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Federal Sentencing Guidelines: Retaining the Preponderance Standard of Proof

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FEDERAL SENTENCING GUIDELINES: RETAINING THE PREPONDERANCE STANDARD OF PROOF

INTRODUCTION

Historically, judges have had wide discretion in sentencing convicted criminals.[1] These practices naturally resulted in substantial disparity among federal courts with regard to sentences given to similarly situated offenders.[2] In response to this problem, Congress enacted the Sentencing Reform Act of 1984,[3] which created the United States Sentencing Commission.[4] The Act au-

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[1] *See* Andrew von Hirsch, *The Sentencing Commission's Functions, in* THE SENTENCING COMMISSION AND ITS GUIDELINES 3 (Andrew von Hirsch et al. eds., 1987). "Typically, American statutes set only the maximum penalties for different crimes, and the judge had the choice of *any* sentence within that limit: a fine, probation, a jail sentence, or a shorter or longer term in state prison." *Id.* (emphasis in original); *see also* Wasman v. United States, 468 U.S. 559, 563 (1984) ("It is now well established that a judge . . . is to be accorded very wide discretion in determining an appropriate sentence."); Williams v. New York, 337 U.S. 241, 245 (1949) (observing that trial judge had discretion to change defendant's sentence from life imprisonment to death); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 1.3 (2d ed. 1991) (discussing indeterminate sentencing); PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 1-15 (1977) (describing "national scandal" created by standardless sentencing system); Julia L. Black, Note, *The Constitutionality of Federal Sentences Imposed Under the Sentencing Reform Act of 1984 After* Mistretta v. United States, 75 IOWA L. REV. 767, 769 (1990) (noting "judges' vast power in sentencing" and resulting disparities existing under prior sentencing system).

[2] *See* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 2 (1992) [hereinafter SENTENCING MANUAL] (disparate sentences were primary reason behind formation of Federal Sentencing Guidelines); Mistretta v. United States, 488 U.S. 361, 365-66 (1989). The *Mistretta* Court noted that prior to the Federal Sentencing Guidelines "serious disparities" were common in criminal sentences. *Id.*

[3] Sentencing Reform Act of 1984, Pub. L. No. 98-473, Ch. 2, 98 Stat. 1988 (codified at 18 U.S.C. §§ 3551-3559 (1988)).

[4] *Id.* (codified at 28 U.S.C. §§ 991-98); *see also* SENTENCING MANUAL, *supra* note 2, at 1. The Commission "is an independent agency in the judicial branch . . . . Its principal purpose is to establish sentencing policies . . . that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." *Id.*; *see also* Mary Buffington, Comment, *Separation of Powers and the Independent Governmental Entity After* Mistretta v. United States, 50 LA. L. REV. 117, 132 (1989). The composition of the Commission is restricted by the Sentencing Reform Act. *Id.* The Commission has seven voting members and one nonvoting member who are appointed by the President and must be confirmed by the Senate. *Id.* These members are charged with promulgating and overseeing the use of the Federal Sentencing Guidelines. *Id.* Three of the voting mem-

thorized the Commission to promulgate mandatory sentencing guidelines.[5] On November 1, 1987, the Federal Sentencing Guidelines (the "Guidelines") became effective.[6] Almost immediately, the Guidelines were challenged as an unconstitutional delegation of legislative power to the judicial branch of government, with many lower courts holding that the Guidelines were unconstitutional.[7] In 1989 the Supreme Court put an end to this debate by upholding the constitutionality of the Guidelines in *Mistretta v. United States*.[8]

Nevertheless, one provision of the Guidelines that continues to be controversial is section 1B1.3, the "Relevant Conduct Provision."[9] This provision allows the government, at a presentencing

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bers must be federal judges, and the attorney general or his designate serves as the nonvoting member. *Id.*

[5] SENTENCING MANUAL, *supra* note 2, at 1. *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988) (discussing debates that occurred before enactment of Guidelines).

[6] SENTENCING MANUAL, *supra* note 2, at 1.

[7] *See* Black, *supra* note 1, at 768. Within one year, 157 federal judges held that the Guidelines were unconstitutional. *Id.*

[8] 488 U.S. 361, 412 (1989). The Court stated:

> We conclude that in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges. Accordingly, we hold that the Act is constitutional.

Id.

