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Guidelines for Guidelines: Implications of the Confrontation Clause's Revival for Federal Sentencing, 48 J. Marshall L. Rev. 1039 (2015)

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**GUIDELINES FOR GUIDELINES:
IMPLICATIONS OF THE
CONFRONTATION CLAUSE’S REVIVAL
FOR FEDERAL SENTENCING**

SOPEN B. SHAH*

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ABSTRACT

Scholars and commentators heavily criticize the current federal sentencing system for over-incarceration, racial disparities in outcomes, and a lack of procedural protections for criminal defendants. This Article focuses on a procedural protection recently revived by the Supreme Court's 2004 decision in *Crawford v. Washington*: the Confrontation Clause of the Sixth Amendment. Though *Crawford* only addressed the Clause's application during trial, the case and its reasoning have important implications for today's federal sentencing regime under the Federal Sentencing Guidelines.

Though the Supreme Court has yet to directly address the issue, I argue that lower courts incorrectly interpret an old, pre-*Crawford* case to read the confrontation right out of federal sentencing. Given the underlying philosophy, goals, and process of sentencing today, the argument to apply confrontation rights has never been stronger. Using never-before-reported U.S. Sentencing Commission data and federal sentencing transcripts, I show that important facts in Pre-Sentence Reports ("PSRs") are routinely disputed and inadequately resolved during sentencing. My analysis also reveals a meaningful lack of uniformity among federal districts and judges—a common theme in sentencing scholarship—in their willingness to change findings of fact in PSRs that impact defendants' final sentences.

I propose a workable solution to satisfy constitutional confrontation rights at federal sentencing. Specifically, confrontation rights should apply when: (a) a defendant disputes a fact in the PSR after pleading or conviction; (b) the fact is related to a possible significant upward enhancement from the base offense level (not just an upward departure from the statutory maximum); and (c) a testimonial statement is the primary source of that fact.

This effort is a small step toward ensuring the Constitution does not abandon defendants when they need it most.

I. INTRODUCTION

"It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."¹

The reality of federal sentencing surprises many who are exposed to the United States' criminal justice system for the first time. Though the stage and cast are largely the same as the trial's,

* Yale Law School, J.D. 2015; Harvard University, A.B. 2008. Professor Denny Curtis, Professor Sarah Russell, and Judge Sidney Stein of the Southern District of New York taught the excellent seminar that inspired this Article. I am grateful for their guidance and feedback. Thank you to Adam Bolotin, Elizabeth Foubert, and the dedicated editors of the *John Marshall Law Review* for their insightful comments and suggestions. I am also thankful to my parents for their unfailing support.

¹ *Acts* 25:19.

the atmosphere is often markedly different. After a highly structured adversarial proceeding governed by a slew of evidentiary rules and well-known constitutional restrictions, sentencing feels somewhat anticlimactic. Without witnesses or objections, and often no jury, the proceeding appears a mere skeleton of its predecessor. A judge reads, often verbatim, from a long document with different phrases and numbers filled in, meant to communicate to the defendant what his next months or years will look like and how, if at all, he can change that.

The legal reality matches the intuition. Many of the rights and procedural protections that defendants are afforded at trial do not carry over into sentencing. This is counterintuitive, because much of the U.S. criminal justice system's "action" occurs at federal sentencing. Given the wide ranges of possible imprisonment, supervised release, community service, and fines that Congress has assigned to each offense, sentencing can be as important as the trial itself. For example, let us say defendants *X* and *Y* are convicted by jury for the very same offense: selling three grams of cocaine to an undercover agent. Defendant *X* could be sentenced to 10 months and defendant *Y* could receive a life sentence, depending on, *inter alia*, the size and nature of the criminal enterprise that sale was a part of, the actions of other individuals involved, and the defendant's prior documented convictions. Under the "relevant conduct" provisions of United States Sentencing Guideline ("U.S.S.G.") § 1B1.3, a defendant can be sentenced for a drug amount greater than that charged in the indictment. For example, defendant *Y* could be held accountable for drugs sold, manufactured, or imported by other people if his three-gram sale was part of "jointly undertaken criminal activity."²

Such divergent outcomes result from information contained in Pre-Sentence Investigation Reports ("PSRs"), prepared and provided to the court by U.S. probation officers. These documents can incorporate facts not charged in the indictment nor proven at trial into the narrative of the crime: drug quantities in narcotics cases (including hypothetical amounts never seized by law enforcement); contact offenses in child pornography cases; loss amounts in fraud cases; and possession of a weapon. The PSRs also allow for enhanced penalties for obstruction of justice, the defendant's significant role in the criminal enterprise, and his or her coconspirators' acts in almost any type of case.³ Though no aggregate statistic for the total percentage of defendants who

² U.S. SENTENCING GUIDELINES MANUAL 27-28 (2014) [hereinafter SENTENCING GUIDELINES] (providing illustrative examples).

³ This information was collected from a conversation with Professor Fiona Doherty, based upon her experience as a public defender. Interview with Fiona Doherty, Professor, Yale Law School, in New Haven, CT (Apr. 1, 2014). It also comes from my personal experience as an intern with the U.S. Attorney's Office for the Eastern District of New York in the summer of 2013.

receive U.S.S.G. adjustments or enhancements is readily available, a May 2007 U.S. Sentencing Commission report indicated that 16.5 percent of drug defendants receive a weapons enhancement and approximately 10 percent receive an “aggravating role” adjustment.⁴ These figures are not insignificant.

Scholars and commentators have heavily criticized the current federal sentencing system for over-incarceration, racial disparities in outcomes, and a lack of procedural protections for criminal defendants. This Article focuses on a procedural protection recently revived by the Supreme Court’s 2004 decision in *Crawford v. Washington*: the Confrontation Clause of the Sixth Amendment.⁵ Though *Crawford* addressed the Clause’s application during trial, the case and its reasoning have important implications for today’s federal sentencing regime.

In this Article, I argue that lower courts incorrectly interpret an old, pre-*Crawford* case to read the confrontation right out of federal sentencing. That case, *Williams v. New York*,⁶ stands on faulty reasoning that has been partially discredited and contradicted by the Supreme Court’s subsequent jurisprudence. In my view, the Court’s reasoning in *Crawford* and other Sixth Amendment cases cast further doubt on the assertion that the Supreme Court would rule against a confrontation right at sentencing. Given the underlying philosophy, goals, and current practices around sentencing, including widespread plea bargaining, the argument to apply confrontation rights at sentencing has never been stronger.

A quantitative analysis of U.S. Sentencing Commission data indicates that sentencing courts change findings of fact in PSRs 16 percent of the time, often enough for that process to warrant attention but not so often that added protections would necessarily overwhelm the U.S. federal court system.⁷ It further revealed that federal districts vary significantly in their propensities to change findings of fact in PSRs. This suggests a troubling lack of uniformity—a problem that has plagued sentencing courts for decades. In addition, a qualitative analysis of a sample of sentencing hearing transcripts from one federal district illustrates that (1) “half-baked” PSRs sometimes end up in front of the court, (2) disputed facts can have a significant impact on a defendant’s final sentence, and (3) though some witnesses and victims testify during sentencings (in what I call “*Fatico*-light” hearings), important individuals are omitted and significant uncertainty

⁴ U.S. SENTENCING COMM’N, REPORT ON COCAINE AND FEDERAL SENTENCING POLICY, available at www.ussc.gov/report-cocaine-and-federal-sentencing-policy-3 (last visited May 14, 2014).

⁵ 541 U.S. 36 (2004).

⁶ 337 U.S. 241 (1949).

⁷ See *infra* Part V.A.

remains about many alleged “facts.”

I then argue for a change to the status quo and propose a workable solution to satisfy confrontation rights at federal sentencing.

II. HOW FEDERAL SENTENCING WORKS TODAY

The Guidelines set rules for calculating a penalty based upon particular facts found at sentencing about the defendant’s crime at hand and his or her criminal history.⁸ Though they are now effectively advisory,⁹ not mandatory, the Guidelines still have an important impact on federal sentences. The Supreme Court held that courts must begin sentencing by correctly calculating the appropriate Guidelines range,¹⁰ and 80.7 percent of the final sentences were either within or below range (pursuant to a government motion for the defendant’s cooperation) from 2008 to 2011.¹¹

According to U.S.S.G. § 1B1.1, the crime the defendant was convicted for or pleads to sets the “base offense level.”¹² It is then adjusted to reflect such factors as the harm to the victim, the defendant’s role in the offense, and crime-specific factors (e.g., whether the defendant possessed a dangerous weapon during a drug-related crime).¹³ These criteria fall under “relevant conduct,” a provision of the Guidelines that requires the judge to add up the base offense levels for all “related” acts proven at sentencing.¹⁴ The “adjusted offense level” can include acts for which the defendant has never been convicted or even those over which the court lacks jurisdiction.¹⁵ The adjusted offense level is then combined with a score assigned to the defendant’s criminal history¹⁶ on the Guidelines’ grid to produce a sentencing range.¹⁷ The judge can pick

⁸ The two major factors that determine a defendant’s sentence are the “offense level” and “criminal history category.” SENTENCING GUIDELINES, *supra* note 2, at 1.

⁹ See *U.S. v. Booker*, 543 U.S. 220, 245 (2005) (“It requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well.”).

¹⁰ *Gall v. United States*, 552 U.S. 38, 50 (2007); *Rita v. United States*, 551 U.S. 338, 351 (2007).

¹¹ The aggregate statistic masks the fact that some circuits hew much more closely to the Guidelines ranges, and there is significant variation by type of federal offense as well. U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2012), available at www.ussc.gov/news/congressional-testimony-and-reports/booker-reports/report-continuing-impact-united-states-v-booker-federal-sentencing.

¹² SENTENCING GUIDELINES, *supra* note 2, at 16.

¹³ *Id.*

¹⁴ *Id.* at 18.

¹⁵ *Id.* at 33.

¹⁶ *Id.* at 374-98.

¹⁷ *Id.* at 399.

a sentence that falls within the range or depart from it entirely if certain aggravating or mitigating factors exist.¹⁸

The main source of information at sentencing is the PSR, prepared by a U.S. probation officer as required by statute. For this report, the officer conducts an independent investigation to create a single version of the offense and the defendant's criminal history. Sources typically include prosecutorial files, law enforcement materials, and interviews, including with the defendant. The defendant must be given the opportunity to comment on and challenge information in the PSR, but the Guidelines do not provide specific requirements or guidance on process.¹⁹ When the two parties disagree, a disputed fact results. The Guidelines encourage resolution of any facts in dispute before sentencing. The court must find any remaining unresolved facts at sentencing, unless the judge determines the "matter will not affect" the sentence or "the court will not consider the matter in sentencing."²⁰ The Guidelines, despite acknowledging the need for "more formality"²¹ than the old regime, do not specify any procedures for finding these facts. The court can choose to hold an evidentiary hearing to resolve a disputed issue, but that decision is highly discretionary.²²

The option to hold these evidentiary hearings was included in the same Sentencing Reform Act of 1984 ("SRA") that created the U.S. Sentencing Commission. But the hearings first became a somewhat common practice throughout the Second Circuit and beyond after a 1977 case.²³ David Fatico, a defendant who pled guilty to one count of receiving stolen goods in interstate commerce, stood for sentencing before Judge Harvey Weinstein.²⁴ The government wanted to call an FBI witness at sentencing to prove that Fatico was a member of the Gambino crime family, a "material fact" under existing law.²⁵ Judge Weinstein held that this was a new allegation and prevented the government from calling the agent.²⁶ "In this sentencing hearing the court cannot rely upon the critical information of an undisclosed informant given by an F.B.I. agent who is not subject to meaningful cross-examination," he stated.²⁷

¹⁸ *Id.* at 457.

¹⁹ *Id.* at 476. *See also* Fed. R. Crim. P. 32(i).

²⁰ Fed. R. Crim. P. 32(i)(3)(b).

²¹ U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (2004). This portion was later deleted by amendment.

²² SENTENCING GUIDELINES, *supra* note 2, at 477.

²³ *See* Kate Stith, *Weinstein on Sentencing*, 24 FED. SENTENCING REP. 214, 214 (2012) (analyzing *United States v. Fatico*, 441 F. Supp. 1285, 1287 (E.D.N.Y. 1977) and its role in sentencing before the U.S. Sentencing Commission was created).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *United States v. Fatico*, 441 F. Supp. 1285, 1299 (E.D.N.Y. 1977).

The Second Circuit disagreed.²⁸ At the new hearing on remand, the government produced 10 witnesses to attest to that fact. Judge Weinstein found the government had met their burden of proof and sentenced Fatico on that basis. When Fatico appealed, the Second Circuit held that Judge Weinstein did not abuse his discretion in holding such a hearing, though judges were not required to do so.²⁹ The SRA incorporated this holding, and Courts of Appeals have repeatedly upheld sentencing courts' decisions not to hold evidentiary hearings because defendants only made "conclusory" or "rhetorical allegations," the contested facts were "immaterial," the PSR contained enough information to side with the prosecution on the contested fact, or the defendant did not present enough information to show the information's unreliability.³⁰

Even if the court chooses to call a *Fatico* hearing, the quality of evidence is very loosely controlled, as discussed *infra* Part V.C. The Guidelines do not require confrontation. Defendants have no absolute right to call witnesses, including government sources or informants, or demand their attendance. In fact, defendants often do not know the identity of sources for the PSR. The government is responsible for proving the reliability of the allegations in the PSR, but can use almost any type of corroborating evidence. Any relevant information with "sufficient indicia of reliability to support its probable accuracy" can be considered.³¹ Some courts only require "some minimal indicium of reliability beyond mere allegation," as in *United States v. Beaulieu*.³² Effectively, the defendant has the burden of demonstrating the unreliability of hearsay.

