

PROCEDURAL ISSUES RAISED BY GUIDELINES  
SENTENCING: THE CONSTITUTIONAL SIGNIFICANCE OF  
THE "ELEMENTS OF THE SENTENCE"

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Under the Federal Sentencing Guidelines ("Guidelines") the sentencing range applicable to each defendant is the product of numerous factual findings. After determining the base level for the offense of conviction, the sentencing judge is required to make findings on a long list of factual issues, such as the quantity of drugs involved in a transaction,<sup>1</sup> and the level of the defendant's participation.<sup>2</sup> Each factual determination has a prescribed effect on the offense level. For example, a finding that the defendant was the organizer or leader of criminal activity involving five or more participants requires a four-level increase, while a finding that the defendant was a manager or supervisor (but not the organizer or leader) of the same group requires only a three-level increase.<sup>3</sup> If the defendant was an organizer, leader, manager, or supervisor in a group in which less than five persons were involved, the Guidelines dictate a two-level increase.<sup>4</sup>

Although some factual issues with a significant impact on Guidelines sentencing are resolved at the guilt-innocence phase, many other facts crucial to the calculation of a Guidelines sentence will not be resolved by the jury's verdict or a guilty plea because they are not elements of the offense.

Under the Guidelines regime, what procedural protections are applicable to critical findings made at the sentencing phase? Does a defendant have a constitutional right under either the Sixth Amendment or the Due Process Clause to full confrontation and cross-examination in connection with findings that increase the ap-

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1. U.S.S.G. § 2D1.1(c) (1993).

2. *Id.* § 3B1.1 (distinguishing major, minor, and minimal participants).

3. *Id.* § 3B1.1(a)-(b).

4. *Id.* § 3B1.1(c).

plicable Guidelines range? Should the Federal Rules of Evidence apply at sentencing hearings? Should the defendant have a right to have factual findings made by a jury? What standard of proof applies to such determinations—proof beyond a reasonable doubt, by a preponderance of the evidence, or some intermediate standard, such as clear and convincing evidence?

The Guidelines cast some light on the Sentencing Commission's thinking on these issues. The Guidelines provide that "the parties shall be given an adequate opportunity to present information to the court" regarding disputed issues, and that "the court may consider relevant information without regard to its admissibility under the rules of evidence at trial, provided that the information has sufficient indicia to support its probable accuracy."<sup>5</sup> The Guidelines' commentary explains that reliable hearsay, including statements of unidentified informants, may be considered.<sup>6</sup> The Commission, however, expressly declined to determine the applicable standard of proof.<sup>7</sup>

A brief description of three cases gives a sense of the importance of these procedural issues. In *United States v. Wise*,<sup>8</sup> the defendant pled guilty to counterfeiting. Upon finding that Wise was the leader or organizer of criminal activity including five or more participants, the trial court increased his Guidelines offense level by four levels, resulting in an additional sentence of twelve months.<sup>9</sup> Wise's plea agreement made no reference to the participation of other individuals. The only evidence of the defendant's leadership role and of the participation of five other persons was the testimony of the probation officer who had prepared the pre-sentencing report.<sup>10</sup> The officer admittedly had no personal knowledge of any facts surrounding the offense, nor had he spoken to any of the individuals allegedly involved with Wise.<sup>11</sup> Instead, the witness' in-

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5. *Id.* § 6A1.3(a) (policy statement); see also FED. R. EVID. 1101(d)(3) (stating that the Federal Rules of Evidence are not applicable at sentencing).

6. U.S.S.G. § 6A1.3 cmt. (1993).

7. *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 47 n.79 (1987), quoted in *United States v. Restrepo*, 946 F.2d 654, 655 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1564 (1992).

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

9. *Id.* at 404.

10. *Id.* at 396.

