

OVERVIEW AND METHODOLOGY

In cooperation with the U.S. Sentencing Commission, Counsel Connect held an online hearing on Simplifying the U.S. Sentencing Guidelines. The hearing ran from October 2 through November 1, 1996. This marked the first time that the Commission turned to online technology to seek public input. It was one of the first online public hearings for a federal agency, and it was the first online hearing on Counsel Connect. With nearly 50,000 members, Counsel Connect, owned by American Lawyer Media, L.P., is the largest online service for lawyers.

The Sentencing Commission provided background on the issues, documents for uploading, and suggested names of possible panelists. No Commission staff participated in the online discussion. This event was part of the Sentencing Commission's comprehensive effort to simplify and clarify the guidelines.

A distinguished panel of 15 experts whose backgrounds ranged from prosecutors to public defenders, to academics, to probation officers, to a judge, conducted the hearing online. Other Counsel Connect members also weighed in. It was an interactive format, and discussion was lively and candid. Topics discussed included: relevant conduct, departures, role in the offense, determining loss, acceptance of responsibility, sentencing by computer, the role of probation offices, and mandatory minimums and the guidelines.

We had 210 members of Counsel Connect log into the seminar, and we had a total number of 1709 hits, or 8 hits per user. Hits represents the total number of times the event was accessed. Of those 210 members who were logging into the event, 4 percent actively discussed the issues. An audience of 210 is a good size by any measure. The audience might have been larger had the Commission staff participated in the discussion rather than play a behind the scenes role.

The transcript below indicates the time and date a comment was made, the subject heading, and the name of the person commenting. Also listed are the names of the individuals appending comments. It is formatted to look and read as the event occurred online. The word "end" indicates the end of a particular discussion or thread of comments. Judge Stanley Harris' comments appear toward the conclusion of the event.

This report and transcript is hereby submitted into the record of the U.S. Sentencing Commission's rulemaking for Simplifying the U.S. Sentencing Guidelines.

Eleanor Kerlow

Executive Editor & Marketing Director

Counsel Connect

Washington, D.C.

December 13, 1996

SIMPLIFYING THE U.S. SENTENCING GUIDELINES

SEMINAR TRANSCRIPT

From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Tue Oct 1 18:40

Subject: INTRODUCTION AND WELCOME

Last Append: Tue Oct 22 14:25:25 1996

In 1987, the United States Sentencing Guidelines were born. These guidelines were controversial. Some people thought judges should not be held to guidelines; they needed more, not less discretion. Others felt the guidelines would be unduly harsh on defendants.

Since the guidelines were passed nine years ago, 225,000 cases have been subject to the guidelines. The guidelines themselves now affect any person due to be sentenced for a federal crime. That includes murder, burglary, fraud, money laundering, drug selling, terrorism, and more. Numerous appellate opinions have been issued on the guidelines. An entire body of academic writing, comment, and study has emerged on the effectiveness and relevance of the guidelines.

One thing is clear, the guidelines are complicated and cumbersome. They require references and cross-references through a two-volume manual. There are countless factors which raise or lower sentences. The guidelines themselves may be too restrictive for judges. The tougher rules may fall harder on women, some judges suggest.

In 1995, the United States Sentencing Commission began the first comprehensive review to attempt to simplify the guidelines. From June through December 1995, the commission staff prepared papers on major guideline topics and began discussing modifications. From January through now, the Commission staff has been developing a refined range of options, and holding regional public hearings. The last hearing was held in Denver, August 12. During this phase, which is expected to last until December 1996, the Commission will be analyzing the public comment and honing specific amendments. Those specific proposals will be published in the Federal Register in December for

formal comment. In March, the Commission will hold public hearings on the formal proposals and then present them to Congress for approval in April.

Beginning Wednesday, October 2, Counsel Connect presents an online public hearing in cooperation with the U.S. Sentencing Commission. This marks the first time the U.S. Sentencing Commission has turned to online technology to seek public input, and is one of the first online public hearings for a federal agency. Counsel Connect members will have a unique chance to help shape new law. A copy of this hearing transcript will be filed with the U.S. Sentencing Commission.

The hearing panel includes representatives from all sides of the sentencing guidelines debate: former prosecutors, federal defenders, probation officers, a federal judge, a former Supreme Court law clerk, and academics. The hearing officers are two of the moderators of Counsel Connect's Criminal Law and Procedure Forum.