III. THE CASE LAW ON THE SIXTH AMENDMENT CONFRONTATION RIGHT

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."³³

A. *At Sentencing*

The application of the Confrontation Clause to sentencing proceedings is, at best, unsettled. Even before the Supreme Court's

²⁸ *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978) (ordering the lower court to allow the government to present its witness).

²⁹ *United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). Similarly-styled hearings are now referred to as *Fatico* hearings.

³⁰ *Sentencing Guidelines*, 42 GEO. L.J. ANN. REV. CRIM. PROC. 733, 786-88 (2013).

³¹ SENTENCING GUIDELINES, *supra* note 2, at 476. This is an important test, as we will see later during an analysis of the case law and *Crawford* in particular.

³² 893 F.2d 1177, 1181 (10th Cir. 1990).

³³ U.S. CONST. amend. VI.

revolutionary decision in *Crawford v. Washington*,³⁴ scholars said courts analyzed the issue inadequately, piecemeal, and at best, fragmentarily.³⁵ No Supreme Court decision directly addresses the Sixth Amendment right of confrontation at sentencing proceedings. Nor has the Supreme Court directly confronted the question of whether sentencing is encompassed within the Sixth Amendment's reference to "all criminal prosecutions." Some of the Sixth Amendment's enumerated rights are in play at sentencing (right to counsel), some are out of play (right to a jury), and "everything else" remains unclear.³⁶

Without clear guidance, lower courts are all over the map. The Courts of Appeal are unanimous in holding that the Clause does not apply during noncapital sentencing, but they are less united in regard to capital sentencing. For example, the Eleventh Circuit in 1982 held that the Confrontation Clause applied during capital sentencing in *Proffitt v. Wainwright*,³⁷ but held in *United States v. Cantellano* that the same right does not apply at non-capital sentencing, noting that the right to confrontation "was a trial right."³⁸ So why is capital sentencing a trial but non-capital sentencing is not? The Eighth Circuit struggled with this very question, reversing itself *en banc* after first determining that the Confrontation Clause prevented the use of a probation officer's hearsay testimony to support the finding of a leadership enhancement under the Guidelines.³⁹ The Seventh Circuit held in 2002 that confrontation rights were not implicated in sentencing, even in capital cases.⁴⁰ The Fifth Circuit, in *United States v. Fields*, rejected the post-*Crawford* application of confrontation rights at a capital sentencing.⁴¹ Courts even comment on the confusion in their own opinions.⁴² After the Sixth Amendment was incorporated to the

³⁴ 541 U.S. 36 (2004).

³⁵ John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1969 (2005).

³⁶ *Id.* at 1970-71.

³⁷ 685 F.2d 1227, 1257 (11th Cir. 1982).

³⁸ 430 F.3d 1142, 1146 (11th Cir. 2005).

³⁹ *United States v. Fortier*, 911 F.2d 100, 103 (8th Cir. 1990) (applying confrontation right even to noncapital sentencing under Federal Sentencing Guidelines), overruled by *United States v. Wise*, 976 F.2d 393, 401 (8th Cir. 1992) (*en banc*).

⁴⁰ *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (holding that the Confrontation Clause "applies through the finding of guilt, but not to sentencing, even when that sentence is the death penalty") (internal citations omitted).

⁴¹ 483 F.3d 313, 337-38 (5th Cir. 2007).

⁴² *See United States v. Higgs*, 353 F.3d 281, 324 (4th Cir. 2003) ("It is far from clear that the Confrontation Clause applies to a capital sentencing proceeding."); *see also United States v. Kikumura*, 918 F.2d 1084, 1103 n.19 (3d Cir. 1990) ("We hope . . . that the Supreme Court in the near future will decide whether confrontation clause principles are applicable at sentencing hearings . . .").

states in 1965 through *Pointer v. Texas*,⁴³ some state courts applied the confrontation right to sentencing, though a majority of those that have ruled reject it.⁴⁴

Many courts rejecting the right of confrontation at sentencing rely on the most “recent” Supreme Court case related to this question: *Williams v. New York*,⁴⁵ decided in 1949. A jury convicted defendant Williams of murder in the first degree. They recommended life imprisonment, but the judge sentenced him to death, citing information from the Probation Department, a statutorily-required pre-sentence investigation report, and other sources.⁴⁶ Specifically, the “material facts concerning appellant’s background which . . . could not properly have been brought to the attention of the jury in its consideration of the question of guilt” included about thirty other burglaries in the same vicinity and evidence of the defendant/appellant’s “morbid sexuality.”⁴⁷ Notably, Williams challenged this ruling using the Fourteenth Amendment’s guarantee of due process, and the Court’s opinion did not once mention the Sixth Amendment. The Court held that Williams was not denied due process of law. It stated that judges’ “intelligent imposition of sentences” required the “fullest information possible concerning the defendant’s life and characteristics,” and much of that “would be unavailable if it were restricted to that given in open court by witnesses subject to cross-examination”⁴⁸ or confrontation. The Court noted that “[m]odern concepts individualizing punishment made it all the more necessary that a sentencing judge not be denied . . . pertinent information . . . by rigid adherence to restrictive rules of evidence properly applicable to the trial.”⁴⁹

B. *At Trial*

The Supreme Court brought the Confrontation Clause to the forefront in *Crawford*, a revolutionary case involving confrontation rights during the guilt phase of trial.⁵⁰ Defendant Crawford was on trial for assault and attempted murder.⁵¹ The prosecution used his wife’s tape-recorded statement to police against him, though she was unavailable to testify.⁵² In a ruling that sent shock waves

⁴³ 380 U.S. 400 (1965).

⁴⁴ This fact is cited in *State v. Hurt*, 702 S.E.2d 82, 87 (N.C. Ct. App. 2010).

⁴⁵ *Williams*, 337 U.S. 241.

⁴⁶ *Id.* at 244-45.

⁴⁷ *Id.*

⁴⁸ *Id.* at 250.

⁴⁹ *Id.* at 247. The characterization of the *Williams* opinion not being based on Sixth Amendment confrontation issues is found in *Vankirk v. State*, 385 S.W.3d 144, 149 (Ark. 2011).

⁵⁰ *See generally Crawford*, 541 U.S. 36.

⁵¹ *Id.* at 40.

⁵² *Id.* Mrs. Crawford did not testify because she invoked marital privilege.

through the legal community, the Supreme Court held on appeal that the trial court unconstitutionally admitted her statement.⁵³ It was “testimonial,” the Court said, and therefore implicated the confrontation right. Because Crawford could not cross-examine her, the statement was inadmissible. A testimonial statement includes, *inter alia*,

ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.⁵⁴

Before *Crawford*, *Ohio v. Roberts* determined the standard for admissibility.⁵⁵ Adverse evidence was admissible without providing opportunity for cross-examination as long as the prosecution showed (a) the witness was unavailable and (b) the evidence bore “indicia of reliability,” either through a firmly rooted hearsay exception or “bearing particularized guarantees of trustworthiness.”⁵⁶ The underlying rationale of the Confrontation Clause, the *Roberts* Court said, was to test the reliability of adverse evidence, a “value” “similar” to the hearsay evidentiary rules. *Roberts*’ holding essentially eliminated a defendant’s separate right of confrontation.

But *Crawford* invalidated the substitution of the two-prong test above for the guarantees of the Confrontation Clause. The Sixth Amendment, said the Court, now “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”⁵⁷ *Crawford* had significant implications. Subsequent Court decisions held that though a laboratory analyst who produced a report used by the prosecution was not a “conventional witness,” that person was still providing testimony against the defendant and must be produced in court.⁵⁸ As Justice Scalia stated for the majority, the Sixth Amendment “contemplates two classes of witnesses—those against the defendant and those in his favor. . . . [T]here is not a third

Such privilege does not extend to statements made out of court. *Id.* (citing *State v. Burden*, 120 Wash. 2d 371, 377 (1992)).

⁵³ *Crawford*, 541 U.S. at 68.

⁵⁴ *Id.* at 51-52 (internal citations and quotations omitted).

⁵⁵ 448 U.S. 56 (1980).

⁵⁶ *Id.* at 65-67.

⁵⁷ 541 U.S. at 61.

⁵⁸ *Melendez-Diaz v. Mass.*, 557 U.S. 305, 324-25 (2009).

category of witness, helpful to the prosecution, but somehow immune from confrontation.”⁵⁹ Again, though these recent Confrontation Clause rulings applied to the trial phase of criminal prosecutions, the Court’s language and reasoning around the Sixth Amendment has important implications for federal sentencing today.

Indeed, some state courts have already relied upon *Crawford* to apply confrontation rights at sentencing. In *Vankirk v. State*, the Arkansas Supreme Court ruled that a videotape of a police investigator questioning a rape victim who did not appear at the hearing was inadmissible at a non-capital jury sentencing.⁶⁰ The court held that the tape was testimonial under *Crawford* and therefore subject to the confrontation mandate.⁶¹ The court noted that what we know today as sentencing used to be a part of trial; the bifurcation of trials into a finding of guilt or innocence and “further proceedings . . . ‘differ[ed] considerably from the prior conduct of trials where the jury assessed both guilt and sentence during one proceeding.’”⁶² And the court was unpersuaded by the distinction between non-capital and capital sentencing. It relied in part upon a federal district court capital sentencing case, *United States v. Mills*,⁶³ even though *Vankirk* itself did not involve the death penalty.⁶⁴

Minnesota also applied the Confrontation Clause during sentencing in *State v. Rodriguez*.⁶⁵ The defendant pled guilty to a drug-related conspiracy and was sentenced above the state’s statutory range for the crime based upon additional characteristics: that there were three or more participants, a juvenile was present, and that it was a “major controlled substance offense.”⁶⁶ The Minnesota Supreme Court held that the confrontation right of the Sixth Amendment applied during jury sentencing,⁶⁷ relying upon *Apprendi v. New Jersey*,⁶⁸ *Blakely v. Washington*,⁶⁹ and *Crawford*. In *Apprendi*, the U.S. Supreme Court held that any fact leading to a sentence longer than the Guideline’s statutory maximum must be found by a jury beyond a reasonable doubt.⁷⁰ *Blakely* reversed a Washington court’s sentence that was higher than the state’s mandatory guidelines range because it was based on facts not

⁵⁹ *Id.* at 313-14.

⁶⁰ 385 S.W.3d at 146. Vankirk pled guilty and chose to be sentenced by jury.
Id.

⁶¹ *Id.* at 148.

⁶² *Id.* at 149.

⁶³ 446 F. Supp. 2d 1115 (C.D. Cal. 2006).

⁶⁴ 385 S.W.3d at 150.

⁶⁵ 754 N.W.2d 672, 680 (Minn. 2008).

⁶⁶ *Id.* at 675, 676-77.

⁶⁷ *Id.* at 680.

⁶⁸ 530 U.S. 466 (2000).

⁶⁹ 542 U.S. 296 (2004).

⁷⁰ *Apprendi*, 530 U.S. at 490.

admitted to by the defendant nor found by a jury.⁷¹ Though the *Blakely* Court explicitly excluded the federal Guidelines from its analysis,⁷² it was a harbinger of the following term's *Booker* decision, which made the Guidelines advisory instead of mandatory.⁷³ The *Rodriguez* court stressed that U.S. Supreme Court jurisprudence established that any facts used to increase a sentence above the Guidelines range must be found by a jury.⁷⁴ Because jury sentencing is essentially a trial, and "the right of cross-examination guaranteed by the Confrontation Clause is a core component of the right to a jury trial,"⁷⁵ the Sixth Amendment must apply.

Unfortunately, other state courts disagree. For example, the Arizona Supreme Court in *State v. McGill* ruled that the Confrontation Clause does not apply to sentencing.⁷⁶ The court, echoing *Williams*, argued that the penalty phase of trial is not a criminal prosecution, "historical practices" support the use of out-of-court statements in sentencing,⁷⁷ and there is a practical need for the sentencing body to have complete information.

IV. THIS PROJECT'S FIT WITH CURRENT SCHOLARSHIP

Though *Crawford's* revival of the Confrontation Clause inspired an industry's worth of scholarship, nearly all of it focuses on its application to hearsay at trial (e.g., dying declarations),⁷⁸ whether a witness is accusatory or giving testimonial statements (e.g., computer programmers revealing findings on a defendant's computer, forensic analysts presenting test results),⁷⁹ and its impact on domestic violence cases.⁸⁰ Recent sentencing scholarship

⁷¹ *Blakely*, 542 U.S. at 303-05.

⁷² *Id.* at 305 n.9.

⁷³ See generally *Booker*, 543 U.S. 220.

⁷⁴ *Rodriguez*, 754 N.W.2d at 678.

⁷⁵ *Id.*

⁷⁶ 140 P.3d 930, 942 (2006).

⁷⁷ *Id.* at 941-42.

⁷⁸ See, e.g., Stephen J. Cribari, *Is Death Different? Dying Declarations and the Confrontation Clause After Crawford*, 35 WM. MITCHELL L. REV. 1542, 1545 (2009) (discussing why dying declarations are an exception to the Confrontation Clause).

⁷⁹ See, e.g., Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827 (2008) (applying Professor Laurence Tribe's concept of the "testimonial triangle" to expert testimony).

⁸⁰ See, e.g., Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005) (discussing evidentiary limitations in the prosecution of domestic violence cases); Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311 (2005) (arguing that *Crawford's* application is problematic for the prosecution of domestic violence cases); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 18 n.3 (2006) (explaining that *Crawford* casts doubt on

focuses mainly on the impact of the Federal Sentencing Guidelines,⁸¹ plea bargaining,⁸² and due process.⁸³

As discussed *supra* Part I.A, the majority of federal courts have not subscribed to the argument that federal sentencing procedures may be unconstitutional. I join the “small” but “increasing” number of experts and commentators who observe a need for greater procedural protections at sentencing under the Guidelines system.⁸⁴ However, most focus on issues only indirectly related to confrontation, at best—requiring a higher burden of proof⁸⁵ or requiring facts that result in upward departures from the Guidelines range to be proven at trial⁸⁶—or speak broadly about requiring reliable evidence.⁸⁷ Any mention of cross-examination at sentencing is usually brief and in through a practical, not constitutional or jurisprudential, lens.⁸⁸ Also, many of the most widely-cited works on federal Guidelines sentencing were written before *Crawford*.⁸⁹ Furthermore, capital cases dominate both case

the constitutionality of victimless prosecution and evidence-based prosecution).