[9] U.S.S.G. § 1B1.3(a). Section 1B1.3(a) provides that relevant conduct shall be determined on the basis of the following:

> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
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> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all 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;

hearing,[10] to present evidence of the convicted defendant's prior criminal activity, including uncharged criminal activity that relates to the offense of conviction.[11] When considered by the judge during sentencing, relevant conduct can have a serious impact on the offender's actual sentence, and has thus justifiably been called the "Cornerstone of the Federal Sentencing Guidelines."[12] Unfortunately, the Guidelines do not specify the standard of proof to be applied at the presentencing hearing,[13] and the Supreme Court has only indirectly addressed this issue by upholding an analogous provison of a state sentencing act in *McMillan v. Pennsylvania*.[14] Although most circuit courts have held that a preponderance of the evidence standard should govern,[15] some conflict

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

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

Id.

10 *See* PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES ch. 8[C][3] (Phylis Skloot Bamberger ed., Supp. 1992) (describing conduct at sentencing hearing).

11 *See* John R. Steer & William W. Wilkins, Jr., *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 497 n.13 (1990). The "offense of conviction" refers to the specific statute which the defendant has been convicted of violating. *Id.* The "offense of conviction" may or may not be the same as the full scope of actual criminal conduct that accompanied the offense of conviction. *Id.*

12 *See* Steer & Wilkins, *supra* note 11, at 520. The authors state:

> The cornerstone of the federal sentencing guidelines, Relevant Conduct, may be analyzed principally in three dimensions: (1) a temporal dimension, focusing on the totality of a defendant's conduct from the planning stages of the offense to the post-offense behavior that bears on the possible guideline adjustments of obstruction and acceptance of responsibility; (2) an accomplice attribution dimension, focusing on the conduct of others acting in concert with the defendant and for which the defendant should be held accountable at sentencing; and (3) a third dimension, limited to certain types of offenses such as drugs or monetary value offenses, that incorporates both of the first two dimensions and permits the court to look beyond the actual offense of conviction to the entire range of a defendant's similar offense behavior.

Id. at 520-21.

13 *See* SENTENCING MANUAL, *supra* note 2. Nowhere in the Guidelines Manual does the Commission expressly delineate the standard of proof to be applied. *Id.* However, the commentary to the Sentencing Guidelines indicates that a preponderance standard would satisfy due process. U.S.S.G. § 6A1.3, cmt. ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.").

14 477 U.S. 79 (1986). The Supreme Court upheld Pennsylvania's sentencing act, which treated visible possession of a firearm as a sentencing factor rather than an element of the crime charged. *Id.* at 91.

15 *See, e.g.*, United States v. Silverman, 976 F.2d 1502, 1503 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1595 (1993); United States v. Galloway, 976 F.2d 414, 425 (8th Cir.

exists.[16] The Third Circuit has held that, as a matter of due process, a clear and convincing standard should apply.[17] Additionally, some of the circuit courts which have applied a preponderance standard have indicated that this standard would not be constitutionally permissible in all cases.[18] Finally, various dissents in those cases[19] and other commentators[20] have recently called for application of a clear and convincing standard.

This Note suggests a resolution to the disagreement regarding the standard of proof to be employed at a presentencing hearing. Part One analyzes the various circuit court opinions dealing with this issue. Part Two discusses the effect of a reduced liberty interest on due process considerations. Part Three distinguishes Supreme Court precedent which stands for the proposition that due process requires utilization of the clear and convincing standard of proof. Part Four then examines balancing societal interests against the interests of convicted criminals. Finally, by analyzing the Supreme Court decision in *McMillan*, this Note concludes in Part Five that the preponderance standard is constitutionally sufficient.

I. SURVEY OF CIRCUIT COURTS: NO UNIFORM STANDARD

The Third Circuit is the only court to have actually held that clear and convincing evidence is required to prove relevant con-

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1992), *cert. denied*, 113 S. Ct. 1420 (1993); United States v. Restrepo, 946 F.2d 654, 656-57 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1564 (1992).

16 *See infra* notes 21-25 and accompanying text (discussing divergent circuit court opinions).

17 United States v. Kikumura, 918 F.2d 1084, 1101 (3d Cir. 1990) ("For the reasons explained above, we hold that in such situations, the fact-finding underlying that departure must be established at least by clear and convincing evidence.").