There is an agenda for this hearing, however, no one is bound to follow it. All members are invited to ask questions and join in what promises to be an enlightening and vigorous debate.

Eleanor Kerlow

Executive Editor & Marketing Director

Counsel Connect

Washington, D.C.

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Tue Oct 1 18:32

Subject: MEET THE PANELISTS

Last Append: Tue Oct 22 14:25:03 1996

The hearing officials for this event are:

Gerald Shargel

Gerald Shargel is a criminal defense attorney practicing in New York City. He is the co-moderator of Counsel Connect's Criminal Law and Procedure Forum. Shargel has been counsel in more than 100 criminal appeals, and trial counsel in more than 100 criminal cases. He has been an adjunct professor at New York University Law School, and a member of NYU's Center for Research in Crime and Justice. New York Magazine named him one of the "Best Lawyers in New York" in 1995. He has received other similar honors from other publications.

Alan Zegas

Alan Zegas is a criminal defense attorney practicing in New Jersey. He also handles commercial litigation and appeals. Zegas is the co-moderator of Counsel Connect's Criminal Law and Procedure Forum. He was involved in the first case in the country to recognize a cause of action for pastoral malpractice. He represented Chase Manhattan Bank in a case where former students of a defunct trade school sought to hold various banks liable for loans made to students. He represented mayors from various New Jersey communities in civil and criminal matters. He has been vice president of the Association of Criminal Defense Lawyers of New Jersey and appears regularly in the media.

The hearing panel is:

Fred Warren Bennett

Fred Warren Bennett is associate professor of law at Catholic University's Columbus School of Law, in Washington, D.C. His expertise is federal evidence and criminal procedure. Prior to joining the faculty in 1992, he served for 12 years as the Federal Public Defender for the District of Maryland. Before that he was the Chief Public Defender for Prince George's County, Md. He also worked in various private firms. He currently serves on the board of editors of the Criminal Law Advocacy Report and the Federal Evidence Practice Guide, monthly criminal law publications for practicing attorneys published by Matthew Bender & Co., Inc. He is a chairman of the Practitioner's Advisory Group, a special committee of defense attorneys formed by the U.S. Sentencing Commission.

Joe Brown

Joe Brown is Special Assistant U.S. Trustee of the U.S. Bankruptcy Trustee program in Nashville, Tenn., where he works on criminal referrals and prosecutions. He began his career as a Judge Advocate in the U.S. Army. In 1971, he became an Assistant U.S. Attorney in the Office of the U.S. Attorney. In 1981, he was appointed U.S. Attorney for the Middle District of Tennessee. During his 21 years in the U.S. Attorney's office, he prosecuted major fraud cases and argued more than 200 cases in the Sixth Circuit. He has worked extensively with sentencing guidelines, office management, and budget issues.

Samuel Buffone

Samuel Buffone is a litigation partner in the Washington, D.C., office of Ropes & Gray who specializes in white-collar criminal defense and complex civil cases. He has represented parties in grand jury and administrative investigations and enforcement actions covering contract fraud, RICO, money laundering, and bank, election, mail, and wire fraud. He has testified before congressional committees, and has written and lectured extensively on a variety of Federal Sentencing Guidelines topics. He served as chairman of the Committee on the United States Sentencing Commission of the ABA's Criminal Justice Section. He currently chairs the section's RICO and Forfeiture Committee. He is also the founder and chairman of the Practitioner's Advisory Group to the U.S. Sentencing Commission.

Judge Stanley Harris

Stanley Harris is a judge for the U.S. District Court for the District of Columbia. Prior to his appointment to the federal court in 1983, he was a judge for the District of Columbia Court of Appeals, and before that he was a judge for the Superior Court of the District of Columbia. Harris also practiced as a partner at Hogan & Hartson in Washington, D.C.

Lawrence Lustberg

Lawrence Lustberg is a partner and chairman of the criminal law department at Newark, N.J.'s Crummy, Del Deo, Dolan, Griffinger & Vecchione. He is also the director of the John J. Gibbons Fellowship in Public Interest and Law at the firm. From October 1985-September 1990, he was the Assistant Federal Defender for the District of New Jersey. He is a former clerk to federal Judge H. Lee Sarokin for the District of New Jersey. He is an adjunct professor at Seton Hall University School of Law. His forthcoming article, "The Importance of Saving the Universe: Keeping Proportionality Review Meaningful," will appear in the Seton Hall Law Review.

