901 F.2d 585 (7th Cir. 1990); *United States* v. *Wood*, 834 F.2d 1382 (8th Cir. 1987); *United States* v. *Kinsey*, 843 F.2d 383 (9th Cir.), *cert. denied*, 487 U.S. 1223 (1988); *United States* v. *Cross*, 916 F.2d 622 (11th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 1331 (1991). *But see, United States* v. *Rigsby*, 943 F.2d 631 (6th Cir. 1991) (expressing grave reservations with drug quantity as a sentencing factor " . . . because quantity under section 841 is such an important and disputable factual issue, it should be determined by the jury," but holding that the court was bound by controlling circuit precedent). Thus, the parties may enter into a factual stipulation as to the amount of drugs in an attempt to control both the mandatory minimum and the maximum statutory sentence. When a stipulation is entered into to control a statutory penalty, rather than a guideline, there is little chance that a defendant will be surprised at sentencing because Rule 11(c)(1) requires that the court inform the defendant prior to accepting the plea of the statutory maximum and minimum sentence. As discussed below, the court is not required prior to acceptance of the plea to inform the defendant of the applicable guidelines.

[28]The Supreme Court in *Burns* v. *United States*, __ U.S. __, 111 S.Ct. 2182 (1991), discussed in this article under "The Role of the Presentence Report," reversed the District of Columbia Circuit and held that F. R. Crim. P. 32 requires that the parties be notified of the sentencing court's intention to depart.

[29]Delay in the acceptance of the plea until completion of the presentence report is contemplated by F. R. Crim. P. 32(c)(1), which permits disclosure of the PSI prior to acceptance of the guilty plea.

[30]As discussed in this article under "The Role of the Presentence Report," F. R. Crim. P. 32(c) requires that probation officers prepare a comprehensive independent presentence report.

[31]Memorandum of Attorney General Dick Thornburgh to Federal Prosecutors, March 13, 1989, provides that plea agreements should not seek to circumvent the guidelines and should stipulate only the facts that accurately represent the defendant's conduct.

[32]For a discussion of the weight of policy statements, see "Looking at the Law," 55 *Federal Probation* 69 (June 1991).

[33]These cases also sometimes raise the claim of ineffective assistance of counsel for counsel's failure to accurately predict the guidelines. *See United States* v. *Turner*, 881 F.2d at 686; *United States* v. *Rhodes*, 913 F.2d at 834-44. Such claims have not been successful, the courts holding that merely inaccurate prediction does not amount to ineffective assistance.

[34]In fact, courts had used very different standards. The district court in *United States* v. *Fatico*, *supra* note 15, required a clear and convincing standard of proof. The court of appeals noted the fact, but did not comment. It simply rejected defendant's assertion that the beyond a reasonable doubt standard was required. In the same circuit, the court of appeals approved a preponderance of the evidence standard in *United States* v. *Lee*, 818 F.2d 1052 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987).

[35]*See* "Looking at the Law," 51 *Federal Probation* 50 (December 1987). In Application Note 5 to U.S.S.G. § 1B1.2(d), however, the Sentencing Commission has suggested that in a case in which a defendant is convicted of a conspiracy to commit more than one offense, the additional object offenses of the conspiracy should be treated as separate offenses for purposes of the multiple offense guidelines only if the court "would convict the defendant of conspiring to commit that object offense." As the Commission indicates in the explanation to the amendment that added this note, a higher standard of proof—a reasonable doubt standard—should prevail when the guideline application, in effect, creates a new count of conviction. The purpose of this special standard of proof is to "maintain consistency with other § 1B1.2(a) determinations . . . ." *United States Sentencing Commission Guidelines Manual*, Appendix C, Note 75 (1990). This provision does not apply, however, if the additional object offense is one of those the Commission has stipulated should be "grouped" together pursuant to U.S.S.G. § 3D1.2(d). These offenses include those, such as drug offenses, whose severity under the guidelines is determined on the basis of the amount of harm or loss. Accordingly, some sentencing factors in conspiracies to commit multiple drug offenses will require a lesser standard of proof than some sentencing factors in conspiracies to commit multiple robberies.

[36]*See*, "Looking at the Law," 53 *Federal Probation* 72 (June 1989).

[37]In civil cases, the preponderance standard has been described to mean that the evidence must show "that the existence of the proposition to be proved is more probably true than not true." Graham, *Handbook of Federal Evidence*, § 301.5 (2nd ed. 1986). *See Restrepo II* at 654.

[38]The clear and convincing standard has been defined as evidence which produces in the mind of the trier of fact "an abiding conviction that the truth of the factual contentions are highly probable." *Colorado* v. *New Mexico*, 467 U.S. 310, 316 (1984).