⁸¹ *E.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 68 (2005); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

⁸² *E.g.*, William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

⁸³ Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 191 (2014).

⁸⁴ *See* SENTENCING GUIDELINES, *supra* note 2, at § 6A1.3 cmt. (discussing the care and formality that will be necessary under the Guidelines). *See also* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 208-25 (1991) (recommending more due process protections to improve the efficiency and fairness of sentencing); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 356 (1992) (arguing for a due-process-oriented sentencing model with increased safeguards and judicial constraints).

⁸⁵ *E.g.*, Harvey M. Silets & Susan W. Brenner, *Commentary on the Preliminary Draft of the Sentencing Guidelines Issued by the United States Sentencing Commission in September, 1986*, 77 J. CRIM. L. & CRIMINOLOGY 1069 (1986); Richard Hussein, Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387 (1990).

⁸⁶ *E.g.*, Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence"*, 35 WM. & MARY L. REV. 147 (1993).

⁸⁷ *E.g.*, Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299 (1994).

⁸⁸ *See, e.g.*, Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 91 (1988) (mentioning briefly that parties will “demand direct and cross-examination of witnesses at evidentiary hearings”).

⁸⁹ KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17

law and scholarship, where sentencing's significance can be simply distilled into the difference between life and death.⁹⁰

This Article focuses instead on a more routine but still important issue: confrontation rights at non-capital judicial sentencing, where life is still at stake. Specifically, I argue confrontation rights should apply when: (a) a defendant contests any fact in the PSR after pleading or conviction; (b) the contested fact is related to a possible significant upward enhancement from the base offense level (not just an upward departure from the statutory maximum); and (c) a testimonial statement is the primary source of that contested fact.

I perform original analysis of U.S. Sentencing Commission data⁹¹ to size and scope the problem. I give further detail by excerpting and commenting on never-before-examined sentencing hearing transcripts from the U.S. District Court for the District of Connecticut. To my knowledge, these analyses are unprecedented in Confrontation Clause and sentencing scholarship.

V. AN ARGUMENT FOR CONFRONTATION RIGHTS AT JUDICIAL SENTENCING

Courts that decline to apply a right of confrontation at sentencing contravene the both the language and the Framers' original understanding of the Sixth Amendment. Furthermore, *Williams* should not be controlling precedent on the confrontation right, especially post-*Crawford*. The paradigm shift in sentencing from the rehabilitative system that existed in *Williams*' time to the current regime under the Federal Sentencing Guidelines, motivated instead by punishment, incapacitation, and deterrence, cuts in favor of applying the procedural safeguard of confrontation. And with rampant plea bargaining, very few facts that determine a defendant's sentence are proven beyond a reasonable doubt. And the Court has been willing to apply other parts of the Sixth Amendment at sentencing, undermining the *Williams* argument that sentencing does not fall under "criminal prosecution."⁹² Lastly, current rules that allow the defendant to challenge the PSR do not satisfy the confrontation right as envisioned by the Framers and the *Crawford* Court. Moreover, even requiring *Fatico* hearings for all disputed facts would fall short of the constitutional mandate without additional procedural requirements within them.

HOFSTRA L. REV. 1 (1988).

⁹⁰ E.g., Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 799 (1998).

⁹¹ See *infra* Part V.A.

⁹² 337 U.S. at 251.

A. *The Framers Would Have Understood Sentencing to Be a Part of “Criminal Prosecution”*

An examination of the Amendment’s text, though not dispositive, helps us understand the Framers’ perspectives around the time of the Constitution’s drafting. They chose not to split the Sixth Amendment into pieces; the accused should enjoy every right granted by the Amendment “[i]n all criminal prosecutions.”⁹³ This is probably because the Framers’ conception of criminal prosecution encompassed both guilt and sentencing phases. Drawing from the same nineteenth-century dictionary Justice Antonin Scalia cited in *Crawford*,⁹⁴ a “prosecution” is first the “institution and carrying on of a suit in a court of law . . . to redress *and punish* some wrong” and second “the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to *final judgment*.”⁹⁵ The references to punishment and final judgment likely include the proceedings we know as sentencing today. Intuitively, the sentencing is part of the prosecution; if not for the sentence, why even bother with the prosecution? An accuser is one who “charge[s] with a fault; . . . blame[s].”⁹⁶ This broad definition arguably encompasses witnesses who raise issues unrelated to charges in the initial indictment or trial. For example, the relevant inquiry to sentence our hypothetical narcotics defendant *Y* is whether he is, in part, *at fault* for the weight of drugs shipped, manufactured, or sold by others. Any witness who would testify to that issue is an “accuser.”⁹⁷

History also suggests that the Framers would not have contemplated separate trial and sentencing rights when the Sixth Amendment was passed in 1791. In Revolutionary times, the Colonies had mandatory death sentences for many offenses, including murder, treason, piracy, arson, rape, robbery, and sodomy.⁹⁸ Many Americans around the time of—and for at least a hundred years following—the ratification of the Sixth Amendment would have viewed the determination of guilt and the sentence as one proceeding. In fact, early juries treated the two as inseparable; jurors would refuse to convict because, though the defendant was

⁹³ U.S. CONST. amend. VI.

⁹⁴ Justice Scalia used it in *Crawford* to define both “testimony” and “witness.” *Crawford*, 541 U.S. at 51 (citing WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1882)).

⁹⁵ *Prosecution Definition*, WEBSTER, AN AMERICAN DICTIONARY, <http://machaut.uchicago.edu/?resource=Webster%27s&word=prosecution+&use1828=on> (last visited Sept. 11, 2015) (emphasis added).

⁹⁶ *Accuser Definition*, WEBSTER, AN AMERICAN DICTIONARY 104 (1828).

⁹⁷ Anyone accusing the hypothetical defendant of fault would fit the definition. *Id.*

⁹⁸ The Supreme Court discussed this history in *Woodson v. North Carolina*, 428 U.S. 280, 289-93 (1976).

guilty, they found him undeserving of the associated punishment.⁹⁹ The shift from mandatory sentencing to a more flexible system did not occur until the nineteenth century, and was inspired by public opposition to the death penalty.¹⁰⁰ Legislation to bifurcate trials was not motivated by a desire to remove Sixth Amendment protections from the last phase of trial. Rather, one segment of society supported it because of opposition to capital punishment, and the other because they thought “fewer guilty defendants would be acquitted.”¹⁰¹

The Framers would likely have envisioned “criminal prosecution” to encompass both trial and sentencing. As a result, the Framers would probably classify sources that provide inculpatory information to today’s U.S. probation officers creating PSRs as “accusers,” since their statements are often collected to prove some fact establishing a wrong or fault in order to punish the defendant.¹⁰²

B. *Williams Should Not Be Controlling Precedent on the Issue of Confrontation Clause Rights at Sentencing*

We now turn from text and history to jurisprudence. In my view, *Williams* should not be read as the Supreme Court’s perspective on the application of the Confrontation Clause to sentencing. Exposing the case’s flaws has implications for the lower courts and federal laws that rely upon it as precedent to deny the confrontation right at sentencing.¹⁰³

Williams, a New York state criminal prosecution, pre-dates the incorporation of the Sixth Amendment to the states by more than fifteen years.¹⁰⁴ Therefore, the case could not have been decided on

⁹⁹ See *id.* at 290-91 (explaining that juries refused to convict murderers and subject them to automatic death sentences).

¹⁰⁰ *Woodson*, 428 U.S. at 311.

¹⁰¹ *Id.*

¹⁰² *Accuser Definition*, *supra* note 96. A popular criticism of PSR investigations is that probation officers do not devote equal time or ink to information favorable to the defendant. See generally Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 960 (1995) (arguing that the probation officer “has been transformed into a component of determinate sentencing and of a just deserts penal philosophy”).

¹⁰³ In 1970 Congress, citing *Williams*, passed the Organized Crime Control Act which provided that no limit could be placed on information regarding “the background, character, and conduct of a person convicted of an offense” for the court to consider for the purpose of imposing an appropriate sentence. Douglass, *supra* note 35, at 1981 (citing H.R. REP. NO. 91-1549, at 63 (1970)); see also *United States v. Grayson*, 438 U.S. 41, 50 n.10 (1978) (discussing Congress’s reliance on *Williams*).

¹⁰⁴ *Williams* was decided in 1949, and the incorporation of the Sixth Amendment to the states occurred in *Pointer*, which was decided in 1965. See

Confrontation Clause grounds. Moreover, the opinion does not once mention the Sixth Amendment or confrontation. The case addresses the reliability of evidence at sentencing under the Fourteenth Amendment's guarantee of substantive due process only. In *Crawford*, Justice Scalia importantly made the Confrontation Clause a procedural due process guarantee, to be satisfied separately from any alternative determination of reliability.¹⁰⁵ And according to other Supreme Court precedent, due process is not the only constitutional provision at play in sentencing. *Mempa v. Rhay*, decided in 1967, held that the Sixth Amendment right to counsel applied during sentencing.¹⁰⁶ Viewed through a post-*Crawford* lens, the confrontation right exists separately from any substantive due process rights.

In addition, most statements in PSRs arguably fall within *Crawford's* definition of "testimonial." *Crawford* said statements "taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard."¹⁰⁷ That definition encompasses some content in PSRs that comes directly from law enforcement records. Even statements from laypeople that the probation department's investigation elicits outside the course of an interrogation could be considered testimonial; the statements were made for the purpose of "establishing or proving some fact."¹⁰⁸ And the fact that probation officers are not police does not exclude them as recipients of testimonial statements: *Crawford* explicitly stated that "the involvement of government officers in the production of testimonial evidence presents the same risk . . ." as the information from law enforcement.¹⁰⁹

Also, *Williams's* view of the history of pre-sentencing investigations contradicts what we know about sentencing in early America. According to the majority opinion, relying on presentence investigations conducted by probation officers was merely today's practical equivalent of an "age-old practice"¹¹⁰ of getting information from out-of-court sources.¹¹¹ However, as discussed *supra* Part I.A, "early American criminal law was dominated by mandatory penalties, not by discretion in sentencing."¹¹² Since the

supra Part II.A. (discussing *Pointer v. Texas*).

¹⁰⁵ *Crawford*, 541 U.S. at 61-63.

¹⁰⁶ 389 U.S. 128, 137 (1967).

¹⁰⁷ 541 U.S. at 52.

¹⁰⁸ *See id.* at 51 (defining testimonial) (citation omitted).

¹⁰⁹ *Id.* at 53.

¹¹⁰ 337 U.S. at 250-51.

¹¹¹ *See id.* at 250 (explaining that it would be "impractical if not impossible" to draw "information concerning every aspect of a defendant's life" in open court and subject it to cross-examination).

¹¹² *See* John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900*, 13, 36-37 (Antonio Padoa Schioppa ed., 1987); Douglass, *supra* note 35, at 1977.

penalty was automatically tied to the finding of guilt, there would be little to no need for the courts to seek out-of-court information.

Courts have also discounted federalism's contribution to the *Williams* holding. The Court did not want to foist a procedural model of sentencing upon the states that might constrain their discretion in choosing among substantive sentencing schemes. For example, if *Williams* prevented the use of hearsay during sentencing, New York might be unable to sustain indeterminate sentencing (where no specific date of release is set, rather, length is based upon the prisoner's behavior). This concern runs through the *Williams* opinion: "New York judges are given a broad discretion to decide the type and extent of punishment [T]he New York procedural policy encourages [the judge] to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities."¹¹³ The Court further states

we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.¹¹⁴

The Court viewed the states as important laboratories of democracy, making adjustments to sentencing policy to better serve the goals of criminal justice. That consideration, however, is irrelevant under the Guidelines. The federal system is unified and is supposed to operate uniformly throughout. The Commission chose a single sentencing philosophy for all federal courts and promulgated it through the Federal Sentencing Guidelines. The proposal I outline in Part VI, whether implemented by the Supreme Court, lower courts, or the Commission, could apply only to federal courts without curbing states' rights to choose their own sentencing methodologies.

Furthermore, the "practical reasons" motivating the Court's decision in *Williams* are severely undermined by the realities of sentencing in the American federal criminal justice system today. The *Williams* Court reasoned that probation officers and sentencing bodies need unlimited information from out-of-court sources to create an individualized sentence.¹¹⁵ Then the defendant could be "restored sooner to complete freedom and useful citizenship."¹¹⁶ The opinion explicitly states that "reformation and rehabilitation of

¹¹³ 337 U.S. at 245.

¹¹⁴ *Id.* at 251.

¹¹⁵ *Id.* at 250.

¹¹⁶ *Id.* at 249.

offenders have become important goals” of the criminal law.¹¹⁷ And the *Williams* Court envisioned sentencing as non-adversarial, noting that probation officers were trained “to aid offenders,” not to prosecute them.¹¹⁸ Today, the Federal Sentencing Guidelines explicitly disavow rehabilitation as a goal—a 180-degree shift.¹¹⁹ And anyone familiar with the workings of U.S. Attorney’s Offices and probation departments would probably characterize the *Williams* Court’s view of probation officer as defendant’s advocate as idealistic or non-representative, at best.¹²⁰ Obviously, the argument for rehabilitation is further undermined in the context of capital sentencing, where neither rehabilitation nor reformation can occur after death.

