South Carolina Law Review

Volume 50
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*
Article 7

Summer 1999

Criminal Procedure

Stacey Coleman-McKinney

GRANGER V. STATE: EXAMINING WHAT CONSTITUTES "NOTICE" FOR PURPOSES OF THE SUFFICIENCY OF AN INDICTMENT AND THE STANDARD OF PROOF ON ISSUES OF FACT AT SENTENCING

I. INTRODUCTION

Sentencing of criminal defendants is a serious matter. The precariousness of individual liberty necessitates the safeguards of due process. Recently, in *Granger v. State*[1] the South Carolina Supreme Court considered whether an indictment is sufficient to place a criminal defendant on notice of the charges against him. In its decision, the court upheld the wording of an indictment charging the defendant with trafficking *more than ten grams* as "sufficient to put Granger on notice of the charge he had to meet, i.e., trafficking,"[2] although the actual amount "revealed" at sentencing was 58.44 grams.[3] The finding by the trial judge at sentencing of the greater quantity of cocaine had a significant effect on the potential sentencing range, increasing it from a range of three to ten years in prison and a fine of $25,000 to a range of seven to twenty-five years and a fine of $50,000 for a conviction for trafficking twenty-eight to 100 grams.[4] Implicitly the court affirmed judicial findings of fact at sentencing by a standard, if any, below that afforded to criminal defendants at trial—beyond a reasonable doubt.

This Comment suggests that the indictment in question was insufficient to put Granger on notice of the charges against him insofar as more than minimal statutory language is necessary to inform defendants of the charges facing them. Other courts have suggested simple ways to inform defendants of the potential punishment range by specifying the statutory subsection in the indictment relating to the quantity of drugs.[5] This Comment explores the potential due process problems associated with judicial findings of fact at sentencing and the need for an evidentiary standard for making such determinations beyond mere preponderance of the evidence. Part II summarizes the facts and the court's reasoning in *Granger*. Part III analyzes the court's justification for finding that the indictment was sufficient to put Granger on notice of the charges facing him and criticizes the court's reliance on *State v.*

---

1. 333 S.C. 2, 507 S.E.2d 322 (1998).
2. *Id.* at 5, 507 S.E.2d at 324.
3. *Id.* at 3, 507 S.E.2d at 323.
4. *Id.* at 4 n.2, 507 S.E.2d at 323 n.2.
5. *See, e.g.*, Darby v. State, 516 So. 2d 775, 780 (Ala. Crim. App. 1986), *rev'd on other grounds*, 516 So. 2d 786 (Ala. 1987).

Towery.[6] Part III also evaluates the harshness of the court's decision insofar as had Granger's indictment been *amended* at sentencing, the case would have come out differently under *Clair v. State*[7] because increasing the potential penalty through amending the indictment would involve changing the nature of the offense. Finally, Part IV focuses on the court's implicit support for judicial findings of fact at sentencing. The trial judge's finding of the actual amount of cocaine in this case is analogous to the practice in the federal courts of real offense sentencing under sentencing guidelines and raises similar concerns about the proper standard for making judicial determinations of fact at sentencing. Because of the inadequacies of the preponderance standard for safeguarding a defendant's due process rights, Part IV also explores the issues and arguments in favor of a higher standard for findings of fact at sentencing.

II. BACKGROUND

Charles Granger, Jr., was indicted for trafficking crack cocaine.[8] According to the indictment, Granger "'was knowingly in actual or constructive possession of *more than ten (10) grams* of Crack Cocaine. This is in violation of South Carolina Code of Laws § 44-53-375.'"[9] Granger pled guilty to the indictment as stated.[10] At the plea hearing, the actual quantity of crack Granger had trafficked, 58.44 grams, was revealed.[11] Upon advising Granger that his potential sentence would now range from seven to twenty-five years (as he was now to be punished for possession of between twenty-eight to 100 grams instead of ten to twenty-eight grams),[12] the judge sentenced him to fifteen years for the trafficking charge.[13]

Granger filed for post conviction relief arguing that the indictment's language charging him with trafficking more than ten grams notified him only that he was charged with trafficking *between ten and twenty-eight grams* of crack cocaine and that he faced the lesser penalty of three to ten years and a

6. 300 S.C. 86, 87, 386 S.E.2d 462, 462-63 (1989) (upholding indictment that made no mention of the quantity of cocaine).

7. 324 S.C. 144, 146, 478 S.E.2d 54, 55 (1996) (holding that an amended indictment raising the penalty divests a court of subject matter jurisdiction).

8. *Granger*, 333 S.C. at 3, 507 S.E.2d at 323.

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* S.C. CODE ANN. § 44-53-375(C) (Law. Co-op. Supp. 1998) (delineating sanctions for the following quantity ranges: 10 to 28 grams in subsection (C)(1)(a)-(c), 28 to less than 100 grams in subsection (C)(2)(a)-(c), 100 to less than 200 grams in subsection (C)(3), 200 to less than 400 grams in subsection (C)(4), and 400 grams or more in subsection (C)(5)).

13. *Granger*, 333 S.C. at 3, 507 S.E.2d at 323.

fine of $25,000.[14] The circuit court agreed and found the indictment was insufficient to put Granger on notice that he could face a more severe sentence and then remanded the case for resentencing.[15]

The South Carolina Supreme Court reversed the Circuit Court's findings by first determining that the indictment met the standards for sufficiency.[16] The court unequivocally stated that "[a]n indictment is sufficient if it apprises the defendant of the elements of the offense intended to be charged and apprises the defendant what he must be prepared to meet."[17] The *Granger* court also noted that punishment is not "part of the pleading charging a crime."[18] Taken together, these statements reveal that while a defendant is entitled to have the elements of the offense set forth in the indictment, a defendant is not entitled to know from the indictment itself what the potential punishment will be.