18 *See, e.g.*, *Restrepo*, 946 F.2d at 654. The court indicated, in dicta, that a heightened standard of review would be required if the evidence introduced at the sentencing hearing would have an "extremely disproportionate effect" on the sentence. *Id.* at 659-60.

19 *See Galloway*, 976 F.2d at 436 (Bright, J., dissenting) (arguing that preponderance standard violates Constitution); *Restrepo*, 946 F.2d at 664 (Norris, J., dissenting) (asserting that clear and convincing standard better serves purposes of Sentencing Reform Act).

20 *See* David N. Adair, Jr., *House Built on a Weak Foundation—Sentencing Guidelines And The Preponderance Standard of Proof*, 4 FED. SENT. R. 292 (1992) (advocating clear and convincing standard on grounds that *McMillan* does not demand preponderance); Judy Clarke, *The Need For A Higher Burden of Proof For Factfinding Under the Guidelines*, 4 FED. SENT. R. 300 (1992) (arguing that fairness requires adoption of clear and convincing standard).

duct at the sentencing hearing.[21] In *United States v. Kikumura*, the Third Circuit found that since the relevant conduct evidence increased the convict's sentence by a "sufficiently great" magnitude, a preponderance standard did not satisfy due process.[22]

Other circuits have disagreed, holding that relevant conduct need be proven only by a preponderance of the evidence.[23] However, many of these courts have indicated in dicta that clear and convincing evidence may be required at some point. For example, the Ninth Circuit has stated that clear and convincing evidence would be required to prove uncharged or unrelated conduct.[24] Additionally, the Second and Eighth Circuits have questioned the propriety of the minimal preponderance standard in situations in which the offender's sentence may be increased substantially.[25]

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21 *Kikumura*, 918 F.2d at 1101.

22 *Id.* In *Kikumura*, the appellant was convicted of passport violations and transportation of explosives. *Id.* at 1089. The maximum sentence for these crimes was one hundred years. *Id.* at 1094 n.9. The original sentence prescribed by the Guidelines for those offenses was between 27 and 33 months. *Id.* at 1089. At sentencing, however, the government introduced evidence that the explosives were made in preparation for a terrorist bombing. *Id.* Based on this additional evidence, the prescribed sentence increased to 30 years. *Id.* The Third Circuit held that the additional evidence introduced at sentencing had to be proven by clear and convincing evidence and remanded the matter for resentencing in accordance with this heightened standard. *Id.*

23 *See, e.g.*, United States v. Masters, 978 F.2d 281, 286 (7th Cir. 1992) (allowing sentence to be increased from 10 to 30 years based on fact proven by mere preponderance), *cert. denied*, 113 S. Ct. 2333 (1993); United States v. Harrison-Philpot, 978 F.2d 1520, 1524 (9th Cir. 1992) (upholding sentence increase from 4 to 29 years based on quantity of drugs proven at sentencing by preponderance), *cert. denied*, 113 S. Ct. 2392 (1993); *Galloway*, 976 F.2d at 425 (requiring that relevant conduct, additional thefts, be proven by preponderance); United States v. Kwong-Wah, 966 F.2d 682, 685 (D.C. Cir.) (increasing sentence from one to eight years based on sentencing factors established by preponderance), *cert. denied*, 113 S. Ct. 287 (1992).

24 *Harrison-Philpot*, 978 F.2d at 1524. The defendant was convicted of selling 67 grams of cocaine. *Id.* at 1522. At sentencing, it was established that the defendant had been involved in a conspiracy whose purpose it was to distribute between 15 and 49.9 kilograms of cocaine. *Id.* This evidence was used to increase the offender's sentence from four to 29 years. *Id.* The court upheld the sentence and found that a preponderance standard was sufficient because the trial judge was only making a quantity determination. *Id.* at 1523-24. The court indicated that clear and convincing evidence would have been required if the determination had involved uncharged conduct rather than a simple quantity determination. *Id.*

25 *See* United States v. Concepcion, 983 F.2d 369, 390 (2d Cir. 1992); United States v. Townley, 929 F.2d 365, 369 (8th Cir. 1991). The *Townley* court, despite reversal of the case on other grounds, did not foreclose the possibility of applying a higher standard in an "exceptional case." *Id.* at 370. The court based this observation on the Third Circuit's decision in *Kikumura*. *Id.* at 369-70. In *Concepcion*, the court held that "disputed facts related solely to sentencing need be proven only by a preponderance of the evidence and that a defendant's right to due process was not violated by the calculation of his sentence with reference to facts proven only under that stan-

These varied approaches indicate that the Federal Sentencing Guidelines have failed to accomplish their essential purpose—uniformity in the sentencing process.