The *Williams* Court also pointed to “discretionary powers” with increasing authority to fix punishments to support loose restrictions on information used at sentencing.¹²¹ The “practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy,” the Court said, and that parole system rested “on the discretion of an administrative board.”¹²² However, the Comprehensive Crime Control Act of 1984 abolished parole in the federal system.¹²³ Criticisms of the practice included its rehabilitative ineffectiveness, the anxiety it caused among prisoners regarding disparate sentences for the same crime and uncertain release dates, and the fact that it was “at odds with ideals of equality and the rule of law.”¹²⁴ Now, the authority to fix sentences is concentrated in the federal court, so this rationale no longer applies.

A proposal consistent with the original understanding of the confrontation right would not necessarily change the amount of information brought before a judge, as Justice Black worried in *Williams*, merely the form in which it were presented.¹²⁵ Evidence of important¹²⁶ disputed facts would be presented through direct testimony from witnesses and cross-examination, instead of a typed

¹¹⁷ *Id.* at 248.

¹¹⁸ *Id.* at 249.

¹¹⁹ 28 U.S.C. § 994(k) (1988) (“The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . .”).

¹²⁰ Bunzel, *supra* note 102.

¹²¹ 337 U.S. at 249.

¹²² *Id.* at 248.

¹²³ Pub. L. 98–473, 98 Stat. 1976 (1984).

¹²⁴ Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993).

¹²⁵ It is an open empirical question what percentage of sources of disputed facts in PSRs are typically “unavailable.”

¹²⁶ My proposal could cabin the confrontation right to those facts related to a potential substantial enhancement above the base offense level minimum. I discuss further *infra* Part VI.

summary primarily of law enforcement records and notes. Because *Crawford* told us that a judge's determination of reliability is no longer an adequate substitute for confrontation, returning to our constitutional roots requires the same level of protection at sentencing.

C. *Other Parts of the Sixth Amendment Apply at Sentencing*

The full text of the Sixth Amendment reads:

In all criminal prosecutions, the accused 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.¹²⁷

The Supreme Court's decisions to apply parts of the Sixth Amendment to sentencing undermine any argument that confrontation should not. The Supreme Court held that the right of counsel and his or her effective assistance applied at sentencing,¹²⁸ and even that an indigent defendant had a right to the appointment of counsel during the proceeding.¹²⁹ The text of the Sixth Amendment itself does not draw a distinction between the right to counsel and the right of confrontation—their places are equivalent within the list of rights. If one right applies at sentencing, there is a powerful textual argument (that might persuade today's Supreme Court) for the other to apply as well.

Some could argue that the Supreme Court's holding that the Sixth Amendment does not mandate juries at sentencing undermines the argument for confrontation rights.¹³⁰ However, the jury right is textually distinguishable from the confrontation right under one reading of the Sixth Amendment. The trial requires an "impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law"¹³¹ The remainder—notice, process, confrontation, and counsel—are associated with "criminal prosecutions." Even if the historical argument that the Framers'

¹²⁷ U.S. CONST. amend. VI.

¹²⁸ *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

¹²⁹ *United States v. Tucker*, 404 U.S. 443, 448 (1972); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948).

¹³⁰ See *Douglass*, *supra* note 35, at 1969-71.

¹³¹ U.S. CONST. amend. VI.

conception of trial would have encompassed sentencing is not persuasive, this plausible reading of the Amendment still supports the notion that confrontation rights should apply at sentencing. “Criminal prosecutions” must mean more than merely the trial itself. If not, why use the word “trial” separately? Therefore, the other rights (notice, counsel, etc.) enumerated in the Amendment must apply to the whole course of the criminal prosecution—not just trial—as well. Also, those rights build upon one another in service of a common goal: an adversarial but fair system from start to finish. Some legal historians suggest they are “interdependent.”¹³² For instance, notice of the charges may be moot without an impartial jury, counsel may be useless without the ability to confront the government’s evidence, and the right to confront one’s accusers might be ineffective without the assistance of counsel.¹³³

And though the Court has never held that the Sixth Amendment requires a jury during all capital sentencings¹³⁴—and the text may support such—the *Apprendi* line of cases suggests the Court may be receptive to purposive arguments about fairness to defendants and due process. Also, these cases hint that the distinction between the guilt phase and sentencing phase of criminal prosecutions may not be meaningful. For example, in *Ring v. Arizona*, the Court held that the Sixth Amendment required a jury, not a judge, to find aggravating factors that increase the statutory minimum sentence above the Guidelines range beyond a reasonable doubt (since Arizona’s capital sentencing statute required at least one statutory aggravating factor to impose the death penalty).¹³⁵

Furthermore, in *Alleyne v. United States*, the Court held that a fact alleged in a PSR that “increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond reasonable doubt” to comport with the Sixth Amendment and the Due Process Clause.¹³⁶ This change in law was so important that the Court explicitly overruled *United States v. Harris*, an earlier decision which held that judges were allowed to engage in fact-finding even when the fact would inevitably extend the sentence for

¹³² *E.g.*, Douglass, *supra* note 35, at 2010 (arguing that the evolution of these interdependent rights played a role in establishing the adversarial system).

¹³³ *Id.*

¹³⁴ *Walton v. Arizona*, 497 U.S. 639 (1990), overruled to an extent by *Ring v. Arizona*, 536 U.S. 584, 597 (2002) (holding that when imposition of death penalty was contingent upon judge’s finding of an aggravating factor (maximum punishment under jury’s verdict was life imprisonment), such factor had to be submitted to a jury).

¹³⁵ 536 U.S. 584, 609 (2002).

¹³⁶ 133 S. Ct. 2151, 2155 (2013).

the crime.¹³⁷ The Court also held in *Green v. Georgia*¹³⁸ that the right to present favorable evidence must not be limited arbitrarily by state evidentiary rules. In that case, a state hearsay rule excluded important defense evidence during the *sentencing* phase of a capital case.¹³⁹ Interestingly, the Court's opinion drew no distinction between trial and sentencing and applied the Fourteenth Amendment's Due Process Clause to the "punishment phase of the trial."¹⁴⁰

The Confrontation Clause could easily be argued to apply to sentencing, bolstered by the Court's ruling on the Sixth Amendment's right to counsel and even in spite of the Court's explicit decision on a lack of jury right at sentencing. In fact, the Court's reasoning in recent cases indicates receptiveness to arguments about the changed nature of federal sentencing and the potentially hazardous implications for fairness.

D. *The Federal Sentencing Guidelines Compel a Second Look at Applying Confrontation*

1. *To Better Achieve Criminal Sentencing's Explicit Goals*

The Sentencing Guidelines were passed in 1984 to solve two main problems: 1) widely disparate sentences for similarly-situated offenders and 2) a lack of "honesty in sentencing," meaning that offenders rarely served out their full sentences.¹⁴¹ Congress also desired proportionality, so sentences matched the severity of the offenses.¹⁴² Though the Guidelines arguably hemmed in judicial discretion in calculating the sentence, they left wide latitude for judges around procedures, admissibility of evidence, and safeguards for defendants. One can easily imagine how liberal procedural leeway could result in use of unreliable or spotty information that undercuts the Guidelines' goal of achieving uniformity and accuracy in sentencing.¹⁴³ When guaranteed, the confrontation right is one

¹³⁷ 536 U.S. 545, 558 (2002) ("Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments."). *But see Alleyne*, 133 S. Ct. at 2163 (overruling *Harris*).

¹³⁸ 442 U.S. 95, 97 (1979).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ SENTENCING GUIDELINES, *supra* note 2, at 1-2; KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 43-44 (1998); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-6 (1988).

¹⁴² SENTENCING GUIDELINES, *supra* note 2, at 1-2.

¹⁴³ See David N. Adair, Jr. & Toby D. Slawsky, *Looking at the Law: Fact-Finding in Sentencing*, FED. PROBATION, Dec. 1991, at 58, 60 ("Lack of standards of fact-finding could also permit manipulation of the sentencing guidelines by permitting use of stipulations that contain misleading

procedural protection that can reconcile disparities in offenders' sentences created by: the judge's discretion in calling an evidentiary hearing for a disputed fact, the arbitrary availability of certain probation department sources, the diligence of the particular U.S. probation officer in discovering exculpatory or favorable evidence for the defendant, and the judge's willingness to compel any witness's attendance.

2. *To Serve the Interests of Fairness Given its Now-Adversarial Nature*

Sentencing is now more adversarial than it was during the *Williams* era and perhaps more than ever before. First, with the rehabilitative goal off the table, the interests of the prosecution and the defense are quite separate. The prosecutor wants to increase the sentence for reasons of deterrence, incapacitation, and retribution, and the defense wants to minimize it. Also, the interests of the prosecution and probation are closely aligned; some field research shows probation officers rely almost solely on prosecution files for PSR content.¹⁴⁴ Sentencing also lacks most characteristics the Supreme Court named as indicative of a non-adversarial proceeding: the absence of a prosecutor, formal procedures, and rules of evidence; and the use of a distinctive tribunal that possesses specialized expertise.¹⁴⁵ Of those, only the lack of evidentiary rules at sentencing—when compared with trial—would suggest it is non-adversarial, and it might be slightly circular to use that fact to argue for their continued absence. To address the other factors: a prosecutor is present at sentencing and there are formal procedures. For example, the judge is required to make sure the defendant understands his or her sentence, has waived certain rights as a result of the plea bargain, and that the Guidelines calculation in the PSR is numerically correct.¹⁴⁶ The “tribunal,” or federal district court, does not possess specialized expertise; federal judges preside

information.”); *see, e.g.*, Peter B. Pope, Note, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258, 1260 (1986) (describing how limiting judicial discretion can curtail disparity).

¹⁴⁴ Bunzel, *supra* note 102; *cf.* G. Thomas Eisele, *The Sentencing Guidelines System? No. Sentencing Guidelines? Yes.*, FED. PROBATION, Dec. 1991, at 16, 25 n.4 (“[Probation officers] are more and more finding themselves operating as agents for the U.S. attorneys offices across the land; or as investigators in an adversarial relationship with the U.S. attorneys and defense counsel; or as surrogate judges resolving factual issues for real judges.”). *But see* Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615, 1623-28 (1980) (describing a wide variety of sources that contribute to the PSR).

¹⁴⁵ *See* *Middendorf v. Henry*, 425 U.S. 25, 35 (1976) (describing differences between criminal trial and revocation hearing).

¹⁴⁶ Fed. R. Crim. P. 32.

over all types of courtroom proceedings, both criminal and civil. And the United States model stands in stark contrast to the “inquisitorial” system used in many European countries, where the tribunal itself conducts the search for truth, testing evidence on behalf of the accused as necessary.¹⁴⁷

In addition, the proof of certain facts is now linked directly to discrete increases in one’s sentence, whereas under the previous regime, a defendant had limited visibility and incentive to dispute facts because he was unsure which ones mattered to judges. And the facts relevant to sentencing under the Guidelines are more like those adjudicated at trial than those under the previous rehabilitative system, since they revolve around offenses and wrongs instead of the accused’s background and characteristics. For example, evidence about Williams’ activities indicated he had a “morbid sexuality,” and that evaluation was critical in the court’s prediction of his future dangerousness as a “menace to society.”¹⁴⁸ The *Williams* Court desired “the fullest information possible concerning the defendant’s life and characteristics.”¹⁴⁹ However, today’s Guidelines “reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”¹⁵⁰ A psychologist’s report has no specific place in most PSRs today; to the extent a Guidelines sentence is imposed for incapacitation purposes, any measure of future dangerousness must come in through a fact-intensive, purportedly objective inquiry into past offenses.¹⁵¹ The combination of fact-driven and trial-type fact-intensive penalty determinations under the Federal Sentencing Guidelines makes informal fact-finding procedures problematic. The Sixth Amendment exists to make criminal proceedings against its citizens adversarial yet fair. Defendants in the system often go up against an adversary with disproportionate resources. It is unfair to conduct an adversarial proceeding without one of the Amendment’s most important protections: confrontation.

¹⁴⁷ Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1183 (2005).

¹⁴⁸ *Williams*, 337 U.S. at 244.

¹⁴⁹ *Id.* at 247.

¹⁵⁰ 28 U.S.C. § 994(e) (1988).

¹⁵¹ SENTENCING GUIDELINES, *supra* note 2, at 452 (explaining that “mental and emotional conditions *may* be relevant in determining whether a departure is warranted,” then specifying “downward departure” for “a specific treatment purpose” or “determining conditions of probation or supervised release” as narrow situations where that might be appropriate) (emphasis added). For example, evidence that a defendant is a sociopath would be insufficient to grant an upward departure from his Guidelines-recommended range. Any upward departure must come not from predictions of future dangerousness but rather from criminal history. For example, qualifying as a “career offender” under Section 4B1.2 of the Guidelines results in an enhanced sentence.

E. The Prevalence of Plea Bargaining Means a Defendant's Only Chance To Be Heard Is at Sentencing

In our trial-obsessed world, it is easy to forget that 97 percent of federal criminal convictions result from plea bargains.¹⁵² Jury-trial legal scholarship is ten times more common than guilty-plea scholarship.¹⁵³ The Supreme Court's jurisprudence offers little help to defendants who plead guilty; *Apprendi* and its progeny assume jury trials, not pleas. These decisions miss the crucial differences in fact-finding between trial and plea bargaining. One long-sitting and prominent federal judge argues that plea bargains are likely to result in greater unpredictability of sentences under the Guidelines.¹⁵⁴ Because there is typically very little discovery and no trial to establish the relevant facts, there may be a disconnect between what the defendant has told defense counsel about his prior convictions at the time of the plea and when facts are developed for sentencing. "As a result, defendants may make decisions on guilty pleas based upon inadequate information and face far stiffer sentences than anticipated."¹⁵⁵ The confrontation right—or the probation department's mere anticipation of the confrontation requirement when preparing the PSR—could ameliorate this situation. The defendant would be less dependent upon the judge's discretion to give voice to his or her side of the conduct.