11. *Id.*

formation came from a variety of government sources, including conversations with various unnamed persons in the federal pre-trial diversion services, the state prosecutor's office, the Secret Service, and the U.S. Attorney's Office.<sup>12</sup> On appeal, Chief Judge Arnold described the nature of the evidence before the district court:

Wise has served an additional 12 months in a federal penitentiary because a witness with no personal knowledge says that a Secret Service file, or some unnamed person in a state prosecutor's office, says that Earl Dean Laughlin, who is not in court, says that Wise was involved with him in the offense and was its leader or organizer. This is double or triple hearsay at best. We do not know exactly even what Laughlin said, or what anyone who ever talked directly to him says he said.<sup>13</sup>

*United States v. Restrepo*<sup>14</sup> illustrates a second facet of the problems that exist under the Federal Sentencing Guidelines. Restrepo was tried and found guilty of selling 37.5 grams of cocaine. His co-defendant pled guilty to two additional sales involving sixty-five grams of cocaine.<sup>15</sup> At Restrepo's sentencing hearing, the district court found by a preponderance of the evidence that Restrepo too had participated in these additional sales.<sup>16</sup> This sentencing finding triggered an automatic increase in Restrepo's Guidelines range from twenty-seven to thirty-three months to forty-one to fifty-one months.<sup>17</sup> *Restrepo* illustrates that the Guidelines definition of "relevant conduct"<sup>18</sup> often reaches beyond the time and place of the offense of conviction, and often includes

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12. *Id.*

13. *Id.* at 406 (Arnold, C.J., dissenting).

14. 946 F.2d 654 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1564 (1992).

15. *United States v. Restrepo*, 903 F.2d 648, 650 & n.2 (9th Cir. 1990).

16. *Id.* at 650.

17. *Id.* at 650 & n.2 (discussing the specific sentencing calculations, based upon both the amount of drugs and the conclusion that Restrepo was the leader of a drug-dealing ring in which his co-defendant participated).

18. The Guidelines define "relevant conduct" as:

(a)(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and (B) in the case of a jointly undertaken criminal activity all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

conduct for which separate criminal charges could have been filed.<sup>19</sup> This is particularly true in the case of drug offenses, where the definition of relevant conduct includes all conduct that was "part of the same course of conduct or common scheme or plan as the offense of conviction."<sup>20</sup>

To date, the largest reported departure from an applicable Guidelines range on the basis of facts adduced at the sentencing hearing came in *United States v. Kikumura*.<sup>21</sup> The Guidelines sentence for Kikumura's offense of conviction was twenty-seven to thirty-three months imprisonment.<sup>22</sup> The district judge increased the defendant's sentence twelve-fold, to thirty years imprisonment, based on his finding by a preponderance of the evidence that Kikumura was a member of the Japanese Red Army and that he was planning a terrorist mission in the United States.<sup>23</sup> The evidence that Kikumura was an international terrorist was presented in the form of two affidavits, one from a Dutch police officer and the other from an FBI agent who detailed his conversations with an unidentified confidential informant.<sup>24</sup>

How have the lower courts resolved the issues raised in cases such as *Wise*, *Restrepo*, and *Kikumura*? Although these issues have provoked serious divisions in the courts—leading to en banc review in both *Wise* and *Restrepo*—each of the sentences has been upheld. Though courts have tended to analyze the Confrontation

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

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

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

U.S.S.G. § 1B1.3(a).

19. *Id.* § 1B1.3 cmt. 1, 2.

20. *Id.* § 1B1.3(a)(2); *see also* *United States v. Hahn*, 960 F.2d 903, 909-11 (9th Cir. 1992) (discussing the factors courts should consider in determining whether to include conduct outside the immediate time frame of the offense of conviction).

21. 918 F.2d 1084 (3d Cir. 1990).

22. *Id.* at 1089.

23. *Id.* at 1097.

24. *Id.* at 1096-97.