Irrespective of the concerns addressed by the circuit courts, it is submitted that a uniform preponderance of evidence standard should apply at all sentencing hearings held pursuant to section 1B1.3 of the Federal Sentencing Guidelines. Once a criminal defendant is convicted, that person can no longer claim constitutional entitlement to the same liberty interest that existed prior to conviction.[26] Furthermore, the interest of society in keeping a convicted criminal imprisoned outweighs the defendant's limited liberty interest.[27] Consequently, due process does not require clear and convincing proof of relevant conduct at the sentencing stage.[28]

II. Less Liberty Interest Upon Conviction

One of the basic premises behind relaxing the standard of proof at sentencing, as opposed to the strict "beyond a reasonable doubt" standard applicable at trial, is that a convicted criminal no longer has a strongly protected liberty interest.[29] The defendant has already been convicted of a crime, with due process being satisfied by requiring the prosecution to prove each and every element of the crime beyond a reasonable doubt.[30] Moreover, since the sentencing range is established by statute, a lesser standard of proof at sentencing cannot operate to extend the maximum sentence.[31] For example, once a defendant is convicted of a crime for which the maximum sentence is one hundred years, the defend-

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dard . . . ." 983 F.2d at 390. Although the court pointed out that a "high" increase in the offender's sentence is permissible, *id.* at 389, it is also noted that an "astronomical" increase might not be permissible if only supported by a preponderance of the evidence. *Id.* at 389-90. The court gave as an example of an "astronomical" increase, a change from 12 months to 210 months. *Id.* at 389.

26 McMillan v. Pennsylvania, 477 U.S. 79, 92 n.8 (1989) (holding that once convicted, defendant has no constitutionally protected liberty interest in period of potential incarceration) (citation omitted).

27 *See infra* notes 29-34, 54-62 and accompanying text (discussing effect of limited liberty interest on due process concerns).

28 *See infra* notes 35-47 and accompanying text (distinguishing sentencing hearing from hearings determined by Supreme Court to require clear and convincing evidence).

29 *See infra* text accompanying notes 30-34.

30 *In re* Winship, 397 U.S. 358 (1970).

31 U.S.S.G. § 5G1.1(a) (providing that Guideline sentence may not exceed statutorily authorized sentence); *see also* United States v. Lawrence, 708 F. Supp. 461, 463

ant's liberty interest in the one hundred years cannot be said to be the same as it was prior to the conviction.[32] Accordingly, the defendant may be given a sentence within that time period without the threat of being punished for a more serious crime than the one committed.[33] This is not to say that a convicted criminal has no liberty interest and is therefore not entitled to due process protection. Rather, the little constitutional protection retained by the defendant at the sentencing stage may be sufficiently safeguarded by requiring that proof of relevant conduct meet a preponderance standard.[34]

III. Due Process Implications

The constitutionality of a preponderance standard at sentencing is not inconsistent with the cases in which the Supreme Court has held that a preponderance standard does not satisfy due process.[35] The most commonly cited cases in support of adopting a clear and convincing standard are *Addington v. Texas*[36] and *Santosky v. Kramer*.[37] In *Addington*, the Supreme Court held that in attempting to commit an individual to a mental institution, the state must prove its case by clear and convincing evidence.[38] In

(D.P.R. 1989) (concluding that if sentence determined under Guidelines is greater than statutory maximum, latter controls).

32 *See, e.g.*, United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990). The defendant was convicted of interstate transportation of explosives. *Id.* at 1093-94. The statutory maximum sentence for the defendant's crime was 100 years. *Id.* at n.9.

33 McMillan v. Pennsylvania, 477 U.S. 79, 92 n.8 (1989) (recognizing elimination upon conviction of defendant's liberty interest in period of time that state was entitled to confine); Elizabeth Mertz, *The Burden of Proof And Academic Freedom: Protection for Institution or Individual?*, 82 Nw. U. L. Rev. 492, 501-03 (1988) (discussing manner in which criminal defendant's liberty interest relates to burden of proof at trial).

