

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

October 11, 1990

ROBERT BOOCHEVER
CIRCUIT JUDGE
125 S. GRAND AVE
P.O. Box 91510
PASADENA, CA 91109-1510

(818) 405-7200
FTS 961-7200

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D. C. 20004

Dear Judge Wilkins:

Receipt is acknowledged of your letter of September 7, 1990, requesting my thoughts on guideline sections or policy statements that I believe need review, amendment or clarification.

One troublesome issue is the standard of proof required for uncharged conduct affecting a sentence under the guidelines. In McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986), a pre-guideline case, the Supreme Court held that a preponderance of the evidence standard satisfied due process for the post-conviction determination by a state judge that a firearm was used in commission of a crime, resulting in imposition of a mandatory sentence. McMillan did not deal with guideline sentencing, nor did it address the appropriate federal standard. Nevertheless, all courts of appeals considering this issue under the guidelines, many explicitly relying on McMillan, have used a preponderance of the evidence standard. See United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990); United States v. Frederick, 897 F.2d 490, 492 (10th Cir. 1990); United States v. Alston, 895 F.2d 1362, 1372-73 (11th Cir. 1990); United States v. Gooden, 892 F.2d 725, 727-28 (8th Cir. 1989); United States v. Silverman, 889 F.2d 1531, 1535 (6th Cir. 1989); United States v. White, 888 F.2d 490, 499 (7th Cir. 1989); United States v. McDowell, 888 F.2d 285, 290-91 (3d Cir. 1989); United States v. Guerra, 888 F.2d 247, 251 (2d Cir. 1989); United States v. Urrego-Linares, 879 F.2d 1234, 1237 (4th Cir.), cert. denied, 110 S. Ct. 346 (1989); United States v. Wright, 873 F.2d 437, 441-42 (1st Cir. 1989).

Despite this substantial authority, I believe that "clear and convincing evidence" is more appropriate in view of the serious consequences of the findings. McMillan should not control the appropriate federal standard given the significant differences between pre- and post-guideline sentencing. Accordingly, I suggest the Commission amend the guidelines by specifying a standard of proof. As an example:

Standard of Proof for Uncharged Conduct Relied upon to Enhance a Sentence

"Clear and convincing evidence" shall be the standard of proof for uncharged conduct relied upon to upwardly adjust, upwardly depart or otherwise enhance a sentence.

If the Commission prefers the "preponderance of the evidence" standard, the standard should be defined in the guideline. In the cases cited above, there is scant consideration of the definition of "preponderance of the evidence." Specifically, I recommend adopting one of the more rigorous formulations of the standard:

Standard of Proof for Uncharged Conduct Relied upon to Enhance a Sentence

"Preponderance of the evidence" shall be the standard of proof for uncharged conduct relied upon to upwardly adjust, upwardly depart or otherwise enhance a sentence.

"Preponderance of the evidence" when used in this context shall be evidence of sufficient weight to convince a reasonable person of the probable existence of the fact relied upon to increase the sentence.

This matter was addressed in United States v. Restrepo, 903 F.2d 648 (9th Cir. 1990), an opinion authored by me, which has had the mandate recalled pending consideration by an en banc court. The en banc court apparently will consider an appropriate definition of "preponderance of the evidence" as well as the possibility of applying a higher standard of proof such as "clear and convincing evidence," or "beyond a reasonable doubt."

The reasoning of the en banc panel may well give guidance in this important matter, but in any event, I believe it would be helpful if the Commission spelled out the appropriate standard and definition of that standard.

Sincerely yours,


Robert Boochever