Clause and the standard of proof separately,<sup>25</sup> the bottom line has been the same: Courts have drawn a sharp distinction between the procedural protections available in the guilt-innocence phase of the trial and those applicable to sentencing under the Guidelines. At sentencing, courts generally have endorsed the use of evidence that is not subject to confrontation and does not satisfy the Federal Rules of Evidence as long as the evidence meets minimal standards of reliability.<sup>26</sup> The courts generally have applied the preponderance standard to the use of such evidence.<sup>27</sup>

The cases reflect the influence of Supreme Court precedents dealing with the Confrontation Clause and standard of proof, and a more general "judgment that a convicted criminal is entitled to less process than a presumptively innocent criminal defendant, as well as the concern that 'over-burdened trial courts would be greatly disserved by the time-consuming hearings' that more intensive procedural protections would require."<sup>28</sup> Though following this trend, *Kikumura* held that in extreme cases—such as the thirty-year sentence increase in that case—an intermediate standard of clear and convincing proof and reasonably trustworthy evidence should apply.<sup>29</sup> Subsequent decisions have distinguished *Kikumura*, requiring only a minimal showing of reliability to admit hearsay evidence not subject to confrontation and applying the preponderance standard.<sup>30</sup>

After briefly reviewing the two lines of analysis that have dominated in the lower courts, I will suggest an overlooked line of thought.

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25. *See, e.g.*, *United States v. Wise*, 976 F.2d 393 (8th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1592 (1993).

26. *Id.* at 397.

27. *Id.* at 400.

28. *Kikumura*, 918 F.2d at 1100 (citation omitted) (quoting *United States v. Lee*, 818 F.2d 1052, 1057 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987)).

29. *Id.* at 1102-03.

30. *See, e.g.*, *United States v. Kwong-Wah*, 966 F.2d 682 (1st Cir.), *cert. denied*, 113 S. Ct. 287 (1992); *United States v. Trujillo*, 959 F.2d 1377 (7th Cir.), *cert. denied*, 113 S. Ct. 287 (1992); *United States v. Schuster*, 948 F.2d 313 (7th Cir. 1991).

A. *Confrontation Rights at Sentencing*<sup>31</sup>

In general, the lower courts have continued to follow "[t]he long established principle \_\_\_\_\_, both before and after adoption of the guidelines, \_\_\_\_\_ that the constitutional protections afforded defendants at a criminal trial, including confrontation rights, are not available at sentencing proceedings to limit the court's consideration of the background, character and conduct of the defendant."<sup>32</sup> The seminal decision on confrontation rights at sentencing is the Supreme Court's pre-Guidelines ruling in *Williams v. New York*.<sup>33</sup> Because *Williams* was decided before the Confrontation Clause was held applicable to state proceedings, the Court applied the Due Process Clause.<sup>34</sup> *Williams* held that the sentencing court did not deny due process by considering evidence from the pre-sentence report that the defendant had no opportunity to rebut.<sup>35</sup> Under *Williams*, once the narrow issue of guilt or innocence has been resolved, the sentencing judge should be free to consider "the fullest information possible concerning the defendant's life and characteristics" in order to determine the proper type and extent of punishment.<sup>36</sup> The Court concluded that, given the function of the sentencing determination, saddling the sentencing process with the requirements of full confrontation and cross-examination was neither necessary nor appropriate:

We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a proce-

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31. For a more extended discussion of confrontation rights at sentencing, see David A. Hoffman, Note, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE L.J. 382 (1992), and Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992).

32. *United States v. Silverman*, 976 F.2d 1502, 1511 (6th Cir. 1992) (en banc).

33. 337 U.S. 241 (1949).

34. *Id.* at 245.

35. *Id.*

36. *Id.* at 247.

ing, and that the new federal sentencing regime requires confrontation.<sup>46</sup> The right to confrontation at sentencing may be grounded in the Confrontation Clause of the Sixth Amendment.<sup>47</sup> Alternatively, some have suggested that the *Mathews v. Eldridge*<sup>48</sup> balancing test for due process<sup>49</sup> requires confrontation at sentencing to avoid erroneous determinations resulting in added periods of incarceration under the Guidelines regime.<sup>50</sup>

### B. *The Standard of Proof at Sentencing*<sup>51</sup>

Although the standard of proof issue has provoked a sharp debate, the lower courts generally have concluded that Guidelines findings need be established only by a preponderance of the evidence, not by proof beyond a reasonable doubt.<sup>52</sup> Some courts, however, have agreed (at least in dicta) that extreme cases might require an intermediate standard, such as the clear and convincing standard applied in *Kikumura*.<sup>53</sup>

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46. *United States v. Petty*, 982 F.2d 1365, 1373 (9th Cir. 1993) (Noonan, J., dissenting); *Wise*, 976 F.2d at 408-09 (Arnold, C.J., concurring in part and dissenting in part).