34 *Cf. infra* notes 38-45 and accompanying text (analyzing Supreme Court opinions addressing liberty interests and appropriate standard of proof).

35 *See, e.g.*, Adair, *supra* note 20, at 292 (citing Santosky v. Kramer, 455 U.S. 745 (1982); Addington v. Texas, 441 U.S. 418 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)). Adair points to three situations in which the Supreme Court required clear and convincing evidence: (1) where moral turpitude was in issue; (2) when the determination would result in commitment to a mental institution; and (3) in the determination of parental rights in a child custody case. *Id.* at 293; *see also* United States v. Restrepo, 946 F.2d 654, 663 (9th Cir. 1991) (Pregerson, J., dissenting) ("When the stakes are high, as they are when individuals stand to lose their freedom, we require a high degree of confidence that the disputed issues are determined reliably . . . . "), *cert. denied*, 112 S. Ct. 1564 (1992).

36 441 U.S. 418 (1979).

37 455 U.S. 745 (1982).

38 *Addington*, 441 U.S. at 431-33. In *Addington*, the appellant was indefinitely committed to a mental institution. *Id.* at 421. The Texas Supreme Court held that due

Santosky, the Court held that in order to remove a child from his natural parent, clear and convincing evidence was required.[39] A closer analysis of these cases demonstrates that these situations are not analogous to a sentencing hearing, and do not lend support to applying a clear and convincing standard at sentencing.[40]

A. No "Adjudication" at Sentencing

In *Santosky*, the Court held that in a parental rights termination hearing the parents' rights must be vigorously protected to prevent the "erroneous termination of their natural relationship."[41] The Court found that in the adjudication between the state and the parents, the clear and convincing standard fairly allocates the risks of erroneous fact-finding.[42]

Similarly, in *Addington*, the Supreme Court found that due to the importance of the adjudication—the determination of mental competence, a higher standard of proof was needed to insure the "correctness of factual conclusions."[43] It is asserted that there is

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process was satisfied as long as the State proved its case by a preponderance of the evidence. *Id.* at 422. On appeal, the Supreme Court held that in such a proceeding, clear and convincing evidence was required as a matter of due process. *Id.* at 431-33.

[39] *Santosky*, 455 U.S. at 747-48. In *Santosky*, the State of New York initiated a neglect proceeding against the Santoskys and eventually denied them custody of their children. *Id.* at 751. The State was only required to prove its case by a preponderance of the evidence. *Id.* The Santoskys challenged this standard on appeal, but the New York Court of Appeals dismissed the claim. *Id.* at 752. The United States Supreme Court granted certiorari and held that in such cases the state must establish its evidence by clear and convincing proof. *Id.* at 747-48. The Court reasoned that this standard was required because the state was severing appellants' fundamental liberty interest in raising their own children. *Id.* at 758-59. The Court also based its decision on the fact that until the parents are proven unfit, due process requires that they receive the benefit of the doubt, and any allocations of the risk of error should favor them. *Id.* at 760-61.

[40] *See infra* notes 41-47 and accompanying text. *But see* Adair, *supra* note 20, at 293 (comparing sentencing hearing to Supreme Court cases favorably in support of argument to adopt clear and convincing standard).

[41] *Santosky*, 455 U.S. at 760. The Court found that in order to prevent an "erroneous termination," the trial court must consider the parents' "vital interest." *Id.*

[42] *Id.* at 766.

[43] *Addington*, 441 U.S. at 423. The adjudication to which the Court was referring was the determination of whether an individual should be adjudicated insane and indefinitely committed to a mental institution. *Id.* at 425. The Court stated:

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated in-

no equivalent adjudication at sentencing. Rather, the important adjudication—the guilt of the defendant—is conducted at trial.[44] Since the essential adjudication has already been made at trial, later determinations made during sentencing do not require a higher "degree of confidence . . . in the correctness of factual conclusions."[45]

B. Stigma of a Criminal Conviction Not at Issue

In deciding to apply a clear and convincing standard in *Addington*, the Supreme Court also took into account the stigma and inference of moral turpitude which would be placed on the respondent as a result of the adjudication.[46] Although an undeniable stigma attaches to the criminal defendant upon conviction, it is suggested that the potential for additional stigma at the sentencing stage is slight, and thus need not be given much weight in determining the appropriate standard of proof.[47] Inasmuch as

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> stances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.