Marc Mauer

Marc Mauer is the assistant director of The Sentencing Project in Washington, D.C., and has directed programs on criminal justice for 20 years. He is the author of some of the most widely cited reports in the field of criminal justice, including "Young Black Men and the Criminal Justice System" and "Americans Behind Bars." He has served as a consultant to the Bureau of Justice Assistance and the Office of National Drug Control Policy. The Sentencing Project is a national organization which develops alternative sentencing programs and conducts research on criminal justice issues.

Julie O'Sullivan

Julie O'Sullivan is associate professor of law at Georgetown University Law Center, Washington, D.C. Her specialty is criminal procedure and white collar crime. O'Sullivan is a former clerk to Supreme Court Justice Sandra Day O'Connor. She is a former associate at New York's Davis, Polk & Wardwell. She was an Assistant U.S. Attorney for the Southern District of New York. In 1994, she served as an Associate Counsel in the Office of Independent Counsel in Little Rock, Ark. She has been at Georgetown since 1995.

Ronald Wright

Ronald Wright is a professor at Wake Forest University School of Law in Winston-Salem, N.C. He is a former trial attorney at the United States Department of Justice where he worked on prosecutions for criminal violations of antitrust, fraud, and obstruction of justice laws. He is a former clerk to Judge Frank Johnson Jr. of the U.S. Court of Appeals for the Eleventh Circuit. He is the co-author of "Criminal Procedures: Judicial, Legislative and Executive Materials," to be published by Little Brown & Co. He has also written on the congressional use of immunity grants after Iran-Contra, amendments in the route to sentencing reform, and other sentencing issues. He is a member of the advisory board of the "Federal Sentencing Reporter".

David Yellin

David Yellin

David Yellin is an associate professor at the Hofstra University School of Law. After clerking for Judge C. Arlen Beam, of the U.S. District Court in Omaha, Neb., he was an associate at Schwalb, Donnenfeld, Bray & Silbert, in Washington, D.C., specializing in civil and white collar criminal litigation. He next served as an Assistant Counsel to the Judiciary Committee of the U.S. House of Representatives, where he worked in the area of sentencing reform. He joined the Hofstra faculty in 1988. He has written a number of articles on sentencing issues and is one of the authors of a treatise, "Federal Sentencing Law and Practice (2d ed.) (West 1994). He has testified before the U.S. Sentencing Commission and advised President Clinton's transition team on white collar crime issues. He is currently one of the attorneys in "U.S. v. LaBonte," a sentencing case before the Supreme Court.

Appended by: Eleanor Kerlow -- DC Counsel Connect - Washington

Date: Wed Oct 2 11:55:32 1996

Subject: MEET THE PANELISTS

Jim Bishop

Jim Bishop is a Deputy Chief Probation Officer for the Middle District of Florida U.S. Probation Office. He has 22 years experience with the probation office. He has been a field officer doing both investigative and supervisory work, a senior probation officer, program development coordinator, and the district's first sentencing guideline specialist. He has trained officers, local bars, and other court-related agencies in the sentencing guideline process. He served a two-year term as the Eleventh Circuit representative to the U.S. Sentencing Commission's probation advisory committee, and has testified before the sentencing commission on several occasions.

Tom Hutchinson

Tom Hutchinson is the chief of the Sentencing Guidelines Group of the Federal Public and Community Defenders in Washington, D.C. He is the co-author of "Federal Sentencing Law and Practice," published by West Publishing Company. He has been a teaching fellow at Stanford Law School for one academic year, a trial lawyer with the Civil Rights Division of the U.S. Department of Justice., and counsel to the Committee on the Judiciary of the U.S. House of Representatives. For nearly 15 years, he was chief

counsel to the Subcommittee on Criminal Justice, during which the Sentencing Reform Act and other major sentencing laws were enacted.

Joe Whitley

Joe Whitley joined Atlanta's Kilpatrick & Cody as a litigation partner after stepping down as United States Attorney for the Northern District of Georgia in November 1993. As U.S. Attorney, he oversaw the state's Criminal and Civil Divisions and Organized Crime Drug Task Force and directed 56 attorneys in 46 counties. Prior to his appointment as U.S. Attorney, he was a partner at Smith, Gambrell & Russell. For three years before that, he served as Acting Associate Attorney General, the third-ranking official in the U.S. Department of Justice. Preceding that appointment, he had served for five years as the U.S. Attorney for the Middle District of Georgia, based in Macon.