47. The Confrontation Clause states: "[The accused shall enjoy the right] to be confronted with the witnesses against him." U.S. CONST. amend. VI.

48. 424 U.S. 319 (1976).

49. *Mathews* requires the balancing of three factors: the private interest at stake, the government's interest (including the cost of additional procedural safeguards), and the incremental improvement in accuracy. *Id.* at 335.

50. See *Wise*, 976 F.2d at 411 (Arnold, C.J., concurring in part and dissenting in part) (concluding that *Mathews* requires confrontation); Hoffman, *supra* note 31; Note, *An Argument for Confrontation*, *supra* note 31.

51. For other articles discussing the standard of proof applicable to Guidelines sentencing, see David N. Adar, *House Built on a Weak Foundation—Sentencing Guidelines and the Preponderance Standard*, 4 FED. SENT. REP. 292 (1992); Judy Clarke, *The Need for a Higher Burden of Proof for Factfinding Under the Guidelines*, 4 FED. SENT. REP. 300 (1992); Richard Hussein, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387 (1990); Steven N. Salkey & Blair G. Brown, *The Preponderance of Evidence Standard at Sentencing*, 4 AM. CRIM. L. REV. 907 (1992).

52. *E.g.*, *United States v. Terzado-Madruga*, 897 F.2d 1099, 1124-25 (11th Cir. 1990); *United States v. Sleet*, 893 F.2d 947, 949 (8th Cir. 1990); *United States v. Guerra*, 888 F.2d 247 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990).

53. *E.g.*, *United States v. Kikumura*, 918 F.2d 1084, 1100-01 (3d Cir. 1990); see also *Terzado-Madruga*, 897 F.2d at 1125 (indicating that the court in the future or in a different context may require a higher standard of proof than a preponderance of the evidence).

dure could endlessly delay criminal administration in a retrial of collateral issues.<sup>37</sup>

The lower federal courts generally have concluded that the sharp distinction between conviction and sentence still exists under the Guidelines regime and justifies the admission at sentencing of evidence not tested by full confrontation.<sup>38</sup> As a majority of the Sixth Circuit concluded in an en banc decision, “[w]hile a number of considerations have changed, we are of the view that the permissible methods of informing the sentencing judge and the need for information in fashioning sentences in light of the constitutional rights of defendants at sentencing have not essentially changed.”<sup>39</sup> The courts have recognized, however, that due process requires that hearsay evidence demonstrate “some minimal indicia of reliability”<sup>40</sup>

These decisions have provoked vigorous dissents arguing that the Guidelines have so revolutionized federal sentencing that pre-Guidelines precedents no longer apply.<sup>41</sup> *Williams* held that confrontation was not essential in a discretionary system where the sentence resulted from the judge’s subjective assessment of the defendant’s rehabilitative potential.<sup>42</sup> This conclusion does not carry over to Guidelines sentencing, which rejects the discretionary model of individualized sentencing.<sup>43</sup> Guidelines sentencing is now “a thoroughly fact-driven process,”<sup>44</sup> in which the sentence results from numerous findings regarding the nature of the offense and not from the judge’s subjective assessments of the defendant’s character and rehabilitative potential.<sup>45</sup> Accordingly, the dissenters have argued that *Williams* has no bearing on Guidelines sentenc-

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37. *Id.* at 250 (footnote omitted).

38. *See, e.g.*, *United States v. Petty*, 982 F.2d 1365, 1367-69 (9th Cir. 1993) (collecting cases from seven circuits).

39. *United States v. Silverman*, 976 F.2d 1502, 1508 (6th Cir. 1992) (en banc).