Id. at 426-27.

[44] *See* Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991) ("The central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . ." (citing Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)); Robert M. Grass, *Bifucated Jury Deliberations in Criminal Rico Trials*, 57 FORDHAM L. REV. 745, 750 (1989) (using capital punishment cases as examples of how guilt determination rendered at trial and in sentencing process are two separate proceedings); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1454 (1984) (describing function of criminal trial as determination of truth or falsity of charges).

[45] *Addington*, 441 U.S. at 423.

[46] *See id.* at 425-26. Central to its decision to apply a clear and convincing standard was the Court's concern about the adverse social consequences the individual would suffer by being labelled "insane." *Id.* The Court stated:

> Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

Id.; *see also* Adair, *supra* note 20, at 292 (noting that Supreme Court has applied clear and convincing standard in civil proceedings, such as libel action, where moral turpitude is implied) (citing Gertz v. Welch, 418 U.S. 323 (1974)).

[47] *See* Julie A. Lumpkin, Note, *The Standard of Proof Necessary To Establish That a Defendant Has Materially Breached a Plea Agreement*, 55 FORDHAM L. REV.

sentencing involves neither a significant adjudication nor a substantial stigmatization of the defendant, it is asserted that the Supreme Court rulings requiring a clear and convincing standard are inapplicable.

IV. BALANCING THE RISKS: CRIMINAL V. SOCIETY

The propriety of utilizing a standard of proof no greater than a preponderance at sentencing garners additional support upon consideration of societal interests. Among society's paramount penological interests are the punishment and deterrence of unlawful conduct.[48] However, these interests must be balanced against the liberty interest of the criminal defendant, and any risk of impairment to either of the competing interests must be allocated accordingly.[49] At the trial stage, the defendant's liberty interest outweighs the interests of society.[50] As a result, numerous procedural safeguards exist to protect the defendant;[51] for example, a criminal defendant is presumed innocent, and due process requires that such presumption can only be defeated by proof of guilt beyond a reasonable doubt.[52] These notions rest on the sound principle that it is better to set a guilty person free than it is to send an innocent person to prison; society will bear the risk of setting a guilty person free.[53] Once a criminal defendant is con-

1059, 1080 (1987) (observing that stigma attaches to criminal conviction and is not at issue during other hearings).

[48] *See, e.g.*, M. CHERIF BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 93-96 (1978).

[49] *Addington*, 441 U.S. at 425. The Court found that it was necessary to assess the interest of the individual and the state's interest in order to decide where to place any risk. *Id.*

[50] *In re* Winship, 397 U.S. 358, 372 (1970) ("In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

[51] *See, e.g., id.* (all elements of crime must be proven beyond reasonable doubt); Miranda v. Arizona, 384 U.S. 436 (1966) (involuntary confession may not be used against criminal defendant); Gideon v. Wainwright, 372 U.S. 335 (1963) (guaranteeing right to counsel to all alleged felony offenders); Mapp v. Ohio, 367 U.S. 643 (1961) (illegally seized evidence is inadmissible in criminal trial); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 93-95 (1992) (discussing various procedural protections given to defendants in criminal matters).

[52] *See Winship*, 397 U.S. at 368 (Harlan, J., concurring); *see also* Kathleen H. Musslewhite, Comment, *The Application of Collateral Estoppel In The Tax Fraud Context: Does It Meet the Requirement of Fairness and Equity?*, 33 AM. U. L. REV. 643, 662 (1984) ("Requiring a prosecutor to demonstrate the defendant's guilt beyond a reasonable doubt is one of the most important procedural protections in a criminal trial.").

[53] *See supra* note 50.

victed, however, these premises evaporate,[54] with the weight of society's interests increasing and resulting in the criminal defendant's assumption of a greater share of the risks. Since the defendant has already been adequately afforded due process of law and a compelling reason to give priority to the defendant's interests are absent, the interests of society should take precedence at the sentencing stage.

The Supreme Court's decision in *Santosky* lends support to this theory.[55] In *Santosky*, the Court recognized that there were two stages to a family court proceeding.[56] After a fact-finding stage, the hearing court must render a determination of parental fitness.[57] It is important to note that the Supreme Court found that once the fact-finding stage was complete, the balancing of the parties' interests was drastically changed.[58] Once the parent was determined to be unfit—analogous to a guilty verdict in a criminal

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54 *See infra* note 62 and accompanying text.