Appended by: Eleanor Kerlow -- DC Counsel Connect - Washington

Date: Wed Oct 2 12:15:00 1996

Subject: MEET THE PANELISTS

Daniel Freed

Daniel J. Freed is Clinical Professor Emeritus of Law and Administration, and Professorial Lecturer in Law, at Yale Law School. His primary field of research and teaching is the sentencing process. Prior to joining the Yale faculty, Freed was in private practice in Washington, D.C., during the 1950s. He joined the Antitrust Division at the U.S. Department of Justice in 1959 as a Senior Trial Attorney. In 1963, he was named co-director of the National Conference on Bail and Criminal Justice. From 1964-69, he served as associate director and director of the Office of Criminal Justice in the Office of the Deputy Attorney General. During his 27 years of teaching at Yale, he has been director of the Clinical Program, The Daniel and Florence Guggenheim Program in Criminal Justice, and the Criminal Sentencing Program. He is a founding editor of the "Federal Sentencing Reporter," a bi-monthly commentary journal published by the University of California Press. His other publications include, "Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences," 101 Yale Law Journal 1681 (June 1992) and "Between Prison and Probation: Using Intermediate Sanctions Effectively," 29 Judges Journal 5 (with Barry Mahoney) (Winter 1990).

From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Wed Oct 2 10:48

Subject: THE AGENDA

Last Append: Mon Oct 28 10:48:48 1996

How can judges and courts apply uniform sentences while also making sentences proportionate to the crimes? When should judges be able to depart from the guidelines? And to what extent should a defendant's role in the offense or other personal characteristics affect a sentence? These are just a few of the topics that will be discussed during this hearing.

Below is the agenda for the online hearing. Start dates are listed.

Starting Oct. 2-Introduction--Overview of Guideline Simplification
Process

Oct. 5--Relevant Conduct (including dismissed and not charged conduct)

Oct. 8-Departures, Koons and Beyond

Oct. 11-Drugs/Role in the Offense; What about crack?

Oct. 14-Loss

Oct. 17-Acceptance-

Oct. 20-Lengthening the amendment cycle, sentencing practice and procedure.

Appended by: Eleanor Kerlow -- DC Counsel Connect - Washington

Date: Mon Oct 28 10:48:48 1996

Subject: The Agenda

We've covered all of the subjects on the agency except the new amendment process and sentencing practice and procedure, which I will begin the discussion on this week. We also added some unexpected topics and extended the seminar for a week, ending November 1. This should allow panelists who have been experiencing technical problems to participate and to give other CC members a chance to weigh in.

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From: Alan L. Zegas -- Attorney - West Orange

Date: Thu Oct 3 06:31

Subject: HOW THEY WORK

For those of you unfamiliar with the Federal Sentencing Guidelines, here is a brief description.

They came into being on November 1, 1987. Their purpose is to promote uniformity in sentencing. Judges, with certain exceptions, are required to sentence a person within their "Guideline Range". This range is calculated as follows. First, each federal crime is assigned an offense level, which is a numerical value increasing with the seriousness of the crime. Once that value is ascertained, certain upward and downward adjustments are made. For example, if a person was involved in a multi-defendant conspiracy and he was the leader of the group, there would be an enhancement to the offense level. On the other hand, if a person was pleading guilty and accepted responsibility for the offense, there would be a downward adjustment in the offense level. After these various adjustments have been made, a total offense level is derived.

The sentencing judge then goes to a grid to determine the sentence. The offense level is represented on the vertical axis of the grid. The offense levels increase from the top to

bottom of the grid. The horizontal axis represents the criminal history. The greater a person's criminal history for a particular offense level, the higher the sentence. Each offense level for a particular criminal history correlates with a sentencing range. For example, if the offense level were 1, and the person were a first offender, the sentence would fall within the 0 to 6 month range. A person in this category would be eligible for probation. If the offense level were 39, and the person were a first offender, the sentencing range would be 262 to 327 months.

As I noted above, the sentencing judge must sentence within the applicable range. In certain circumstances, the judge may depart upwards from the prescribed sentence. This is done in the relatively rare circumstance where the formulators of the guidelines did not foresee the nature of the particular crime committed and thus did not account for the crime in the scoring process. Judges may also depart downwards from the guidelines when the defendant provides valuable assistance to the government in the prosecution of another.