In holding that Granger was on notice of the charged offense vis-à-vis the indictment, the court relied principally on its holding in *State v. Towery*.[19] In *Towery* the court found sufficient an indictment in which the State failed to specify a quantity of cocaine.[20] The indictment alleged simply that the defendant "'did traffic in cocaine by willfully, unlawfully and knowingly having in his possession *a quantity of cocaine*.'"[21] Because of the *Towery* holding, the *Granger* court found the indictment at issue also sufficient.[22]

The court further supported its holding by distinguishing *Granger* from cases dealing with amended indictments that changed the nature of the underlying offense.[23] For instance, in *Hopkins v. State*[24] an amendment to an indictment changing the offense from felony driving under the influence causing great bodily harm to felony driving under the influence causing death changed the nature of the offense because there was an increase in punishment from ten to twenty-five years.[25] The common denominator of cases like

---

14. *Id.* at 3-4, 507 S.E.2d at 323.
15. *Id.* at 4, 507 S.E.2d at 323.
16. *Id.* at 4-5, 507 S.E.2d at 323-24.
17. *Id.* at 4, 507 S.E.2d at 323 (citing State v. Evans, 322 S.C. 78, 81, 470 S.E.2d 97, 98 (1996)).
18. *Id.* at 5 n.3, 507 S.E.2d at 324 n.3; *see also* State v. Butler, 277 S.C. 452, 457, 290 S.E.2d 1, 3 (1982) (concluding punishment "is not and never has been considered a part of the pleading charging a crime").
19. *Granger*, 333 S.C. at 4, 507 S.E.2d at 323-24 (relying on State v. Towery, 300 S.C. 86, 386 S.E.2d 462 (1989)).
20. *Towery*, 300 S.C. at 87, 386 S.E.2d at 463.
21. *Id.* at 87, 386 S.E.2d at 462 (emphasis added).
22. *Granger*, 333 S.C. at 4, 507 S.E.2d at 324.
23. *Id.* at 5, 507 S.E.2d at 324.
24. 317 S.C. 7, 451 S.E.2d 389 (1994).
25. *Id.* at 8-9, 451 S.E.2d at 389-90; *see also* State v. Riddle, 301 S.C. 211, 212, 391 S.E.2d 253, 253 (1990) (holding that an amendment to an indictment for "assault with intent to commit *third* degree criminal sexual conduct to the greater charge of assault with intent to commit *first* degree criminal sexual conduct" was improper as it increased the penalty from a maximum of 10 years to a maximum of 30 years).

Hopkins is that if the amendment increases the potential penalty, it changes the nature of the offense and is an improper indictment. The court blithely distinguished *Hopkins* and other similar cases by noting that Granger's indictment was not amended.[26]

Finally, the court went to great lengths to distinguish *Clair v. State*,[27] a very recent and factually similar case.[28] The court's key distinction between the cases was that the indictment in *Clair* was *amended* from trafficking in cocaine weighing more than 100 grams and less than 200 grams to an amount more than 200 grams and less than 400 grams.[29] According to the *Granger* court, "[t]he critical difference between *Clair* and the present case . . . is that Granger's indictment does not state that Granger was charged with trafficking *less than 28 grams* of crack."[30] Had the indictment in *Granger* been amended to reflect a greater quantity of crack cocaine, the court would have treated the amendment as improper under *Clair*, and thus, the court would have lacked subject matter jurisdiction.[31]

III. ANALYSIS

A. Insufficient Notice

An examination of the case law dealing with sufficiency of indictments shows that the *Granger* court ignored many standard requirements found in previous decisions. In *Carter v. State*[32] the court explained that "[a]n indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon."[33] *Carter* involved an appeal by the State from a finding that Carter's guilty plea "was not voluntarily and knowingly entered."[34] The defendant had been indicted under section 44-53-370 of the Code of Laws of South Carolina for manufacturing methamphetamine, and the supreme court held that counsel had properly advised Carter that his conviction under section 44-53-370 would require him to be sentenced more severely under the penalties of section 44-53-375.[35] Section 43-53-375 does not define a separate crime, but

26. *Granger*, 333 S.C. at 5, 507 S.E.2d at 324.
27. 324 S.C. 144, 478 S.E.2d 54 (1996).
28. *Granger*, 333 S.C. at 5, 507 S.E.2d at 324.
29. *Id.* (citing *Clair*, 324 S.C. at 145-46, 478 S.E.2d at 55).
30. *Granger*, 333 S.C. at 5, 507 S.E.2d at 324.
31. *Clair*, 324 S.C. at 146, 478 S.E.2d at 55.
32. 329 S.C. 355, 495 S.E.2d 773 (1998).
33. *Id.*, 329 S.C. at 362-63, 495 S.E.2d at 777; *see also* State v. Perry, 87 S.C. 535, 539, 70 S.E. 304, 305 (1911) (stating that an "offense should be so plainly stated in the indictment as to enable the Court looking alone to the indictment and the verdict to impose the sentence prescribed by law").
34. *Carter*, 329 S.C. at 359, 495 S.E.2d at 775.
35. *Id.* at 361, 495 S.E.2d at 776.