55 *Santosky*, 455 U.S. at 759-61.

56 *Id.* at 759-60. The Court found that there was a fact-finding stage followed by a dispositional stage and distinguished between the two. *Id.* The Court stated:

> The factfinding does not purport—and is not intended-to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. Fam. Ct. Act § 614.1.(d). The questions disputed and decided are what the State did—"made diligent efforts," § 614.1.(c)—and what the natural parents did not do—"maintain contact with or plan for the future of the child." § 614.1.(d). The State marshals an array of public resources to prove its case and disprove the parents' case. Victory by the State not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.
>
> At the factfinding, the state cannot presume that a child and his parents are adversaries. After the state has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge.

Id. (emphasis added).

57 *Id.* At this stage the court considers such factors as whether the natural parents have "maintain[ed] contact with or plan[ned] for the future of the child." *Id.* at 760. This phase of the proceeding "entails a judicial determination that the parents are unfit to raise their own children." *Id.*

58 *See id.* at 760-61 ("After the State has established parental unfitness at [the] initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge." (emphasis added)).

trial—the interests of the child and the foster parents were given greater weight than the interest of the unfit parent.[59]

With respect to societal interests, society is unduly burdened when a convicted criminal is set free without first having served an appropriate sentence.[60] An appropriate and effective method of preventing this undesirable circumstance is to lessen the standard of proof at sentencing to a preponderence, which enhances society's position compared with that at trial by equally balancing the interests of each party.[61] This theory comports with the principle that, once convicted, the criminal is entitled to "less process."[62] Thus, it is submitted that applying a preponderance standard when considering "relevant conduct" at sentencing strikes an appropriate balance between the level of protection due process requires for the convicted criminal and society's interest in punishing and deterring criminal conduct.

V. *McMillan*'s Applicability to the Federal Sentencing Guidelines

To further support the application of a preponderance standard, it is necessary to examine the Supreme Court's only decision which directly addressed this issue. In *McMillan v. Pennsylvania*,[63] the Supreme Court approved Pennsylvania's sentencing statute[64] which required that sentencing factors be proven by

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[59] *Id.* ("[The] judge shall make his order 'solely on the basis of the best interests of the child,' and thus has no obligation to consider the natural parents' rights in selecting dispositional alternatives.").

[60] Bassiouni, *supra* note 48, at 96-97.

[61] *See* United States v. Fatico, 458 F. Supp. 388, 402-11 (E.D.N.Y. 1978) (discussing extensively different standards of proof), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). Judge Weinstein explains that when a preponderance standard is used, the parties share the risk of error equally. *Id.* at 402-03.

[62] United States v. Mobley, 956 F.2d 450, 455 (3d Cir. 1992). "At the sentencing stage, however, a convicted criminal is entitled to less process than a presumptively innocent accused." *Id.* (citing *McMillan*, 477 U.S. at 79). The court went on to state that " 'sentencing courts have always operated without constitutionally imposed burdens of proof' when considering the appropriate sentence." *Id.* (citing *McMillan*, 477 U.S. at 92).

[63] 477 U.S. 79 (1988).

[64] *Id.*; 42 Pa. Cons. Stat. § 9712 (1982). Section 9712 provides in pertinent part:

> (a) Mandatory sentence. - Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault . . . or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commis-

a preponderance of the evidence.[65] Although decided prior to the enactment of the Guidelines, *McMillan* set forth the constitutional standards a sentencing guidelines statute must meet, and indicated the boundary at which such statutes may be unconstitutional.[66]

In *McMillan*, the Supreme Court found that a sentencing guideline statute would be constitutionally permissible as long as it did not allow sentencing factors to become additional elements of the crime.[67] At issue was a sentencing provision which made visible possession of a weapon an important sentencing factor for several different felonies.[68] Under the Pennsylvania guidelines, if the state could prove visible possession of a weapon beyond a preponderance of the evidence, the trial judge was required to sentence the convicted defendant to a minimum of five years.[69] Several defendants challenged the provision as violative of due process.[70] They argued that, in effect, the guidelines made visible possession of a weapon an element of each of the crimes enumerated in the statute without requiring the state to prove visible possession beyond a reasonable doubt.[71] The Court disagreed.[72]

> sion of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

Id.