Indeed, as a result of the proliferation of plea bargaining, sentencing is often the defendant's only opportunity to be heard. According to Stephanos Bibas, the Sixth Amendment "check[s] arbitrary judges and prosecutors and imbue[s] the law with the conscience of the community."¹⁵⁶ Confrontation and cross-examination of adverse sources is one way the Sixth Amendment can serve this function for the many defendants who do not go to trial. Those who plead depend on one judge for not only the substance of their sentence but also the process.

¹⁵² Michael Nasser Petegorsky, *Plea Bargaining in The Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 *FORDHAM L. REV.* 3599, 3602 (2013).

¹⁵³ Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in A World of Guilty Pleas*, 110 *YALE L.J.* 1097, 1149 (2001).

¹⁵⁴ See Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 *UCLA L. REV.* 83, 93-95 (1988) (discussing how plea bargaining inherently leads to disparate sentences for similar crimes).

¹⁵⁵ *Id.* at 94.

¹⁵⁶ Bibas, *supra* note 153, at 1151.

F. *Current PSR Procedures Do Not Satisfy the Confrontation Right*

As discussed *supra* Part I, there is no guarantee that a defendant will be able to confront and cross-examine people who provide information that may contribute to a longer sentence. A disputed fact in the PSR does not require an evidentiary, or *Fatico*, hearing. The hearing itself does not require the production of the probation department's sources in court, even when those sources make substantial contributions to the PSR. As an alternative, the probation officer can present documentary or real evidence (e.g., objects such as guns or photographs) to prove one side of the disputed fact in the PSR.

Why does confrontation matter? The conventional wisdom is that cross-examination is likely to reduce the harmful effect of untrue information used against today's defendants. It is lauded as the "most important aspect of trial procedure" and "the greatest engine ever invented for the discovery of truth."¹⁵⁷ Courtroom lawyers believe that it is an essential element in guaranteeing both the accuracy and the completeness of testimony.¹⁵⁸ The Federal Rules of Evidence¹⁵⁹ also reflect the primary importance of cross-examination as a vehicle for truth. A hypothetical is also illustrative: imagine an individual who was framed by his alleged coconspirators for a past "related" offense. The "coconspirators" are now in prison on other charges and provide information to the probation department about the past crime, which ends up in the PSR. They also fabricate real and documentary evidence of his involvement. Even if the defendant disputes the made up crime, the court is not required to call an evidentiary hearing. And even if the hearing is called, the government can choose not to call witnesses (the court is not required to make the government produce the sources)¹⁶⁰ and rely instead only on the real or documentary evidence and the original content in the PSR. Here, cross-examination would be valuable to illuminate the motives of his alleged co-conspirators or poke holes in their fabricated evidence.

Is cross-examination equally valuable when judges, not jurors, sentence? The Federal Rules of Evidence, for example, presume that

¹⁵⁷ Jonathan E. Scharff, *Federal Sentencing Guidelines Due Process Denied*, 33 ST. LOUIS U. L.J. 1049, 1071 (1989) (citing 5 WIGMORE ON EVIDENCE § 1390 (Chadbourn rev. ed. 1974)).

¹⁵⁸ *E.g.*, Joseph B. McDonnell, *Cross-Examination: The Trial Lawyer's Search Engine*, 90 ILL. B.J. 657 (2002).

¹⁵⁹ FED. R. EVID.

¹⁶⁰ *See generally* Alexa Chu Clinton, *Taming the Hydra: Prosecutorial Discretion Under the Acceptance of Responsibility Provision of the U.S. Sentencing Guidelines*, 79 U. CHI. L. REV. 1467, 1482 n.105 & n.107 (2012) ("A *Fatico* hearing is a presentencing hearing at which parties *may* offer evidence as to appropriate sentencing. A *Fatico* hearing is not a trial.") (emphasis added).

judges are more able than jurors to discern the reliability of evidence without additional safeguards such as cross-examination.¹⁶¹ Therefore, one could argue that the benefit of cross-examination in front of a judge is slight; that he or she is already able to assess the credibility of the information based upon the context in the PSR or testimony during a *Fatico* hearing, without cross-examination. However, we do not sacrifice the cross-examination right for defendants during bench trials, where the argument that judges do not need cross-examination to determine credibility would also apply. We should preserve that right for federal judge-only sentencing as well.

VI. SIZING THE PROBLEM & EXAMPLES

A. *Quantitative Analysis of Sentencing Commission Data*

Unfortunately, very little information on *Fatico* hearings is collected at all, let alone systematically. The U.S. Federal Sentencing Commission, federal prosecutors, and public defenders all said that no published statistics on *Fatico* hearings exist, even to answer basic questions.¹⁶² “We have never, to my knowledge, received any documentation from *Fatico* hearings,”¹⁶³ said a Research Data Coordinator for the U.S. Sentencing Commission. It is currently impossible to determine what percentage of disputed facts in PSRs is resolved through evidentiary hearings. Other questions include: how much does the rate of granting *Fatico* hearings vary by judge? Or federal district? How many witnesses testify, on average, at a *Fatico* hearing? How many of those are defense witnesses? How many *Fatico* hearings allowed the defendant or counsel to cross-examine a prosecution witness? How many *Fatico* hearings result in resolution of a disputed fact in favor of the defense? Or the prosecution?

Another way into this problem would be to analyze information on disputed findings of fact in PSRs. Though the Commission “ha[s] never produced any reports looking into the disputed facts in PSRs,”¹⁶⁴ it does collect raw data on “changes made to information presented in the PSR due to findings of fact.”¹⁶⁵ Specifically, it tracks when changes to findings of fact in the PSR are made by the

¹⁶¹ For example, courts are supposed to serve a gatekeeping function when determining whether expert evidence is reliable enough to submit to a jury. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-48 (1999).

¹⁶² Conversations with Fiona Doherty, *supra* note 3, and Sarah Merriam, *infra* note 185.

¹⁶³ E-mail from Timothy Drisko, Research Data Coordinator, U.S. SENTENCING COMM’N, to author (Sept. 16, 2014) (on file with author).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

court, as denoted in the court's Statement of Reasons ("SOR").¹⁶⁶ The SOR is a transcription (or other public record) of the court's reasons for the imposition of a particular sentence.¹⁶⁷ It is required under federal law and must be provided (along with the order of judgment and commitment) to the Sentencing Commission, Probation System, and—as necessary—to the Bureau of Prisons.¹⁶⁸ This data provided a starting point for my analysis. I downloaded data for all the sentencings that occurred during Fiscal Year 2013.¹⁶⁹ It included 80,035 cases, or observations. I analyzed the data using SPSS, a statistical software package, and Microsoft Excel.

As I mentioned above, the first question is how frequently facts in PSRs are disputed. As a rough answer to the question, Figure 1 below shows changes made by the sentencing court to Chapters 2, 3, and 4 of the PSR due to findings of fact, as discussed in the SORs. Chapter 2 of the PSR defines the contours of and determines the base point level for the offense at hand. Chapter 3 is where the court applies adjustments for the defendant's role in the offense, any obstruction of justice, and his or her acceptance of responsibility. Chapter 4 determines the defendant's criminal history category.¹⁷⁰ Looking at the number of times the court changed a fact in a PSR does not tell us how frequently *Fatico* hearings are held—because the court could easily have changed the fact without one. Nor does it tell us what percentage of PSRs contains disputed facts—because a court does not have to change every disputed fact. However, this figure gives us a lower bound on how frequently facts are disputed, because it is improbable that a court would change a finding of fact in a PSR without a dispute first being raised about it. Also, the figure provides a ballpark estimate for how frequently *Fatico* hearings would be held if every change to the PSR's findings of fact required one.

The first column in Figure 1 shows the total number of SORs received by the Sentencing Commission for sentences handed down in Fiscal Year 2013, approximately eighty thousand.¹⁷¹ Columns 2, 3, and 4 illustrate the total number of changes made to findings of fact in the PSR in those respective chapters. As one can see,

¹⁶⁶ *Id.*; U.S. SENTENCING COMM'N, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS 16-17, www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/USSC_Public_Release_Codebook_FY99_FY13.pdf (last visited Feb. 22, 2015).

¹⁶⁷ 18 U.S.C. § 3553(c) (2010).

¹⁶⁸ *Id.*

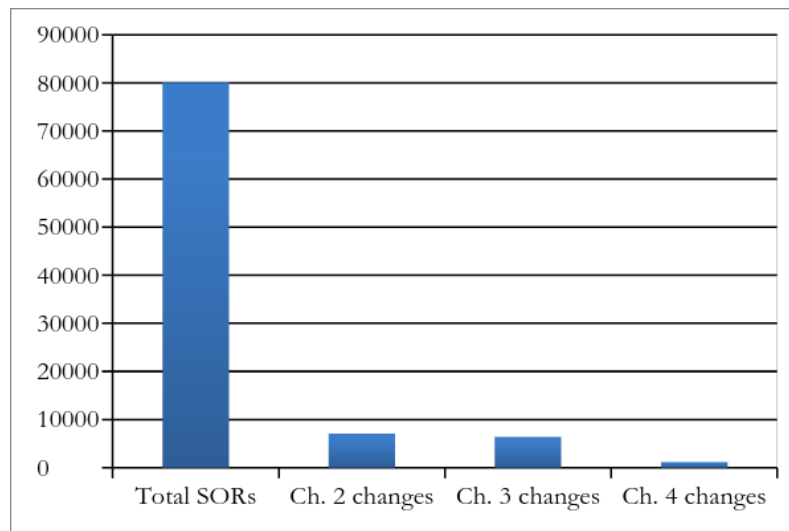
¹⁶⁹ Data for 2013 was the most recent year available at the time this Article was written and submitted. Data for 2014 has been released. *Commission Datafiles*, U.S. SENTENCING COMM'N, <http://www.ussc.gov/research-and-publications/commission-datafiles> (last visited Feb. 25, 2015). These data files do not include re-sentencings.

¹⁷⁰ SENTENCING GUIDELINES, *supra* note 2, at § 1B1.1.

¹⁷¹ *Commission Datafiles*, *supra* note 169.

sentencing courts rarely make changes to the PSR's findings of fact. Changes to Chapters 2 and 3 far outstrip changes to Chapter 4: there were about 7,000 changes to Chapter 2 and 6,400 changes to Chapter 3, while only about 1,100 changes were made to Chapter 4.¹⁷² This suggests that courts are far more likely to change facts related to the offense at hand than a defendant's criminal history. One important caveat: the number of Chapter 2 changes cannot be added to the Chapter 3 and Chapter 4 changes to come up with the total number of PSRs with changes made to findings of fact in Fiscal Year 2013; there would be double-counting. Courts may make changes to multiple chapters in the same PSR or even multiple changes to the same chapter within a single PSR. The Sentencing Commission data tracks up to six changes made to the same chapter.¹⁷³ The total percentage of PSRs with changes to findings of fact is lower than if you were to add columns 2, 3, and 4 together.

Figure 1: Changes to Disputed Findings of Fact in PSRs.



Figures 2, 3, and 4 indicate the specific types of facts within each chapter that were changed. The Sentencing Commission had approximately five to ten categories for each chapter. The most common Chapter 2 changes were to facts other than those named in the chart (30 percent), and to “safety valve”¹⁷⁴ facts (25 percent).¹⁷⁵

¹⁷² *Id.*

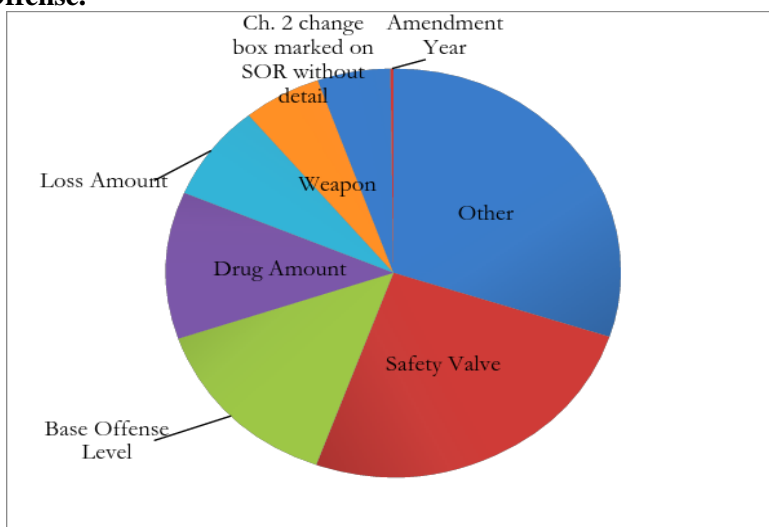
¹⁷³ That said, PSRs with more than two changes to a single chapter were rare in the dataset. The maximum number of changes to a single chapter within one PSR was four. None had five or six changes within a single chapter.

¹⁷⁴ 18 U.S.C. § 3553(f) (listing circumstances under which drug defendants can escape mandatory minimum sentences, also known as “safety valves”).

¹⁷⁵ *Commission Datafiles*, *supra* note 169.