only an enhanced punishment for a violation of section 44-35-370 involving methamphetamine.[36] The court found the indictment in *Carter* sufficient, despite the indictment's referral to section 44-53-370, because the plain language of the body of the indictment notified the defendant that he was charged with manufacturing methamphetamine.[37]

The indictment in *Granger* did not meet the standard for the sufficiency of an indictment as stated in *Carter*. Although the defendant knew he was pleading to trafficking in crack cocaine, he did not know he could be penalized for trafficking 58.44 grams from an indictment merely stating, "*more than ten (10) grams*,"[38] as section 44-53-375 breaks down the appropriate sanction according to quantity.[39] The indictment would have provided notice with particularity if it had stated that Granger had trafficked between twenty-eight grams and 100 grams. Further, the trial judge, without the additional information of the exact quantity of crack cocaine involved, would not have known the proper sentence to pronounce from the indictment itself. The words, "more than ten grams" could mean 100, 200 or 400 grams—all of which require different mandatory sentences under section 44-53-375.[40]

Similarly, an indictment is arguably insufficient when it omits one of the necessary elements of the offense.[41] If one regards the amount of crack cocaine as an element of the offense, then at least a statutory range should have been given in the indictment, rather than the minimal statutory language that Granger trafficked in more than ten grams. The rule in *State v. Butler*[42] is that punishment is not part of the pleading charging a crime.[43] In *Butler* the defendant was indicted for murder, but the indictment did not include the aggravating circumstance of rape.[44] The defendant argued that the failure to allege the aggravating circumstance was contrary to the requirement of notice of the charges against him.[45] In rejecting this argument the court stated that "[n]otice is sufficient where the statutory requirements are met" and that Butler's death sentence was for murder, not the aggravating circumstance of rape.[46] *Granger* and *Butler* differ in three significant ways. First, the defendant in *Butler* did not argue that he lacked notice of the murder charge for which he was sentenced,[47] whereas Granger based his post conviction relief motion on

36. *Id.*
37. *Id.* at 363, 495 S.E.2d at 777.
38. Granger v. State, 333 S.C. 2, 3, 507 S.E.2d 322, 323 (1998).
39. *See* S.C. CODE ANN. § 44-53-375(C) (Law. Co-op. Supp. 1998). This section delineates different sanctions for the varying quantity ranges. *See supra* note 12.
40. *See* S.C. CODE ANN. § 44-53-375(C).
41. *See* State v. McIntire, 221 S.C. 504, 509, 71 S.E.2d 410, 412 (1952).
42. 277 S.C. 452, 290 S.E.2d 1 (1982).
43. *Id.* at 457, 290 S.E.2d at 3.
44. *Id.* at 456-57, 290 S.E.2d at 3.
45. *Id.*
46. *Id.* at 457, 290 S.E.2d at 4.
47. *Id.*

the fact that he was denied such notice.[48] Second, if courts interpret *Butler* narrowly, the case stands only for the proposition that notice does not require setting forth aggravating circumstances in an indictment for capital murder. Unlike the murder statute in *Butler*,[49] section 44-53-375, which was controlling in *Granger*, specifies different punishments depending on the amount the defendant is alleged to have trafficked.[50] Finally, because the amount of cocaine—not the criminal act—triggers the trafficking statute,[51] the amount is a significant aspect of the offense.

The court's reliance on *State v. Towery*[52] is also questionable. The original indictment charging Towery with trafficking cocaine stated that he "'did traffic in cocaine by willfully, unlawfully and knowingly having in his possession *a quantity of cocaine.*'"[53] Towery argued that because the original indictment returned by the grand jury failed to state a quantity of cocaine, the trial court lacked subject matter jurisdiction.[54] In holding that the original indictment was sufficient, the court stated simply that the requirements of *State v. Owens*[55] were met without offering further explanation.[56] However, there is an important distinction between *Towery* and *Granger*. In *Towery* the prosecutor amended the original indictment prior to trial to reflect that the quantity of cocaine was "'in excess of 100 grams but less than 200 grams.'"[57] Without that amendment, it is unclear whether the court would have upheld the minimal language in the original indictment because the trial court would not have known, from the indictment itself, the proper sentence to impose.[58] The words "a quantity of cocaine" could mean an amount less than ten grams, which would constitute some lesser offense than trafficking.[59] Such a vague determination could mean anything from trace amounts to 400 grams or more. The court should not summarily dismiss the importance of quantity when quantity is the determining factor in how much loss of liberty a defendant faces. Although the exact amount may be difficult to ascertain when the indictment is presented, at minimum, a statutory range—like the one in the amended

48. Granger v. State, 333 S.C. 2, 3, 507 S.E.2d 322, 323 (1998).

49. *See* S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1976).

50. *See* S.C. CODE ANN. § 44-53-375(C) (Law. Co-op. Supp. 1998).

51. *See* State v. Peay, 321 S.C. 405, 408, 468 S.E.2d 669, 671 (Ct. App. 1996) (citing State v. Raffaldt, 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995)).

52. 300 S.C. 86, 386 S.E.2d 462 (1989).

53. *Id.* at 87, 386 S.E.2d at 462 (emphasis added).

54. *Id.*

55. 293 S.C. 161, 359 S.E.2d 275 (1987). According to the *Owens* court, "[a]n indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce [and to enable] the defendant to know what he is called upon to answer." *Id.* at 165, 359 S.E.2d at 277.

56. *Towery*, 300 S.C. at 87, 386 S.E.2d at 463.