40. *Petty*, 982 F.2d at 1369. Most courts permit consideration of extrinsic corroborating evidence to demonstrate the requisite reliability. *Id.*

41. *See, e.g., id.* at 1370 (Noonan, J., dissenting); *United States v. Wise*, 976 F.2d 393, 405 (8th Cir. 1992) (Arnold, C.J., concurring in part and dissenting in part), *cert. denied*, 113 S. Ct. 1592 (1993).

42. *Wise*, 976 F.2d at 399-400.

43. *See id.* at 400.

44. Note, *An Argument for Confrontation*, *supra* note 31, at 1881.

45. *Id.*



The principal authority for the application of the preponderance standard at sentencing is *McMillan v. Pennsylvania*.<sup>54</sup> In *McMillan* the Supreme Court upheld the constitutionality of a state sentencing scheme that imposed a five-year minimum sentence when it was found by a preponderance of the evidence that the defendant visibly possessed a firearm during the commission of certain enumerated felonies.<sup>55</sup> Although the Due Process Clause requires “the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime with which he is charged,”<sup>56</sup> the Court concluded that this stringent standard was not applicable to the state sentencing statute. Under the state statute, possession of a firearm was not an element of the crime, but rather “a sentencing factor that comes into play only after the defendant has been found guilty of one of [the enumerated] crimes beyond a reasonable doubt.”<sup>57</sup> While recognizing that under some circumstances the requirement of proof beyond a reasonable doubt might apply to facts not identified formally as elements of the offense charged,<sup>58</sup> the Court noted the absence in the case before it of the kinds of factors that might require a higher standard of proof.<sup>59</sup> The Court observed that the mandatory five-year term operated only to limit the court’s discretion in selecting the penalty from within the applicable range, not to increase the maximum punishment nor to define a separate offense.<sup>60</sup> The Court also concluded that the statute gave no hint of having been tailored to ensure that the sentencing factors were the “tail which wags the dog,” i.e., collateral factors that were permitted to determine the outcome.<sup>61</sup> Finally, the Court observed that there was no indication that Pennsylvania was trying to evade the requirements of proof beyond a reasonable doubt by defining possession as a sentencing factor rather than an element of the offense.<sup>62</sup> Under those circum-

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54. 477 U.S. 79 (1986).

55. *Id.* at 85-87.

56. *Id.* at 84 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

57. *Id.*

58. *Id.* at 86.

59. *Id.*

60. *Id.* at 87-88.

61. *Id.* at 88.

62. *Id.* at 89.

stances, the Court found no due process bar to the use of the preponderance standard.<sup>63</sup>

Both courts and commentators have debated the applicability of the *McMillan* analysis to Guidelines sentencing. In general, the lower courts have concluded that *McMillan* permits the use of the preponderance standard because the Guidelines, like the statute in *McMillan*, merely determine the appropriate sentence within the statutory range.<sup>64</sup> In the view of these courts, the Guidelines neither evade the constitutional proof requirements, nor permit the tail to wag the dog.

A few dissenting judges, and some commentators, have taken quite a different view of Guidelines sentencing.<sup>65</sup> In their view, findings under the Guidelines do not simply guide a court in selecting a sentence within the applicable range, as in *McMillan*.<sup>66</sup> Instead, the Guidelines restrict the sentencer's discretion to a narrow sentencing range based upon the offense of conviction and the defendant's criminal record.<sup>67</sup> Once the sentencer has identified the base offense and calculated the defendant's criminal history score, the Guidelines prescribe a narrow sentencing range (e.g., twenty-seven to thirty-three months in Restrepo's case).<sup>68</sup> Thus, in a real sense, sentencing findings (such as the finding linking Restrepo to sixty-five grams of cocaine) do increase the defendant's sentence over that otherwise provided by law. Critics charge that the Guidelines' structure does indeed permit the "tail" of conduct, proved only by a preponderance, to "wag the dog" of the conduct charged in the indictment and proved beyond a reasonable doubt at trial.<sup>69</sup> By increasing the defendant's sentence on the basis of distinct offenses with which he was neither charged nor convicted,<sup>70</sup> such as the two additional cocaine sales in *Restrepo*, the

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63. *Id.* at 91-93.