Safety valves allow drug offenders to escape mandatory minimum sentences if they meet certain requirements; for example, if they do not have a significant criminal history, if they did not use violence or induce others to do so, *inter alia*.¹⁷⁶ Other common changes were to the base offense level, drug amount, and loss amount: 14 percent, 12 percent, and 8 percent, respectively.¹⁷⁷

Figure 2: Changes Made to Chapter 2, Related to the Offense.¹⁷⁸



As Figure 3 shows, changes related to the defendant's acceptance of responsibility and mitigating role comprised 73 percent of the changes to facts in Chapter 3, followed by aggravating role adjustments at a distant third with 10 percent.¹⁷⁹ Unfortunately, the data do not indicate whether the changes to findings of fact resulted in the addition or subtraction of a mitigating or aggravating role adjustment. Courts infrequently changed facts related to abuse of positions of trust, vulnerable victims, or usage of minors in commission of the crime.¹⁸⁰

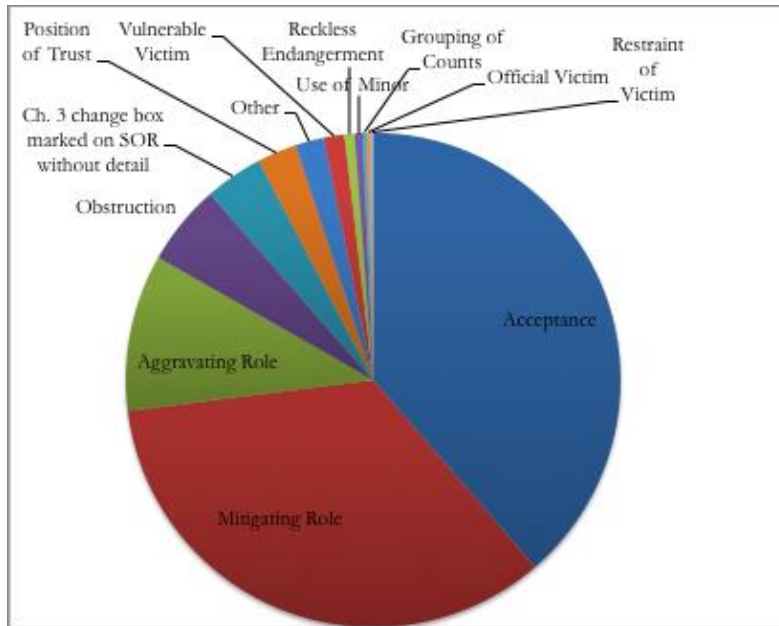
¹⁷⁶ 18 U.S.C. § 3553(f)(1)-(5).

¹⁷⁷ *Commission Datafiles*, *supra* note 169.

¹⁷⁸ Amendment Year could refer to the version of the Sentencing Guidelines being used. U.S. SENTENCING COMM'N, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS 2, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/USSC_Public_Release_Codebook_FY99_FY13.pdf (last visited Feb. 22, 2015). This is merely hypothesis, but changes to Amendment Year are probably due to PSRs using outdated versions of the Guidelines to calculate sentences. Thankfully, those represent a very small slice of the pie.

¹⁷⁹ *Commission Datafiles*, *supra* note 169.

¹⁸⁰ *Id.*

Figure 3: Changes Made to Chapter 3, Adjustments.

As shown in Figure 1, courts rarely change findings of fact about a defendant's criminal history. On one hand, this makes sense, since those facts are least likely to have been discussed during the trial or during any plea bargaining. As a result, the court may not feel comfortable tampering with the section it knows the least about. On the other hand, this indicates that Chapter 4 of the PSR, as drafted by Probation, has significant inertia and is unlikely to change. Given that this section often includes outdated and incomplete information, as I show by example *infra* Part V.C, and that it plays such a determinative role in sentencing, it might be troubling that courts do not make changes more often. Figure 4 shows that uncategorized changes account for 32 percent, followed by the removal of criminal history events with 29 percent. Only 2 percent of changes were around adding criminal history events. Similarly, eight percent of changes removed criminal justice points, which are applied when the defendant committed the instant offense when he was under "probation, parole, supervised release, imprisonment, work release, or escape status."¹⁸¹ Three percent of changes added criminal justice points.

¹⁸¹ SENTENCING GUIDELINES, *supra* note 2, at 252.

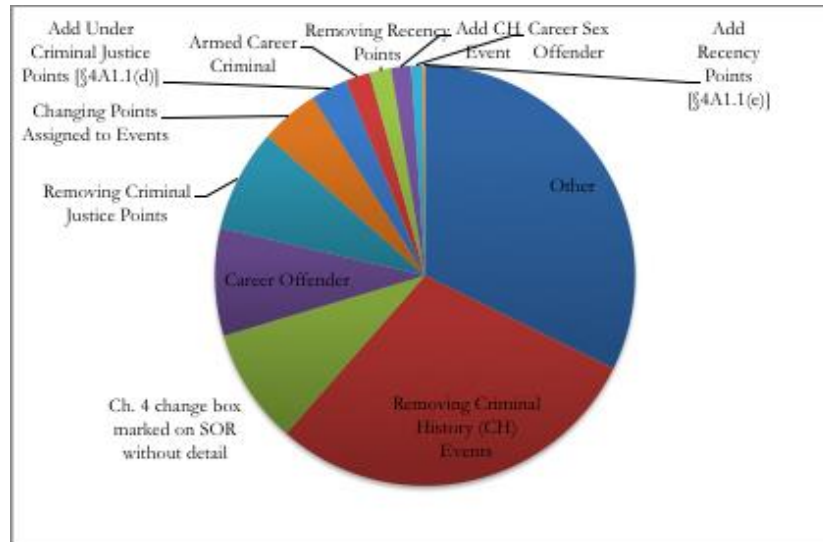
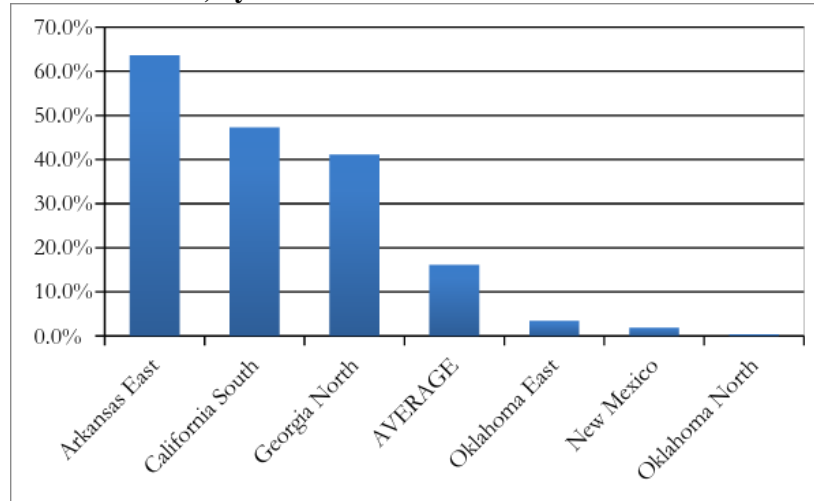
Figure 4: Changes Made to Chapter 4, Criminal History.

Figure 5 illustrates one of the most common themes in sentencing scholarship: significant variation among federal districts. One possible explanation is that federal district judges have very different thresholds for changing facts in PSRs.¹⁸² I analyzed how frequently courts made changes to findings of fact in Chapters 2, 3, and 4 by federal judicial district. The chart shows the three districts with the highest and lowest rates, along with the average. (There are 96 federal judicial districts in the U.S.) The Eastern District of Arkansas led, followed by Southern California, and Northern Georgia. The bottom three included Eastern Oklahoma, New Mexico, and Northern Oklahoma, which had a near-zero rate of changes to PSR findings of fact.¹⁸³

¹⁸² Another possible but not probable explanation is that certain judges or districts just happen to consistently receive cases with more incorrect facts in PSRs than others.

¹⁸³ I omitted specific percentages in the text and instead relied only on the graphical representation because of the risk of triple-counting. The important point here is the variation among districts, not the absolute percentage of PSRs changed. The columns are not representative of numbers of PSRs changed. Instead, they represent the number of facts changed in PSRs. *See supra* discussion preceding Figure 1 (describing the risk of double-counting).

Figure 5: Percentage of SORs Denoting Changes to Findings of Fact in PSRs, by District.¹⁸⁴



B. *Call for Further Research*

Researchers interested in other sentencing topics, such as plea bargaining, racial and gender discrimination, or immigration, *inter alia*, could also use this information included in this Article. The publicly-available Sentencing Commission data include variables indicating the disposition of the defendant’s case, whether he was represented, his citizenship status, and his age and education level, to name a few. For example, a researcher could use the Sentencing Commission’s data to see whether changes to findings of fact in PSRs are more likely for defendants who plead guilty or for those who go to trial, or whether eventual upward or downward departures are more likely when there have been changes to PSR findings of fact. Another study could see whether changes to findings of fact in PSRs are more likely for defendants with longer or shorter sentences. It would also be interesting to determine how significant the disputed facts are to the overall sentence, though calculating that statistic would require additional data collection.

C. *Narrative Examples of Potential “Disputed Facts”*

This project also uncovered never-before-analyzed transcripts

¹⁸⁴ These percentages capture changes to Chapters 2, 3, and 4. *Commission Datafiles*, *supra* note 169. Multiple changes within the same chapter were not double-counted, but it is possible that a court changed a finding of fact in all chapters of a single PSR. That result would show up three times in the numerator when calculating the percentage of SORs denoting such changes.

of sentencing hearings.¹⁸⁵ A federal public defender helped me pull a “representative cross-section” from the District of Connecticut. This gives readers a rare and detailed glimpse of what type of facts are disputed, how they are (or are not) resolved, and what impact they can have on a defendant’s sentence.

1. *Mr. Blackwelder’s Sentencing*

The 2013 sentencing of defendant Julius Blackwelder, who pled guilty to two fraud charges, involved disputed facts around the defendant’s eligibility for two enhancements: 1) whether he abused a position of trust in the commission of the crime and 2) the number of victims.¹⁸⁶ Specifically, did a victim’s two daughters also count as victims because the money he withdrew to invest in the fraudulent scheme came from an account that was partially designated for their benefit? This would raise the total number of victims from eight to 10, resulting in a two-level increase. A two-level increase raises the Guidelines sentence by seven months, from 30 to 37.¹⁸⁷

The first enhancement was not included in the PSR, but the government argued for it during the sentencing hearing. The second was included, and the defense argued against it at the hearing.¹⁸⁸ There was also a dispute as to the financial loss amount; the government asserted between \$428,000 and \$438,000 in their memorandum, but verbally argued \$498,679.20 during the hearing.¹⁸⁹ The defense said \$402,000 was the correct loss amount.¹⁹⁰ Loss amount matters because it is also tied to increases in the defendant’s base offense level.¹⁹¹ There are dollar amount cut-offs: more than \$5,000 adds two levels, more than \$10,000 adds 4, more than \$30,000 adds six, and so on.¹⁹² The relevant threshold here is \$400,000, which would add 14. The next dollar amount cut-off, to add 16, is at \$1 million, a difference of \$600,000. Under the mandatory Guidelines sentencing regime, this dispute may have been irrelevant, since \$402,000 meets the \$400,000 requirement. However, under *Booker*, the defense argued that the court could “take into account how close [the defendant’s loss amount] is to that

¹⁸⁵ According to the Connecticut Federal Defender I spoke with, Sarah Merriam, she is the only attorney in the office who has access to the database and she had never before provided the transcripts to researchers (as of September 2014).

¹⁸⁶ Mr. Blackwelder, was a religious leader in the Mormon Church. *United States v. Blackwelder*, No. 3:12CR61-EBB (D. Conn. June 27, 2013).

¹⁸⁷ *Id.* at 5.

¹⁸⁸ *Id.* at 2-3.

¹⁸⁹ *Id.* at 15, 39.

¹⁹⁰ *Id.* at 15.

¹⁹¹ See SENTENCING GUIDELINES, *supra* note 2, at 81-82 (showing the table for loss amount and increase in base offense level).

¹⁹² *Id.*

cliff” when calculating a sentence.¹⁹³

The government was arguing for the enhancement for abuse of a position of trust in light of a new victim, “R.J.,” who, according to the government, came forward three days before sentencing.¹⁹⁴ He apparently denied being a victim in his initial interview with the government.¹⁹⁵ The government alleged that Mr. Blackwelder, knowing he was under investigation, called R.J. prior to his interview with the government.¹⁹⁶ Mr. Blackwelder allegedly told R.J. that he did not need to talk to investigators.¹⁹⁷ The government argued that Mr. Blackwelder’s attempted concealment illustrated an abuse of a position of trust, that he was leveraging his position as a community leader to pressure R.J.¹⁹⁸

The government also argued that one of the victims, Darin Horne, had two daughters who should also count as victims.¹⁹⁹ The government said that the money Mr. Horne gave Mr. Blackwelder to invest came from a separate account with Mr. Horne’s daughters’ names on them.²⁰⁰ Further, the government argued that the promissory notes Mr. Blackwelder gave to Mr. Horne also had his daughters’ names on them.²⁰¹

Some of Mr. Blackwelder’s victims spoke before the court. A couple argued in favor of leniency. For example, Mr. Horne testified that Mr. Blackwelder’s position as bishop in the church never factored into whether he could trust Mr. Blackwelder’s guaranty.²⁰² He further stated that in his mind, he was investing only his money, not his daughters’.²⁰³ Others, like Mrs. Jack,²⁰⁴ testified that they never would have invested were Mr. Blackwelder not the bishop.²⁰⁵ The government also went through a long and detailed presentation that included evidence that was originally submitted as exhibits to their sentencing memorandum: a promissory note given to a victim for \$5,000,²⁰⁶ an extensive analysis of Mr. Blackwelder’s finances and phony investment accounts,²⁰⁷ and comparisons between the living quarters of Mr. Blackwelder and those of his victims.²⁰⁸ The

¹⁹³ *Blackwelder*, No. 3:12CR61-EBB, at 8-9.

¹⁹⁴ *Id.* at 21, 24.

¹⁹⁵ *Id.* at 24.

¹⁹⁶ *Id.* at 22.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 25.

²⁰⁰ *Id.* at 26.

²⁰¹ *Id.*

²⁰² *Id.* at 30.

²⁰³ *Id.* at 30.

²⁰⁴ She preferred not to use her first name because of privacy concerns. *Id.* at 33.

²⁰⁵ *Id.* at 32.

²⁰⁶ *Id.* at 43.

²⁰⁷ *Id.* at 44-55.