57. *Id.* at 87, 386 S.E.2d at 462.

58. Or the proper "judgment to pronounce." *See Owens*, 293 S.C. at 165, 359 S.E.2d at 277.

59. *See* S.C. CODE ANN. § 44-53-375(B) (Law. Co-op. Supp. 1998).

indictment in *Towery*—should be stated for purposes of notice.

The court in *Granger* cited the Alabama case of *Darby v. State*[60] for the proposition that provisions of the trafficking statute relating to minimum sentencing requirements did not involve elements of trafficking.[61] In *Darby* the defendant was charged with trafficking "'28 grams or more of cocaine.'"[62] The defendant argued that the indictment did not sufficiently track the statute[63] (similar to section 44-53-375(C) of the Code of Laws of South Carolina) because it did not specify the exact quantity the defendant allegedly had in his possession.[64] The court rejected Darby's argument because it found that the statute's subparagraphs specifying the punishments depending on the quantity involved were merely minimum sentencing requirements and not elements of the offense.[65] Although the South Carolina Supreme Court cited *Darby* in support of its ultimate holding in *Granger*, the Alabama court did not entirely dismiss the significance of the quantity of drugs involved. In fact, the *Darby* court suggested "[a] better practice might be for the indictment to specify the paragraph of the trafficking statute alleged to have been violated in terms of quantity."[66] Similarly, the form of jury verdict would specify the statutory range of amount that the jury determines.[67] For instance, the form of verdict might say, "We the jury find the defendant guilty of trafficking in more than 28 grams but less than 100 grams of crack cocaine." While the exact quantity is not given, this approach at least states the penalty range amounts, constituting better notice than Granger received in the indictment against him. The indictment charging Granger with trafficking could easily have been written to give him notice of the penalty.

Finally, *Granger* invites criticism because it condones imprecision in the drafting of an indictment. As previously stated, the indictment could have been made more specific simply by specifying a range.[68] The court justified Granger's increased sentence of fifteen years—an increase of at least five years if Granger had received the maximum penalty for a first offense of trafficking in ten to twenty-eight grams[69]—on grounds that the indictment satisfied minimal standards of notice.[70]

The decision's injustice is also apparent in light of the result in *Clair*

60. 516 So. 2d 775 (Ala. Crim. App. 1985), *rev'd on other grounds*, 516 So. 2d 786 (Ala. 1987).
61. Granger v. State, 333 S.C. 2, 4-5, 507 S.E.2d 322, 324 (1998).
62. *Darby*, 516 So. 2d at 778.
63. ALA. CODE § 20-2-80(2) (1975), *amended by* ALA. CODE § 13A-12-231 (Supp. 1998).
64. *Darby*, 516 So. 2d at 779.
65. *Id.*
66. *Id.* at 780.
67. *Id.*
68. Granger v. State, 333 S.C. 2, 3, 507 S.E.2d 322, 323 (1998) (emphasis omitted).
69. *See* S.C. CODE ANN. § 44-53-375(C) (Law. Co-op. Supp. 1998).
70. *Granger*, 333 S.C. at 2, 4, 507 S.E.2d at 324.

v. State.[71] *Clair*, decided after *Towery*, explains that when an amendment to an indictment increases the potential punishment, it changes the nature of the offense and is improper.[72] The only difference between *Granger* and *Clair* is that the prosecutor in *Granger* failed to amend the indictment to reflect the greater quantity. If the prosecutor had taken that step, rather than the trial judge finding the actual amount to be 58.44 grams, *Clair* would have mandated a different result because the amendment would have stripped the court of subject matter jurisdiction.

B. *Authority of the Sentencing Judge to Make Findings of Fact at Sentencing*

A second issue in *Granger*, but one the court did not address in its opinion, is the court's implicit affirmance of judicial findings of fact at sentencing. At Granger's plea hearing, the trial judge sentenced him upon revelation that the actual quantity Granger trafficked was 58.44 grams of crack cocaine.[73] The opinion is silent as to whether the trial judge made any specific finding of this fact on the record or what, if any, standard of proof he relied on to determine the amount. Because the trial judge's actions in taking this plea are similar to findings of relevant conduct[74] in the federal courts, the same problems of the appropriate standard of proof for such findings are present and in need of consideration.

Of course, trial judges have broad discretion at sentencing that "applies to both the type of information considered and the length of sentence imposed."[75] In *Williams v. New York*[76] the Supreme Court held that a sentencing judge is not limited to the rules of evidence when determining the proper sentence to impose upon a defendant.[77] Likewise, South Carolina courts have held that "[a] sentencing judge is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined."[78] However, the judge is not free to act "on surmise or suspicion," but must "listen

71. 324 S.C. 144, 478 S.E.2d 54 (1996).
72. *Id.* at 146, 478 S.E.2d at 55.
73. *Granger*, 333 S.C. at 3, 507 S.E.2d at 323.
74. *See* UNITED STATES SENTENCING GUIDELINES COMMISSION, GUIDELINES MANUAL § 1B1.2(b) (1998) [hereinafter GUIDELINES].
75. Robert E. Hanlon, Note, *Hard Time Lightly Given: The Standard of Persuasion at Sentencing*, 54 BROOK. L. REV. 465, 480-81 (1988).
76. 337 U.S. 241 (1949).
77. *Id.* at 247.
78. State v. Cantrell, 250 S.C. 376, 379, 158 S.E.2d 189, 191 (1967); *see also* State v. Gulledge, 326 S.C. 220, 228, 487 S.E.2d 590, 594 (1997) (concluding that evidentiary rules are inapplicable in a sentencing proceeding); State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (stating that the trial judge has wide discretion in determining the imposition of sentences).