64. See *United States v. Masters*, 978 F.2d 281, 286-87 (7th Cir. 1992) (collecting cases), *cert. denied*, 113 S. Ct. 2333 (1993); *United States v. Restrepo*, 946 F.2d 654 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1564 (1992).

65. See, e.g., *United States v. Silverman*, 976 F.2d 1502, 1533 (6th Cir. 1992) (en banc) (Martin, J., dissenting); *Restrepo*, 946 F.2d at 664 (Norris, J., dissenting).

66. *Restrepo*, 946 F.2d at 669-72 (Norris, J., dissenting).

67. *Id.* at 674.

68. *Id.* at 664, 671.

69. *Id.* at 664.

70. *Id.*

Guidelines also permit the prosecutor to evade the constitutional requirement of proof beyond a reasonable doubt.

Even if proof beyond a reasonable doubt is not required, the due process balancing test of *Mathews v. Eldridge* suggests that at least clear and convincing evidence is required to extend the length of the defendant's Guidelines sentence.<sup>71</sup>

### C. Another View—Looking At the Bottom Line

The lower courts understandably have turned to the Supreme Court precedents that seem to be most on point: *Williams* and *McMillan*. As a second tier of analysis, courts and commentators have considered the effects of the general due process balancing test of *Mathews v. Eldridge*.<sup>72</sup>

These narrow lines of analysis have obscured the big picture, or perhaps more accurately, the bottom line.<sup>73</sup> In fact, the bottom line is quite astonishing. As a result of the sharp distinction between the guilt-innocence phase and the sentencing phase, federal criminal defendants now have far less protection at the sentencing stage than civil defendants who contest damages once liability has been determined. Procedural protections regarded as essential to the determination of the amount of damages in a civil proceeding, such as the application of the rules of evidence, and particularly the opportunity to confront and cross-examine adverse witnesses, cannot be deemed unnecessary when courts determine the appropriate sentence for a defendant whose criminal liability has been established.

The absence of procedural protections may well have been reasonable when sentencing was not a truly legal decision. In a discretionary sentencing scheme dominated by at least a rhetoric of rehabilitation, the sentence was not a product of any findings of fact about the nature of the offense, but rather a product of the judge's intuition about the defendant's prospects for rehabilitation.<sup>74</sup> The

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71. Hussein, *supra* note 51, at 1407.

72. See, e.g., *Restrepo*, 946 F.2d at 665 (Norris, J., dissenting).

73. For an excellent critique of the effects of bifurcating fact finding regarding offense-related conduct, see Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Factfinding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992).

74. *Williams v. New York*, 377 U.S. 241, 248-49 (1949).

rhetoric of the rehabilitative ideal also led courts to characterize the proceedings as non-adversarial.<sup>75</sup> While the reality did not live up to this vision, the vision nonetheless played an important role in shaping the *Williams* ruling.<sup>76</sup>

The current situation is quite different. Under the fact-driven and legalistic Guidelines system, findings on a series of issues lead to prescribed increases in the applicable sentencing range. The sentencing elements have the same determinant effect on an individual sentence as do the facts proven in the damages phase of a civil trial.<sup>77</sup>

Consider in this connection the relationship between the issues discussed here and those before the Supreme Court in *Patterson v. New York*.<sup>78</sup> *Patterson* upheld a New York statute requiring the defendant to bear the burden of proving that he acted under the influence of extreme mental or emotional distress.<sup>79</sup> A bare majority of the Court distinguished an earlier decision which had held that requiring the defendant to prove that he had acted in the heat of passion violated the due process requirement of proof beyond a reasonable doubt.<sup>80</sup> *Patterson* held that the crucial distinction was formal: New York not only had shifted the burden of persuasion to the defendant, but also had defined "extreme emotional distress" as a defense, not a negation of one of the elements of the offense of murder.<sup>81</sup>

Despite the sharp division it provoked on the Court and the considerable academic commentary it generated,<sup>82</sup> the decision in *Patterson* actually disadvantaged defendants far less than the current Guidelines regime. Though *Patterson* required the defendant to bear the burden of persuasion on a mitigating defense,<sup>83</sup> the defendant was still entitled to have the issue of his mental distress

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75. *Id.* at 249.