²⁰⁸ *Id.* at 55.

government also alleged that a victim who testified favorably toward Mr. Blackwelder misunderstood what actually happened to his money, and continues to turn a blind eye because of the position Mr. Blackwelder held in the community.²⁰⁹ By the conclusion of its presentation, the prosecution was arguing for a Guidelines sentence between 46 and 57 months.²¹⁰

The defense countered by saying that the government made assertions that were simply not supported in the record. “[T]hey can’t make it so just by saying it,” said Ms. Merriam, the public defender.²¹¹ For example, Ms. Merriam argued that the victims themselves said that their decision to invest had nothing to do with Mr. Blackwelder being a bishop.²¹² Ms. Merriam also noted that Mrs. Jack was not technically a victim, since her husband’s business was the investor, but respected her right to address the court.²¹³

The court ultimately handed down a 46-month sentence.²¹⁴ The court decided to wait on ordering a dollar amount for restitution until the parties agreed on a figure, but did note that it seemed to be about \$505,000 according to the PSR.²¹⁵

At the conclusion of the sentencing hearing, the prosecutor asked the judge to clarify for the record whether she adopted the findings of fact in the PSR.²¹⁶ She said she did, and followed up with: “There were some objections that were filed to the presentence report by the defendant[,] I think, but I think they’ve all been addressed, have they not?”²¹⁷ The prosecutor responded that “with respect to the findings of fact, there were a couple of adjustments” discussed during the hearing.²¹⁸ The transcript, reproduced verbatim below, suggests that the judge never addressed directly whether the adjustments were accepted.

MR. FRANCIS (Assistant United States Attorney): The objections to the guidelines calculations, just with respect to the findings of fact, there were a couple of adjustments we talked about today. With those adjustments, with your Honor’s rulings, that you accept the findings.

And then finally, I just missed the sort of magical incantation that your Honor recognized that you had the authority to impose a nonguidelines sentence.

THE COURT: We are no longer bound by the guidelines. They are

²⁰⁹ *Id.* at 38.

²¹⁰ *Id.* at 58.

²¹¹ *Id.* at 60.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 64.

²¹⁵ *Id.* at 65.

²¹⁶ *Id.* at 68.

²¹⁷ *Id.*

²¹⁸ *Id.*

very useful, however, in determining the sentence.²¹⁹

There appear to be a few issues with this proceeding. We are left wondering whether the relevant number of victims was ten or eight, since the court did not explicitly assent to accepting the changed findings of fact. In some ways, it seems like a *Fatico* evidentiary hearing occurred during this sentencing since so many individuals testified. However, the defense did not have an adequate opportunity to counter their testimony. Ms. Merriam herself noted at the conclusion of the proceeding that she had never seen Mr. Horne or Mr. Lercado, another victim who testified, before in her life. She had never spoken to them and did not know what they were going to say.²²⁰ She did not have an opportunity to ask them questions during the sentencing. Further, the list of people who testified during the sentencing was arguably incomplete. The prosecution extensively discussed R.J., the victim who recently came forward,²²¹ and said his experience was “enough to assess an abusive position of trust enhancement.”²²² R.J. did not testify at the hearing, and the government even apologized that they “weren’t able to put [“this new information”] in [their] brief and investigate it further.”²²³ Essentially, the defendant was given zero opportunity to respond to or question this testimony. Though we do not know exactly what role it played in the judge’s final decision, the judge did mention right after issuing the sentence that she found “breach of that kind of trust . . . reprehensible.”²²⁴

2. *Mr. Jackson’s Sentencing*

Defendant Mr. Jackson pled guilty to conspiracy to possess with intent to distribute heroin. During sentencing, the defense objected to two things in the PSR: 1) the lack of reduction for the defendant’s role in the offense and 2) his classification as a career offender.²²⁵

In determining whether Mr. Jackson qualified for a role adjustment, the court asked both attorneys whether Mr. Jackson “was a purchaser of redistribution quantities.”²²⁶ The government asserted yes.²²⁷ The defense attorney said that Mr. Jackson was a user himself, at the “bottom” level in the conspiracy who would

²¹⁹ *Id.*

²²⁰ *Id.* at 60.

²²¹ *Id.* at 21-25.

²²² *Id.* at 25.

²²³ *Id.*

²²⁴ *Id.* at 64.

²²⁵ *United States v. Jackson*, No. 3:09CR24-AWT (D. Conn. June 6, 2011).

²²⁶ *Id.* at 11.

²²⁷ *Id.*

occasionally purchase for others in addition to himself.²²⁸ The judge found the information in the defense briefing and submissions to be insufficient:

There is a very vague reference, for my purposes, at least, as to the degree which Mr. Jackson . . . redistributed drugs to others. I found it not helpful at all. And I felt like I was being given a little piece of the picture and not the whole picture. And it really is causing a problem for me²²⁹

He continued:

It's one thing to come in and say, well, we don't have to tell the judge about everything that the defendant did and we're happy to just have the judge look at what we put in front of the judge. But it's another thing to say we're going to do that and we're going to expect the judge to then speculate in the defendant's favor. And that's something I'm not prepared to do.²³⁰

After more back-and-forth on the issue, the judge mentioned that he looked at a previous PSR from the defendant's 2000 sentencing, which occurred in front of another district judge, to get more information.²³¹ This is further evidence that the judge found the PSR, as submitted, deficient. Again, the defense and the court disagreed about whether the defendant was forthcoming in that PSR about whether he sold or redistributed crack cocaine.²³² The defense's submissions claimed the defendant was addicted to heroin and only purchased enough to feed his addiction and a few of his friends'.²³³ This judge, after reading those submissions, asked probation to "go out and get additional information."²³⁴ None was returned, and the judge said that is why he turned to the old PSR.²³⁵ The new PSR contained a description of a transaction that occurred on November 7, where a heroin addict contacted the defendant and said she needed heroin.²³⁶ The defendant said he could maybe get it for her, and made a phone call.²³⁷ The transaction eventually fell through.

The prosecution believed that the defendant's story evolved during the six months between the change of plea agreement and the sentencing proceeding to completely deemphasize the defendant's role as a "street dealer."²³⁸ As evidence that Mr. Jackson

²²⁸ *Id.* at 13-14.

²²⁹ *Id.* at 14-15.

²³⁰ *Id.* at 15.

²³¹ *Id.* at 18.

²³² *Id.* at 12-14.

²³³ *Id.*

²³⁴ *Id.* at 16.

²³⁵ *Id.*

²³⁶ *Id.* at 29.

²³⁷ *Id.*

²³⁸ *Id.* at 19-20.

was a distributor, the prosecution referenced alleged purchases from a co-defendant, Mr. White, included in the PSR: a brick of heroin (100 bags), and three bundles (30 bags).²³⁹ The prosecution also mentioned that the defendant had \$1685 in cash and three cell phones, and had the testimony of a cooperating witness that Mr. Jackson was a street dealer.²⁴⁰ The witness is not named and he or she did not testify. Mr. Jackson's defense attorney asserted that other two cell phones belonged to Mr. Jackson's live-in girlfriend, Alison Sloan, and their daughter.²⁴¹ Further, counsel said the cash also belonged to Ms. Sloan, who had just withdrawn a substantial amount from her investment account.²⁴² The defense attorney said Ms. Sloan was present in the courtroom and prepared to testify to those facts.²⁴³ She never was called to do so. The judge moved on after asking a few more questions of the attorneys and returned to the issue of Mr. Jackson's consumption versus his distribution.²⁴⁴ The defense attorney asked the court if Mr. Jackson could explain the issue himself.²⁴⁵ The court allowed it.²⁴⁶ The judge then observed that "[he]'d like to finish up today, but [didn't] want to do so at the expense of getting an inaccurate read of what's going on."²⁴⁷

The court also felt information about the career offender finding was inadequate. There was confusion over whether the court had the correct information about a charge to which the defendant pled in 1994, included as an exhibit to the government's memorandum.²⁴⁸ Specifically, a clerk's handwritten note on the plea documents suggested the defendant pled to an amended charge.²⁴⁹ But the court did not have the charging document or a certified transcript of the proceedings.²⁵⁰ When the court asked the government if it tried to obtain those, the prosecution responded that the documents before the court were all the State of Connecticut had at their Enfield Records Center.²⁵¹

Instead of imposing a sentence, the judge decided to wait for counsel to submit more material to help him resolve the uncertainty around what Mr. Jackson did with the heroin he bought.²⁵² Then the judge would schedule a date to continue the sentencing.²⁵³ This

²³⁹ *Id.* at 20.

²⁴⁰ *Id.* at 21.

²⁴¹ *Id.* at 24-25.

²⁴² *Id.*

²⁴³ *Id.* at 23.

²⁴⁴ *Id.* at 27.

²⁴⁵ *Id.* at 31.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 34.

²⁴⁸ *Id.* at 35.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 35-36.

²⁵¹ *Id.* at 36-37.

²⁵² *Id.* at 39-40.

²⁵³ *Id.*

episode illustrates how defendants can end up before the court for final judgment with important issues unresolved. Specifically, important documentation from old charges is often missing or ambiguous. Even more surprising, the scope of the very offense the defendant is being sentenced for—in Mr. Jackson’s case, whether he was a dealer or merely a user—is unclear. In this case, testimony from Ms. Sloan, Mr. White, and Mr. Jackson may have assisted Chief Judge Thompson, the sentencing judge. Thankfully, it appears he asked counsel to obtain some of this information outside of court. But it is troubling that many judges may not be as discerning as Chief Judge Thompson was in this case, and may have just sentenced Mr. Jackson without these important facts.

3. *Mr. Parker’s Sentencing*

Mr. Parker’s case is a rare example of a post-trial, as opposed to post-plea, sentencing hearing.²⁵⁴ In March 2010, a jury convicted Mr. Parker of a) conspiracy to possess with the intent to distribute 500 or more grams of cocaine and b) possession with intent to distribute cocaine.²⁵⁵

As another example of inaccurate PSRs, a previous version of the PSR submitted to the court mistakenly had Mr. Parker possessing cocaine base, which carries a heavier penalty.²⁵⁶

Though both parties agreed with the findings of fact in the PSR and the court adopted them, the government argued at the hearing for a firearm enhancement, upping the Guidelines level by two points, because of a gun found in Mr. Parker’s sofa.²⁵⁷ The defendant, *pro se*,²⁵⁸ was initially confused:

THE COURT: Great. So Mr. Vatti [the prosecutor] wants to up your guidelines calculation by two points because of the firearm found in your sofa.

THE DEFENDANT: Yeah, he said that he wasn’t going to charge me with that.

THE COURT: Okay. You weren’t charged with the firearm, but the firearm is an enhancement to the guidelines when it’s present, and probable that it was connected to the drug crime.²⁵⁹

The government outlined its facts behind the handgun: that it was found during the execution of the search warrant next to the cocaine underneath a seat cushion in Mr. Parker’s apartment.²⁶⁰

²⁵⁴ *United States v. Parker*, No. 3:09CR117-MRK (D. Conn. July 15, 2011).

²⁵⁵ *Id.* at 2.

²⁵⁶ *Id.* at 3-4.

²⁵⁷ *Id.* at 9.

²⁵⁸ *Id.* at 2.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 9-10.

Though the prosecutor felt that established a sufficient connection between the firearm and Mr. Parker's crime, he argued for a sentence of 87 months (the high end of the range without the enhancement and the low end of the range with), so the issue was essentially moot.²⁶¹ The court said it was not inclined to apply the enhancement. After some prompting by the court, Mr. Parker "advocated for [him]self" by arguing that the gun was never sent to the laboratory.²⁶² Then the judge confirmed that he would not apply the enhancement.²⁶³

The court also spent a significant amount of time on the defendant's criminal history and related wrongful acts.²⁶⁴ The prosecutor argued that Mr. Parker's rap sheet showed escalation. He pointed to a "number of assaults that did not get criminal history points" because they were too old and a probation department's status report that showed four disciplinary tickets from the Wyatt Detention Facility, where Mr. Parker had been detained.²⁶⁵ The prosecutor said those disciplinary tickets included assaults on a staff member and another inmate.²⁶⁶ Mr. Parker disagreed enough with the representation of those incidents to leave open questions in the judge's mind:

THE COURT: Mr. Parker has written me, and he doesn't particularly like Wyatt and he is not getting his proper medication, and also people are provoking him.

THE DEFENDANT: Your Honor—

THE COURT: I don't know what the story is, but—²⁶⁷

The defendant told the court at that point that he was being provoked by his cellmate, who punched him.²⁶⁸ None of the individuals who were involved in or witnessed these incidents spoke to the court or were cross-examined by the defense. Though the judge never articulated explicitly how he incorporated the information about incidents at Wyatt in the final sentence, he did later tell the defendant that "another goal of sentencing is to convince you not to do this again."²⁶⁹ The judge eventually sentenced the defendant to 75 months, in between the Guidelines

²⁶¹ *Id.* at 10. However, the prosecution's willingness to drop it may have been driven by the fact that the Assistant United States Attorney did not notify Probation within the 10-day window to object to the PSR, nor did he tell the pro se defendant until the day before the sentencing. *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 10-11.

²⁶⁴ *Id.* at 13.

²⁶⁵ *Id.* at 16-17.

²⁶⁶ *Id.* at 17.

²⁶⁷ *Id.* at 17.

²⁶⁸ *Id.* at 17-18.

²⁶⁹ *Id.* at 22.

range of 70 to 87 months.²⁷⁰

This example shows us another example of flimsy factual support for an enhancement, and inadequate notice to the defense of the government's intent to seek it. Thankfully, the judge helped the pro se defendant advocate against it, but the ruling easily could have gone the other way. Also, the records of disciplinary violations from the detention facility were not subject to cross-examination by the defendant. Again, fortunately the defendant submitted letters to the court giving his side of the conflicts at Wyatt, but that took initiative and was not facilitated by the court. Though we do not know what impact the defendant's history of wrongdoing had on his final sentence, it is worth noting that the Court spent significant time discussing convictions the Guidelines Commission would think are too old to automatically incorporate into the sentence. Furthermore, the judge did specifically allude to deterrence as a rationale for sentencing, and warned the defendant that he would not get "his good time credits if he assault[ed] other" inmates.²⁷¹ Clearly, the discussion about the events at Wyatt was not immediately forgotten.