and give serious consideration to any information material to punishment."[79]

Although trial judges have broad discretion at sentencing, one must focus on how the imposition of a harsher sentence based on the actual quantity of cocaine trafficked in *Granger* is analogous to the judge's consideration of relevant conduct in the federal courts. In the federal system, relevant conduct is defined as "conduct that is not necessarily the basis for the defendant's conviction or charge, nor even an element of the offense of conviction, but may nevertheless be used to determine the base offense level and applicable specific offense characteristics."[80] The guidelines instruct judges to account for factors such as "the amount of drugs, property, or money" forming part of the same common scheme or plan as the underlying offense "even if those amounts were not part of the convicted offense."[81]

United States v. Harrison-Philpot,[82] decided under the federal sentencing guidelines, illustrates the effect of relevant conduct at sentencing. In *Harrison-Philpot* the defendant was convicted of distributing sixty-seven grams of cocaine.[83] Harrison-Philpot appealed because the Government at trial asserted as relevant conduct an actual amount of fifteen to 49.9 kilograms of cocaine.[84] The Ninth Circuit Court of Appeals held that the sentencing judge could apply a higher sentencing range and find, by a preponderance of the evidence, that the greater quantity existed.[85] Likewise, the trial judge in *Granger* sentenced the defendant to fifteen years based on the actual amount trafficked, rather than the amount charged in the indictment. However, in *Granger*, unlike *Harrison-Philpot*, there is no indication of the burden of proof by which the judge should have found the existence of the greater quantity. In either of the above cases, had the defendants been tried on the relevant conduct or actual amount, each would have had the benefit of the quantity being found beyond a reasonable doubt, rather than by the preponderance of the evidence or, worse, by no standard of proof. This difference necessitates examination of

---

79. *Franklin*, 267 S.C. at 245, 226 S.E.2d at 897 (1976); *see also* United States v. Tucker, 404 U.S. 443, 446 (1972) (noting that the sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come").

80. Lauren Greenwald, Note, *Relevant Conduct and the Impact of the Preponderance Standard of Proof Under the Federal Sentencing Guidelines: A Denial of Due Process*, 18 VT. L. REV. 529, 536 (1994) (citing GUIDELINES, *supra* note 74, § 1B1.3(a)(1)(A)). *See generally* Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523 (1993) (discussing "real-offense sentencing" and the lack of constitutional restraints and arguing for "conviction-offense sentencing" as an alternative); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990) (focusing on relevant conduct and its scope as well as the preponderance standard).

81. Greenwald, *supra* note 80, at 537 (citing GUIDELINES, *supra* note 74, § 1B1.3(a)(2)).

82. 978 F.2d 1520 (9th Cir. 1992).

83. *Id.* at 1522.

84. *Id.*

85. *Id.* at 1524.

the constitutional issues regarding the proper standard of proof at sentencing and whether there should be a standard in South Carolina.

1. Three Choices

Courts often choose among three standards of proof: proof beyond a reasonable doubt, clear and convincing evidence, and preponderance of the evidence.[86] The highest standard, proof beyond a reasonable doubt, is most often reserved for criminal proceedings in which the Government seeks to deprive a person of life or liberty.[87] Because the accused has a strong interest in preserving his life and freedom, the prosecution must carry a greater burden of proof. This standard seeks to reduce errors by placing the burden of persuading the fact finder of guilt beyond a reasonable doubt almost entirely on the prosecuting party.[88] The clear and convincing standard is less exacting than beyond a reasonable doubt, although it "places the risk of nonpersuasion more heavily on the plaintiff" than the preponderance of the evidence standard.[89] For example, this standard is often used in fraud cases and civil commitment proceedings.[90] To prevail under the least stringent standard, preponderance of the evidence, a plaintiff must show that, more likely than not, the allegations set forth in the complaint are correct.[91] Preponderance of the evidence is the standard most judges use in civil matters.[92]

Prior to the adoption of sentencing guidelines, courts "traditionally heard evidence and made findings of fact . . . without any prescribed standard of proof."[93] In fact, "[u]nder traditional rules of indeterminate sentencing . . . trial courts have huge discretion to select punishment, and no burden to explain their decisions."[94] Currently, South Carolina appears to follow the traditional approach.[95] In other states, however, findings of fact at sentencing are determined by a standard of at least preponderance of the evidence.[96] In the federal system, the United States Sentencing Commission, after initially failing

86. Hanlon, *supra* note 75, at 490.

87. Boyce F. Martin, Jr., *The Cornerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirements of Due Process*, 3 SETON HALL CONST. L.J. 25, 33-34 (1993).

88. Hanlon, *supra* note 75, at 490.

89. Martin, *supra* note 87, at 32.

90. *Id.* at 32-33.

91. *Id.* at 32.

92. Hanlon, *supra* note 75, at 490.

93. Martin, *supra* note 87, at 34 (footnote omitted).

94. Reitz, *supra* note 80, at 525 (footnote omitted).

95. *See, e.g.*, State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) (reflecting the court's reluctance to disturb the sentence of the trial court and holding that "this [c]ourt has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court . . . and is not the result of prejudice, oppression or corrupt motive").