65 *See McMillan*, 477 U.S. at 92-93. In *McMillan*, the defendant was convicted of aggravated assault after shooting the victim in the right buttock. *Id.* at 82. McMillan was sentenced to a term of three to ten years. *Id.* at 82 n.2. The state proceeded under § 9712 and introduced evidence of the visible possession of a firearm. *Id.* at 82-83. The trial court, however, declared the statute unconstitutional. *Id.* The Commonwealth appealed, and the Supreme Court of Pennsylvania overruled the trial court, finding the statute to be consistent with due process. *Id.* On appeal to the Supreme Court, McMillan argued that § 9712 violated the Due Process Clause of the Fourteenth Amendment because it made visible possession an element of each of the enumerated crimes without requiring the state to prove the visible possession beyond a reasonable doubt. *Id.* at 84. The Supreme Court rejected this argument and found the provision constitutional. *Id.* at 91. Central to the Court's decision was the finding that the statute did not redefine any elements of the crime as sentencing factors. *Id.* at 89-90.

66 *Id.* at 79.

67 *Id.* at 89. After noting that the Pennsylvania statute did not "evade the commands of *Winship*," the Court stated: "The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor . . . ." *Id.* at 89-90.

68 *Id.* at 81-82.

69 *Id.* at 81.

70 *McMillan*, 477 U.S. at 83.

71 *Id.* at 83-84.

First, the Court held that there was no evidence that the state legislature intended to make visible possession of a weapon an element of each of the enumerated crimes.[73] Rather, the legislature intended to limit the discretion of the trial judge at sentencing if visible possession could be proven in connection with the crime.[74] Importantly, the Court noted that a determination of visible possession would never allow a sentencing judge to order a sentence beyond the maximum number of years allowed by the statute.[75] Rather, such a determination would only deprive the judge of the discretion to give less than a five year sentence.[76] These factors were crucial to the Court's finding that the Pennsylvania guidelines gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense."[77] Thus, visible possession of a weapon could be treated as a sentencing consideration, rather than an element of a particular offense, because the guidelines did not give the state "unbridled power to redefine crimes to the detriment of criminal defendants."[78]

The defendants also argued that even if visible possession was found not to be an element of the enumerated crimes, due process required that visible possession be proven at sentencing by clear and convincing evidence.[79] The Court had "little difficulty concluding that . . . the preponderance standard satisfies due process,"[80] noting that sentencing courts have traditionally made determinations from evidence presented "without any prescribed burden of proof at all"[81] and that there was nothing in the statute to "warrant constitutionalizing burdens of proof at sentencing."[82]

A preponderence standard as the appropriate burden of proof at sentencing under the Guidelines is consistent with the Court's dictate in *McMillan*. The Court concluded that "once the reasonable doubt standard has been applied to obtain a valid conviction," the criminal defendant's due process rights were not impaired by

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[72] *Id.* at 84-86.
[73] *Id.* at 86-87.
[74] *Id.* at 88.
[75] *McMillan*, 477 U.S. at 88 n.4.
[76] *Id.*
[77] *Id.* at 88.
[78] *Id.* at 86.
[79] *Id.* at 91.
[80] *McMillan*, 477 U.S. at 91.
[81] *Id.*
[82] *Id.* at 92.

a lesser standard of proof at sentencing.[83] *McMillan* made clear that, as a general rule, sentencing courts may hear evidence and find facts "without any prescribed burden of proof at all."[84] Therefore, application of a preponderance standard does not offend due process. This standard will thus achieve the primary goal of the Guidelines—uniformity in federal sentencing.[85]

CONCLUSION

Based on the presumption of innocence, our society has established stringent rules which protect the rights of criminal defendants. Proponents of a clear and convincing standard at sentencing essentially argue that some of the numerous and extensive rights afforded to accused criminals should be extended to convicted criminals. Neither the Constitution nor Supreme Court precedent give a convicted criminal the right to a heightened standard of proof at sentencing. To adopt such a standard would only serve to place the rights of criminal convicts above those of society as a whole, a result which is neither constitutionally justified nor morally required.

Daniel J. Lyons

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[83] *Id.* at 92 n.8.
[84] *Id.* at 91.
[85] *See supra* note 2.