76. *Id.* at 246-51.

77. *United States v. Restrepo*, 946 F.2d 654, 664 (9th Cir. 1991) (Pregerson, J., dissenting), *cert. denied*, 112 S. Ct. 1564 (1992).

78. 432 U.S. 197 (1977).

79. *Id.* at 216.

80. *Id.* at 200-01, 216 (distinguishing *Mullaney v. Wilbur*, 421 U.S. 684 (1975)).

81. *Id.* at 206-10.

82. *See, e.g.*, Irene M. Rosenberg, *Winship Redux: 1970-1990*, 69 *TEX. L. REV.* 109, 114 (1990).

83. *Patterson*, 432 U.S. at 207.

determined by a jury on the basis of legally admissible evidence,<sup>84</sup> and to have full rights of confrontation, cross-examination, and compulsory process.<sup>85</sup>

The Guidelines have gone a step, or perhaps several steps, further. Suppose the Guidelines include the presence or absence of heat of passion or extreme emotional disturbance as a sentencing factor. Under the view now prevailing in the lower federal courts, if these issues are characterized as sentencing factors—rather than as elements or defenses—there will be no jury trial, no requirement of proof beyond a reasonable doubt, no requirement that the government's evidence be admissible under the Federal Rules of Evidence, and no right to full confrontation and cross-examination. Rather, the evidence need offer only minimal guarantees of trustworthiness and meet the preponderance standard.<sup>86</sup> As noted above, the procedural guarantees at sentencing will be far less than those attending the determination of damages in a garden variety civil proceeding once civil liability has been determined.

Our present procedures make a lie of our purported commitment to a higher standard of procedural fairness in criminal prosecutions than in civil proceedings. Indeed, the gap between rhetoric and reality is even greater than might appear at first blush since there is no trial at all in roughly ninety percent of the cases which are disposed of by plea bargain.<sup>87</sup> Thus, in the vast majority of cases, the only factual findings on contested issues—the findings that determine with a degree of mathematical precision the length of the sentence that the defendant will serve—are made in a process with standards of procedural fairness insufficient for a civil lawsuit.

My suggested approach, focusing on the bottom line, virtually compels the conclusion that the procedural safeguards at sentencing should be no less than those accorded civil litigants. Indeed, because the fairness and accuracy of the Guidelines regime depends on the reliability of the factual findings supporting the sentences, the Commission itself should adopt these standards as a

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84. *Id.* at 206.

85. *Id.*

86. See *supra* note 64 and accompanying text.

87. See U.S. DEP'T OF JUST., *Defendants Disposed in U.S. District Courts*, 1991 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 530, table 5.37 (Timothy J. Flanagan & Kathleen Maquire eds., 1992) (showing 87% of cases disposed of by guilty plea).

matter of policy.<sup>88</sup> However, since the Commission has not done so, surely the due process balancing test under *Mathews v. Eldridge*<sup>89</sup> requires that the protections accorded at a Guidelines sentencing hearing be no less than those accorded to civil litigants when damages are calculated after liability has been determined.

Comparison with the civil model suggests an even more dramatic conclusion. Federal sentencing, like the determination of civil damages, should be subject to the same procedural rules that attend the finding of liability or, in this case, guilt. In the criminal context, that rule would entail not only proof beyond a reasonable doubt, confrontation, and compulsory process, but also trial by jury at the sentencing stage.

While some arguments may support a unified view of the trial as including sentencing,<sup>90</sup> I do not advocate that view. In fact, the text of the Sixth Amendment suggests a distinction between the "criminal prosecution[]" as a whole and the "trial," which is but one part of the criminal prosecution. The Sixth Amendment states:

In all criminal prosecutions the defendant shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.<sup>91</sup>

Though criminal defendants have the right to a jury only at the trial, courts have held that the Sixth Amendment right to the assistance of counsel applies to the other critical stages of a criminal

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88. Cf. Stephen A. Saltzburg, *Sentencing Procedures: Where Does the Responsibility Lie?*, 4 FED. SENT. REP. 247 (1992) (arguing that the Commission must address the burden of proof issue because ineffective procedures can result in erroneous determinations that undermine the social goals the Commission seeks to achieve).