96. *See, e.g.*, Darby v. State, 516 So. 2d 775, 780 (Ala. Crim. App. 1986), *rev'd on other grounds*, 516 So. 2d 786 (Ala. 1987).

to specify a standard of proof to be applied at sentencing, has amended the commentary in section 6A1.3 of the Sentencing Guidelines to reflect its approval of the preponderance standard.[97] Despite a 5-4 decision in *McMillan v. Pennsylvania*, in which the Supreme Court upheld the preponderance standard at sentencing,[98] its application is not without criticism.[99]

To understand why a standard of beyond preponderance of the evidence should be required at sentencing, one must evaluate the rationale for a higher standard of proof at trial. In *In re Winship*[100] the Supreme Court held that proof beyond a reasonable doubt is constitutionally required in juvenile adjudicatory proceedings as well as criminal trials.[101] In that case the family court judge found that the appellant, twelve years of age at the time, had stolen money from a woman's purse.[102] Because New York law required only that delinquent acts in adjudicatory proceedings be established by a preponderance of the evidence, the judge found the appellant delinquent and ordered him to training school for eighteen months despite the fact that "[t]he judge acknowledged that the proof might not establish guilt beyond a reasonable doubt."[103] In reversing, the Court focused on the importance of the role of the reasonable-doubt standard as an "instrument for reducing the risk of convictions resting on factual error."[104] Regarding that role, the Court explained that an "accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[105] Because of these important interests, the Court held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[106]

Although criminal trials and juvenile-adjudication proceedings require proof beyond a reasonable doubt, the lower standard—preponderance of the evidence—is constitutionally permitted both for findings of fact and for findings of the presence of relevant conduct under the federal Sentencing Guidelines.[107] Finding a fact or relevant conduct by a preponderance standard "merely requires a judge to find that it is more likely than not that the defendant

---

97. *See* GUIDELINES, *supra* note 74, § 6A1.3 commentary.
98. McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986).
99. *See* Martin, *supra* note 87, at 35.
100. 397 U.S. 358 (1970).
101. *Id.* at 368.
102. *Id.* at 359-60.
103. *Id.* at 360.
104. *Id.* at 363.
105. *Id.*
106. *Id.* at 364; *see* U.S. CONST. amend. XIV, § 1, (prohibiting states from "depriv[ing] any person of life, liberty, or property, without due process of law"); *see also* S.C. CONST. art. I, § 3 (guaranteeing that no person shall "be deprived of life, liberty, or property without due process of law").
107. *See* McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986).

did engage" in such conduct.[108] Consequently, a defendant sentenced under this lower standard "is denied the protection [to which] he or she would have been entitled . . . had he or she been tried on the relevant conduct, namely, the guilt beyond a reasonable doubt standard."[109]

2. *The Supreme Court Examines the Preponderance Standard at Sentencing*

In *McMillan v. Pennsylvania*[110] the Supreme Court upheld the constitutionality of the preponderance standard at sentencing.[111] The case involved a challenge to Pennsylvania's Mandatory Minimum Sentencing Act which mandated a minimum sentence of five years imprisonment for persons convicted of specified enumerated felonies.[112] The judge at sentencing had to determine, by a preponderance of the evidence, if the person used a firearm during the commission of the felony.[113] Because the Act did not provide for imposition of a sentence greater than that otherwise allowed for the underlying offense, the Court was willing to allow the sentencing scheme.[114]

However, the Court's primary reason for upholding the preponderance standard in *McMillan* was the distinction it drew between sentencing factors and essential elements of a crime.[115] Petitioners argued that because possession of a firearm was an essential element of the offense for which they were being sentenced, *In re Winship* required that this element be proven beyond a reasonable doubt.[116] In rejecting this argument, the Court relied on the fact that the Pennsylvania Legislature had expressly provided in the Mandatory Minimum Sentencing Act that visible possession of a firearm was not an element of the enumerated crimes, but a sentencing factor arising only after a defendant has been found guilty of one of the listed offenses.[117] The Court also denied that the Pennsylvania Legislature had evaded the due process commands of *In re Winship* because the elements of the enumerated felonies did not change upon passage of the Act.[118] While refusing to decide "the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases," the Court did caution that there are constitutional limits on the state's power to distinguish sentencing factors from elements of the

---

108. Greenwald, *supra* note 80, at 544.
109. *Id.* at 545.
110. 477 U.S. at 79.
111. *Id.* at 91.
112. *Id.* at 81; *see also* 42 PA. CONS. STAT. ANN. § 9712(a) (West 1982).
113. *McMillan*, 477 U.S. at 81; *see also* 42 PA. CONS. STAT. ANN. § 9712(b) (West 1982).
114. *McMillian*,477 U.S. at 89.
115. *Id.* at 85-86.
116. *Id.* at 84.
117. *Id.* at 85-86.
118. *Id.* at 89.

substantive offense.[119]

Although the Supreme Court in *McMillan* upheld the preponderance standard for the factual finding of visible possession of a firearm at sentencing, *Granger* is distinguishable in aspects that could necessitate a higher standard of proof. First, in *McMillan* the determination that the defendant possessed a firearm during commission of the crime did not result in "a sentence in excess of that otherwise allowed" for the underlying offense.[120] Further, the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense."[121]

In *Granger* the trial court's finding that the defendant possessed 58.44 grams (rather than ten to twenty-eight grams for which the defendant argued he had been indicted) resulted in an increased prison sentence. While the fifteen-year sentence did not exceed the maximum sentence for a first offense of trafficking more than twenty-eight grams,[122] it did exceed the maximum sentence for a first offense of trafficking in *ten to twenty-eight grams* of crack cocaine by at least five years.[123] Even if the finding of the quantity of cocaine trafficked is not the tail wagging the dog, its importance in sentencing determinations cannot be overlooked.