4. *Other Excerpted Examples*

In another sentencing, four paragraphs from a police report discussing the defendant's alleged trespassing was put directly in a PSR.²⁷² However, the defendant had a different version of the incident. His attorney pointed out that the defendant was never convicted of the offense described in the report, and never had an opportunity to test those allegations.²⁷³ The judge responded by saying that it was entirely within his discretion to consider the police report, even though it was hearsay.²⁷⁴ "Doesn't mean I believe every word of it," he said. "I'm allowed to consider it and I will."²⁷⁵

This is another scenario in which a hearing might be helpful. The judge could bring in the law enforcement officer who took the police report or another person who witnessed the trespassing incident.

Another issue in the same case was whether "bond forfeiture" in state court counted as a prior conviction under state law.²⁷⁶ The defense attorney argued that there was no basis in law for that assertion, and that she "couldn't find anyone in the State court system who would say [those] are convictions."²⁷⁷ After the court

²⁷⁰ *Id.* at 23.

²⁷¹ *Id.* at 22.

²⁷² *United States v. Bush*, No. 3:11CR94-JCH (D. Conn. Aug. 23, 2011).

²⁷³ *Id.* at 7.

²⁷⁴ *Id.* at 12.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 9.

²⁷⁷ *Id.* at 10.

pressed the probation officer for more support, he admitted that—even though in his addendum he said there was a record of a finding of guilty by the court—he did not actually have one in this case and has also seen other state court docket sheets where the crime is not associated with a finding of guilt.²⁷⁸ Again, though it is unknown how significant the police report of trespassing and bond forfeiture convictions were in the judge’s final imposition of a 75-month sentence on the defendant (above the 60-month mandatory minimum),²⁷⁹ the defendant was never given an opportunity to contest any of these charges.

Another interesting case dealt with the “relevant offense conduct” of an East Haven police officer, Mr. Zullo, who pled guilty to filing a false police report amidst a Department of Justice investigation into racial profiling practices.²⁸⁰ The prosecution argued that the filing of the false police report fell within Guidelines Section 2J1.2, “Obstruction of Justice,”²⁸¹ as an effort to avoid detection or responsibility.²⁸² Under the government’s novel theory, the filing of that false police report should count as an effort to obstruct the on-going civil rights investigation in addition to counting as the offense of conviction.²⁸³ The court asked the Assistant United States attorney follow-up questions about the timeline of the events—e.g., when the DOJ investigation started—to see if the fact pattern fit with the sequence as required by the statute.²⁸⁴ Here is an example of how one small difference in the court’s characterization of the “relevant offense conduct” can drastically increase the sentence. If the obstruction of the entire civil rights investigation was considered part of the filing of the false police report, the government acknowledged that Mr. Zullo could be subject to the multiple victim enhancement.²⁸⁵

Some disputed facts also existed around Mr. Zullo’s arrest of Jose Luis Alvarracin, who alleged he was harassed and hurt by members of the East Haven police department.²⁸⁶ Mr. Zullo’s attorney disputed the level of force used to overcome Mr. Alvarracin’s passive resistance.²⁸⁷ Mr. Alvarracin gave a statement through a Spanish-English translator at the hearing.²⁸⁸ All in all, three witnesses spoke for the prosecution, including Mr. Alvarracin,

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 37.

²⁸⁰ U.S. v. Zullo, No. 3:12CR00017-AWT (D. Conn. Jan. 8, 2013).

²⁸¹ SENTENCING GUIDELINES, *supra* note 2, at 231.

²⁸² *Zullo*, No. 3:12CR00017-AWT, at 6.

²⁸³ *Id.* at 8-10.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 14.

²⁸⁶ *Id.* at 43.

²⁸⁷ *Id.* at 16.

²⁸⁸ *Id.* at 43.

and the defense offered five in addition to Mr. Zullo.²⁸⁹

The defense attorney said he was inclined to “request a full-blown evidentiary hearing with the right to cross-examine” regarding an allegation of unreasonable force against a victim who testified for the prosecution at the sentencing hearing.²⁹⁰ The prosecutor responded by saying that “[w]e routinely come to sentencings and unexamined people always come up and speak.”²⁹¹ Again, this example illustrates the demand for solutions like the one in this Article, given the factual intensity of important matters decided at sentencing. Just because witnesses currently offer unexamined testimony does not mean they should continue to do so.

5. Summary

My examination of sentencing transcripts revealed some important overarching findings:

(1) “Half-baked” PSRs often end up in front of judges. Specifically, PSRs often omit important information. Sometimes it happens as a result of submissions on short notice, multiple addenda that become confusing, or information that the opposing side has not seen at all. Also, PSRs occasionally contain errors of fact, of calculation, and sometimes of law;

(2) Sometimes “*Fatico*-light” hearings are held during the sentencing, where individuals speak during the proceeding. However, this happens unsystematically and I could not identify a unifying or coherent principle for when it occurs;

(3) Often, witnesses relevant to disputed facts about the instant offense or past offenses in the PSR do not appear before the sentencing judge at all;

(4) Even when those witnesses appear, the defense is sometimes bothered enough by the lack of cross-examination to voice complaints; and

(5) The outcome of apparently minor disputed facts can significantly impact a defendant’s sentence, as through the firearm enhancement.

Though the informal opportunities provided to defendants, victims, and some witnesses to speak at sentencing hearings are promising, and judges generally exercise their discretion wisely, the examples I examined illustrate a real need for uniform procedural protections.

VII. A PROPOSAL

Applying the Confrontation Clause at sentencing to be

²⁸⁹ *Id.* at 30-31.

²⁹⁰ *Id.* at 32.

²⁹¹ *Id.*

consistent with *Crawford's* and its progeny's mandates would provide important safeguards to defendants and reconcile current sentencing practice with constitutional imperatives. I propose a few modifications to the current system.

1. Once a plea bargain had already been struck or the defendant was found guilty, a judge would be required to hold an evidentiary *Fatico* hearing if a disputed fact in the PSR would result in a "substantial"²⁹² increase above the base offense level. The judge would not be allowed to skate around the need for the hearing by simply asserting that the disputed fact would not be relied upon or considered in sentencing, or that the PSR contained sufficient evidence to resolve the fact itself.

2. The probation department would have to produce its source for cross-examination if a live person's testimony was the primary source of the disputed fact. If the primary source were unavailable, the department would have to find other evidence to prove the disputed fact. The court could not rely upon the PSR statements alone. Testimony from confidential informants that frequently makes it into PSRs today would be excluded if the prosecution could not produce the declarant. The government could, of course, find alternative evidence to prove the same fact, albeit less conveniently. Though it is frustrating for the court to leave potentially useful and reliable evidence unconsidered, judges are constitutionally obligated to navigate this same dilemma under the Confrontation Clause during the guilt phase. Indeed, courts are still dealing with the difficulties of producing at trial the declarants required by the Confrontation Clause.²⁹³

3. The defendant would be able to issue subpoenas to produce the probation department's sources. To that end, additional notice requirements would apply so defendants know what information is being used against them ahead of time.²⁹⁴ The probation

²⁹² A potential definition for this term is located *supra* Part I.A and *infra* Part VI.A.

²⁹³ *E.g.*, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (expert testimony referring to DNA profile as produced from semen on victim did not run afoul of Confrontation Clause); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (holding that introduction of a blood-alcohol analysis through testimony of analyst who did not test or certify it violated Confrontation Clause); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (holding that state drug testing analysts' report identifying a substance as cocaine were affidavits as covered by the Confrontation Clause). The Supreme Court has not yet tested the viability of providing an alternate source in the case of an unavailable declarant who made testimonial statements. Until then, perhaps Congress or the Guidelines Commission could craft an acceptable test for "substitutes" for primary sources that cannot be produced at sentencing. However, until then, *Crawford* requires the opportunity to confront the source of the testimonial statement him or herself.

²⁹⁴ Scholars hypothesize that the additional burden of notifying defendants of the information being used against them would not be too significant. R. Craig Green, *Apprendi's Limits*, 39 U. RICH. L. REV. 1155, 1178 (2005).

department may begin to produce PSR sources as a matter of course once the requirement becomes widely known. Probation officers may also craft the PSRs themselves more assiduously, knowing that sources of testimonial statements will have to be produced and cross-examined in court. In addition, prosecutors and probation officers may take additional care to ensure facts that could be relevant at sentencing are resolved with the defendant pre-plea bargain.²⁹⁵

A. *Practical Considerations*

One criticism of this proposal is that requiring the production of witnesses for every disputed fact at sentencing may burden the court's time and financial resources. But in addition to the constitutional argument to be made post-*Crawford*, my research suggests that my proposal would not be such a heavy lift. First, disputed facts in PSRs are the exception rather than the rule.²⁹⁶ Furthermore, only "testimonial statements" as defined specifically by *Crawford* and its progeny would require production of the declarant, though many statements to probation officers in PSRs would arguably count as testimonial under a common understanding of the word. In any case, not every sentencing would require the extra resources dedicated to producing PSR sources. Granting defendants their constitutional due would not place too great a burden on the courts.²⁹⁷ Congress or the U.S. Sentencing Commission could further limit any strain by guaranteeing evidentiary hearings and confrontation rights only when the disputed fact would lead to a "significant" increase in the defendant's Guidelines sentence. Concerns about the exclusion of crucial evidence could be addressed with a "substantial effort" test: the government or probation could admit the evidence without the declarant as long as they proved that they made a substantial effort to produce him. Another way to reduce the burden on the court system and protect defendants would be to prohibit facts implicitly decided at trial (e.g., the presence of a dangerous weapon during the offense) from being redecided at sentencing. However, this version

²⁹⁵ This may also allow defendants more control over the evidence presented during sentencing, rather than having lawyers "resolve" the issues themselves and then re-present information to the judge. The current process may have more to do with bargaining power than actual truth.

²⁹⁶ Informal conversations with the public defenders and prosecutors cited *supra* notes 3 and 185 indicate this is the case. Further support comes from my own experience at the U.S. Attorney's Office in the summer of 2013. But determining exactly how frequently facts are disputed is a topic for future data collection and research.

²⁹⁷ Though, importantly, the Sixth Amendment is not subject to a *Mathews v. Eldridge* balancing test, like the Fifth Amendment. See 424 U.S. 319, 334 (1976) (describing balancing test for determining procedural due process).

does not address post-plea bargain sentencing.

I propose that the threshold for “significant” or “substantial” applies to any fact that would increase the sentence by 25 percent above the base offense level minimum sentence. The Commission or Congress, however, can perhaps better determine the “correct” figure.

B. Implementation

The Supreme Court should and perhaps will address confrontation at sentencing. In the meantime, the Sentencing Commission could require the procedural protections necessary to satisfy the confrontation right, outlined *supra* Part V. The Commission, an independent agency within the judicial branch, can announce changes to federal sentencing and submit them to Congress. The changes take effect automatically unless “disapproved by an Act of Congress.”²⁹⁸ The Commission cannot, however, say what is constitutionally required. Regardless, district judges are generally bound to follow the Commission’s rules in determining a defendant’s sentence. Alternately, Congress could pass independent legislation, since it had the authority to create the Sentencing Commission in the first place.²⁹⁹

Lower courts may also provide an interim solution. As discussed *supra* Part II.A, some federal and state courts have already applied confrontation rights at capital sentencing. More jurisdictions should follow suit and extend such rights to non-capital sentencing as well. They must correctly interpret *Williams*’ and *Crawford*’s precedential authority on the issue. As the natural arbiters of procedural and substantive due process, courts may be the most appropriate source of reform.

Even if the Supreme Court directly addresses the issue and rejects the confrontation right at sentencing, that does not prevent the Commission or Congress from establishing it independently. The Court’s decision would be a floor, not a ceiling.³⁰⁰

²⁹⁸ See R. Craig Green, *Apprendi’s Limits*, 39 U. RICH. L. REV. 1155, 1234 n.68 (2005) (citing 28 U.S.C. § 994(p) (2000)).

²⁹⁹ Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1987 (1984).

³⁰⁰ It has long been understood that the Constitution and Supreme Court jurisprudence create a floor for individual rights; Congress and states can grant defendants an additional procedural protection even if the Supreme Court holds it is not constitutionally required. Congress has granted statutory rights: those as to Social Security benefits and disclosure of government information, as examples. See *FEC v. Akins*, 524 U.S. 11 (1998) (holding that Congress created general right to access certain campaign spending information); *Mathews*, 424 U.S. 319 (holding that Congress created statutory property right in Social Security benefits).

VIII. CONCLUSION

“Sentencing proceedings are arguably the most important judicial business conducted by Article III judges.”³⁰¹

Sentencing is home to a lot of the action in our criminal justice system but not as much of the attention. Following the Court’s revival of the Confrontation Clause in *Crawford* and its recent sentencing jurisprudence, I am hopeful that the constitutional basis is strengthened for defendants to properly confront their accusers at all stages of criminal prosecutions, as intended and required by the Sixth Amendment and its authors. The substance and process of the law—in criminal justice and other areas—are supposed to work together. It should offend our sensibilities to shift the substance of sentencing through the Guidelines and other measures without adjusting the procedural protections we grant defendants. Supported by the quantitative and qualitative research in this paper, it is obvious that without the right of confrontation, today’s system risks creating the same arbitrary and unfair outcomes that inspired the last round of federal sentencing reform.

³⁰¹ Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years--The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 *Geo. WASH. L. REV.* 857, 889 (1992).