89. See *supra* note 71 and accompanying text.

90. One commentator has suggested that at the time of the drafting of the Sixth Amendment there were no separate sentencing proceedings because criminal statutes generally provided for mandatory sentences. Note, *An Argument for Confrontation*, *supra* note 31, at 1888-89; cf. Herman, *supra* note 73, 323-37 (arguing that due process should be interpreted to preclude characterization of offense-related conduct as mere sentencing factor not subject to all procedure safeguards applicable at trial).

91. U.S. CONST. amend. VI.

prosecution.<sup>92</sup> The treatment of the right to counsel provides an attractive model for the rights of confrontation and compulsory process as well.<sup>93</sup> Thus, even if the sentencing proceeding is not deemed to be part of the trial, the language of the Sixth Amendment suggests that the rights to confrontation and compulsory process apply at other critical stages of the criminal prosecution whenever witnesses appear for and "against" the defendant. Because the government may present evidence at sentencing that the defendant was involved in additional criminal offenses, or organized five or more participants in the crime, Guidelines sentencing clearly involves the presentation of witnesses against the defendant. Accordingly, the defendant should have not only the right to the assistance of counsel at the sentencing hearing, but also the right to confrontation and compulsory process.

#### *D. Conclusion*

How can the federal courts, whose resources are already stretched nearly to the breaking point,<sup>94</sup> accommodate those additional rights? The expansion of rights at the sentencing phase suggested here certainly will require a greater commitment of resources. Indeed, the commitment of these resources is essential to the completion of the reform of the sentencing process that Congress envisioned by enacting the Sentencing Reform Act. Unreliable fact finding undermines the premise of the Guidelines system. But what if no additional resources are forthcoming? Two alternatives could be implemented without committing more resources at a time when the Administration is seeking to pare down the federal budget.

First, the Guidelines could be simplified to require far fewer findings in each individual case. Simplification is not inconsistent with sentencing reform. To the contrary, the federal sentencing process is presently far more complex than are its state counter-

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92. *Coleman v. Alabama*, 399 U.S. 1, 7-10 (1970).

93. *Cf. United States v. Petty*, 982 F.2d 1365, 1370-71 (9th Cir. 1993) (Noonan, J., dissenting) (stating that the right to counsel at sentencing—the only adversarial evidentiary hearing provided in most criminal cases—is of little value if counsel cannot cross-examine the witnesses against the defendant).

94. *See FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4-7* (1990) (describing the "crisis" in the federal courts).

parts,<sup>95</sup> and many critics believe that this complexity is a vice, rather than a virtue.<sup>96</sup> Second, a reduction in the number of federal criminal cases, bringing the caseload in line with available resources, is not only feasible, but in fact overdue. As a recent blue ribbon commission demonstrated, the federal criminal caseload has expanded to include many cases that could and should be brought in the state courts.<sup>97</sup>

Unless more resources are made available, streamlining the Guidelines and/or limiting federal criminal prosecutions are the only means available to fulfill the guarantees of the Bill of Rights and complete the reforms envisioned with the passage of the Sentencing Reform Act.

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95. Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 589 (1992).

96. *See, e.g., id.* (proposing a simplified seven-level federal grid that would conform to all statutory criteria and clarify the policy choices implicit in the Guidelines); Owen S. Walker, *Litigation-Enmeshed Sentencing: How the Guidelines Changed the Practice of Criminal Law*, 25 U.C. DAVIS L. REV. 639 (1992) (comparing the State of Washington's sentencing guidelines with the Federal Guidelines).

97. FEDERAL COURTS STUDY COMM., *supra* note 94, at 35-38 (finding that many drug cases currently being brought in federal court should be brought in state court, and the federal courts' most pressing problems stem from an unprecedented number of federal narcotics prosecutions).