The Court in *McMillan* also justified the preponderance standard by finding that a determination of possession of a firearm was merely a sentencing factor and not an element of the offense.[124] While the South Carolina Supreme Court would likewise find that subsections in the trafficking statute relating to quantity are not "elements of the offense,"[125] Justice Stevens, dissenting in *McMillan*, voiced concern that the states, in defining what factors are elements of a crime to be proven beyond a reasonable doubt, could circumvent the *In re Winship* standard of proof beyond a reasonable doubt for every essential element of the offense through broad definitions of offenses.[126] Justice Stevens gave the following example:

> A legislative definition of an offense named "assault" could be broad enough to encompass every intentional infliction of harm by one person upon another, but surely the legislature could not provide that

119. *Id.* at 86.
120. *Id.* at 82.
121. *Id.* at 88.
122. *See* S.C. CODE ANN. § 44-53-375(C)(2)(a) (Law. Co-op. Supp. 1998) (providing for a maximum term of imprisonment of not more than 25 years for a first offense of trafficking more than 28 but less than 100 grams).
123. *See id.* § 44-53-375(C)(1)(a) (providing for a maximum term of imprisonment of not more than 10 years for a first offense of trafficking more than 10 but less than 28 grams).
124. 477 U.S. at 88.
125. *See* Granger v. State, 333 S.C. 2, 5, 507 S.E.2d at 324 (1998).
126. 477 U.S. at 102 (Stevens, J., dissenting).

> only that fact must be proved beyond a reasonable doubt and then specify a range of increased punishments if the prosecution could show by a preponderance of the evidence that the defendant robbed, raped, or killed his victim "during the commission of the offense."[127]

The above scenario resembles what happened in *State v. Towery*.[128] Because the court in *Towery* found the indictment adequate even though the indictment failed to specify the quantity of cocaine,[129] the *Granger* court likewise upheld the indictment and the subsequent enhancement of Granger's sentence by a judicial finding of the actual quantity of crack cocaine.[130] If quantity is not an essential element of the trafficking offense, had Granger elected to go to trial for that offense, everything except the actual amount would have to be proven beyond a reasonable doubt in order to convict him. Justice Stevens, finding fault with this approach, submitted an alternative that would satisfy due process. According to Justice Stevens, "if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*."[131] Applying Justice Stevens's approach to *Granger*, the subsections specifying enhanced punishments depending on quantity are arguably components that give rise to a "special punishment." Although finding the amount beyond a reasonable doubt would be constitutionally required under *In re Winship* (if quantity were an essential element of the offense), for efficiency purposes South Carolina courts will more likely apply a lower standard of proof, if any, to such findings of fact at sentencing.

The use of the preponderance standard at sentencing is not without justification. Some decisions favoring preponderance are based on the judgment that the convicted defendant's interest in sentencing decisions is not as crucial as the interest in the initial determination of guilt.[132] Balancing the defendant's interest in receiving an appropriate sentence against the government's interest in avoiding the burdens of meeting a higher standard of proof, many courts have found the lowest degree of procedural protection to be sufficient.[133] However, that balance is upset when a defendant's liberty interest

---

127. *Id.*

128. 300 S.C. 86, 386 S.E.2d 462 (1989).

129. *Id.* at 87, 386 S.E.2d at 462-63.

130. *Granger*, 333 S.C. at 4, 507 S.E.2d at 324.

131. *McMillan*, 477 U.S. at 103 (Stevens, J., dissenting).

132. Steven M. Salky & Blair G. Brown, *The Preponderance of Evidence Standard at Sentencing*, 29 AM. CRIM. L. REV. 907, 914 (1992).

133. *Id.*

is "directly related to the appropriate resolution of disputed facts."[134] For instance, in *Granger* the determination of the greater sentence directly depended on the trial judge's finding of the amount of crack cocaine trafficked. Clearly, Granger's liberty interest was greater than the State's interest in not bearing a burden of proof at sentencing.

3. *The* Matthews *Alternative*

Because both the lack of a standard of proof and the preponderance standard are inadequate to satisfy a defendant's due process rights at sentencing, some courts and commentators have turned to the balancing test announced in *Matthews v. Eldridge*[135] for guidance in selecting the appropriate standard.[136] Although the test's aim is to determine the process due when the government tries to deprive an individual of a property right,[137] the test has been used in other contexts[138] and could be applied to situations like that presented in *Granger*. *Matthews* dealt with whether the Fifth Amendment's Due Process Clause requires an evidentiary hearing before the termination of social security benefits.[139] In making this determination, the Court crafted the following test involving a comparison of the following: (1) the nature of the private interest affected by the official action; (2) the risk of error through the procedures employed and the probable value of additional safeguards; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[140] Applying this test to the situation presented in *Matthews*, the Court concluded that the interest in uninterrupted social security benefits did not necessitate an evidentiary hearing to "comport [fully] with due process."[141]

The first factor in applying the *Matthews* test to sentencing "is the individual's interest in sentencing."[142] Because a defendant's liberty is at stake during sentencing, this interest is understandably strong. Some argue that this interest has been elevated by the creation of sentencing guidelines, particularly in the federal system, where resolution of disputed facts affects the adjustment of offense levels and changes the presumptive sentence.[143] Similarly, the sentencing judge's determination of the greater quantity of crack cocaine in *Granger* resulted in a longer prison sentence than the defendant had anticipated and, hence, had a significant effect on his liberty interest.

---

134. *Id.*
135. 424 U.S. 319, 335 (1976).
136. Salky & Brown, *supra* note 132, at 911-12.
137. *Id.* at 911.
138. *Id.*
139. *Matthews*, 424 U.S. at 323.
140. *Id.* at 335.
141. *Id.* at 349.
142. *See* Hanlon, *supra* note 75, at 493.
143. *See* Salky & Brown, *supra* note 132, at 914.

The second factor in the *Matthews* test, the interest in safeguarding against the risk of error, favors greater due process protections at sentencing. If a preponderance standard is used at sentencing to protect the defendant's liberty interest, then both the prosecution and the defense "share the risk of error equally."[144] However, both the imbalance in resources between the government and an individual and the fact that the rules of evidence do not apply at sentencing increase the risk of error.[145] The possibility of prejudicial error from hearsay and uncorroborated evidence at sentencing is also heightened because that evidence often comes from sources, such as law enforcement personnel and prosecutors, who are likely to view the defendant in the most negative light, or from codefendants motivated by self-serving interests to shift the blame to the defendant.

In cases like *Granger* in which sentencing courts do not rely on any particular standard of proof to make their determinations, the defendants could bear more than half the risk of error. Because the trial court is not required to articulate its findings of fact by any standard, defendants enjoy little protection against erroneous findings. Without a standard, a sentencing judge is likely to accept whatever the prosecutor states as fact without further proof. Even if that standard were preponderance of the evidence, arguments against the preponderance standard in the federal sentencing process caution that it would not be enough protection for the defendant.

The final factor of the *Matthews* test is the government's interest, which includes the financial and administrative burdens of a heightened procedural requirement. Requiring due process protections of trial at sentencing would place "an additional burden on the prosecutorial staff and on the judiciary."[146] Indeed, judicial economy favors a lesser degree of proof.[147] However, as one commentator argued, "the most rigorous standard of proof at sentencing, that of beyond a reasonable doubt, would likely result in more carefully prepared and documented presentence investigations, the content of which would more easily withstand scrutiny and thus reduce the incidence of frivolous challenges."[148] From that perspective, a higher standard of proof might better serve the state's interests.

Application of the *Matthews* test to *Granger* leads to the undeniable conclusion that the defendant had an enhanced liberty interest in the sentencing process, that he bore a greater risk of error through the lack of any requisite standard of proof, and that the State would not be overly burdened by complying with a standard beyond preponderance of the evidence. Even if requiring proof beyond a reasonable doubt on findings of fact at sentencing is too great a burden on the State, it does not follow that a standard of clear and

144. Greenwald, *supra* note 80, at 553.
145. *Id.*
146. Hanlon, *supra* note 75, at 498.
147. *Id.*
148. *Id.* (footnote omitted).

convincing evidence would be any more taxing. For example, courts already apply that standard to deprivations of liberty for involuntary commitment to mental institutions[149] and for termination of parental rights.[150] Considering the important liberty interests at stake in sentencing, criminal defendants deserve no less.

IV. CONCLUSION

The South Carolina Constitution guarantees that no person will "be deprived of life, liberty, or property without due process of law."[151] Due process requires that criminal defendants receive sufficient notice of the charges against them. Unfortunately, the *Granger* decision fails to live up to this constitutional mandate. The standards for the sufficiency of an indictment were not met because the indictment alleging that Granger trafficked more than ten grams neither gave the defendant notice of the charge he had to meet nor allowed the sentencing judge to know what sentence to impose absent the "revealed" information at sentencing about the actual quantity. Further, by relying on a case such as *Towery*, in which the court upheld minimal statutory language, the *Granger* court weakened the importance of delineating a statutory quantity range in an original indictment. Because the amount is directly related to the loss of liberty facing a defendant, it should not be eliminated from allegations in indictments for drug trafficking, distribution, or possession.

Considering how easily the indictment could have included a statutory range of twenty-eight to 100 grams to give Granger notice, the result is harsh. Alternatively, had the indictment been amended to reflect the greater quantity of 58.44 grams, the amendment would have been improper under *Clair*. Practically, it might be wise for defense counsel to seek an amendment when an original indictment does not specify a statutory quantity range. Of course the better practice would be for the prosecution, when drafting indictments, to at least refer to the statutory subsection relating to the quantity range and corresponding penalty.

Clearly, due process requires that the prosecution at trial meet its burden of proving guilt beyond a reasonable doubt. For sentencing hearings (or guilty pleas), the standard for satisfying due process is less certain. Although the *Granger* court implicitly upheld the trial judge's finding of fact at sentencing, it did not indicate whether the trial judge should have made that determination by any particular standard of proof. Because South Carolina courts have yet to address this important concern, a look to other states and to the federal system is necessary for guidance. Although the Supreme Court in *McMillan* upheld the preponderance of the evidence standard for findings of

149. *See* Addington v. Texas, 441 U.S. 418, 432-33 (1979).
150. *See* Santosky v. Kramer, 455 U.S. 745, 769 (1982).
151. S.C. CONST. art. I, § 3.

fact at sentencing, there are persuasive arguments in favor of a higher standard of proof. While recognizing that sentencing judges have broad discretion to consider hearsay and other matters at sentencing, requiring them to make determinations which have a significant effect on the sentence by a standard of proof of at least clear and convincing evidence would not be overly taxing.

Stacey Coleman-McKinney