The above is a general and simplified outline of how the Guidelines work.

To start the discussion, let me ask the following. Have departures been more common than the Guideline Commission anticipated? Do the offense levels accurately correlate with the seriousness of the crimes at issue? Do the Guidelines, in the name of uniformity,

so restrict judges, and cause them to disregard the characteristics of the offender that the sentencing results are unfair?

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From: Alan L. Zegas -- Attorney - West Orange

Date: Sun Oct 6 21:00

Subject: Credit for House Arrest

Here is an issue that has come up in several cases I have been involved in: should defendants, who are placed under strict conditions of house arrest pending trial, be granted credit for the time they were confined at home if they are ultimately convicted?

Granted, living at home is not the same as living in prison, but being confined to the home is not the same as being free on the streets. Should the guidelines not provide that those under house arrest be granted credit at sentencing for the time spent in confinement at home?

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Wed Oct 2 16:12

Subject: Judging From Experience

Last Append: Thu Oct 3 18:55:13 1996

We are fortunate to have panelists from all sides of the sentencing issue: defenders, prosecutors, probation officers, policy makers, a judge, and academia. To begin the discussion in this area, I'd like to ask our panelists and other Counsel Connect members to provide a sense of what your personal experience has been with the guidelines. Have they been too harsh? Too easy on defendants? Too difficult to maneuver? Are you generally in favor of, or opposed to the notion of having sentencing guidelines? What is your rationale? Please provide some real life examples if you can.

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Wed Oct 2 17:59:20 1996

Subject: overall comments

In general the guidelines are needed and work with some degree of reasonableness. The major problem is the use of excessive micro management by congress. Congress needs to trust the commission to work as intended and not be too specific with minimum-mandatory sentences. This area causes serious problems when even experienced prosecutors think the sentence prescribed by congress is too much. This leads to problems with charging decisions, relevant conduct, and 5k1.1 motions.

Appended by: Gerald Shargel -- Atty-Gerald Shargel - New York

Date: Thu Oct 3 06:43:23 1996

Subject: Judging From Experience

Although I believe that significant changes are necessary, I strongly favor the guidelines system. Fundamentally, it allows us to advise a client, to a reasonable degree of certainty, as to what will happen to him/her if convicted after trial. From that starting point, plea discussions will almost always result in a more favorable, indeed, far more

favorable alternative. The client's choice about whether to go to trial will, in most cases, be clearly framed.

As people who deal with guidelines cases know, I am not simply talking about a 2 or 3 point adjustment for acceptance of responsibility for pleading guilty. I hesitate to use the word manipulation, but there is a vast difference between a negotiated "gentle" interpretation of the guidelines in contrast to a no holds barred application of the guidelines that prosecutors usually reach for after trial. In short, the difference between plea and conviction after trial can mean many years.

In the "old days" (pre Nov. 1, 1987), a plea in a RICO case, for example, might mean that the client had to plead to an "open" 20 year count. And you had no idea, or at least not a good idea, of what the sentence would be until the words left the judge's lips. If the client asked, "What would I get if convicted after trial?", the answer would be nothing more than an educated guess. And there were many times when all of us guessed very badly. The best you might be able to say, when discussing options, is that the judge gives a lot of credit to defendants who plead guilty. I usually liked to end the meeting before the client asked, "what does that mean?"

Tomorrow, I would like to talk about guideline reform, particularly in the area of downward departure.

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Thu Oct 3 18:55:13 1996

Subject: Judging From Experience

I certainly agree with Mr. Shargel's comments. There is a certain confort in being able to generally advise the client of his exposure under different choices, i.e., going to trial, pleading, and pleading with cooperation (safety valve). On the other hand the current complexity of the guidelines in many instances can prejudice a client when a less experienced attorney incorrectly advises the client of the applicable guidelines. I have seen cases were an attorney has completely missed the ball park in terms of the guideline range which the client was exposed to. Also, there have been times were attorneys have not anticipated certain guideline and statutory provisions. Often, attorneys will overlook statutory provisions (e.g., minimum mandatories resulting from prior convictions, 941 offenses, etc.) which mislead the client.

Thus, I am encouraged by the "simplification process." However, I would like to go beyond merely simplifying the guidelines to reassessing some of the core issues such as the over reliance on the quantity of drugs or money rather than the specific role of the defendant in narcotics and money laundering offenses. In Miami, we constantly see instances of very minor players facing harsh sentences only because the offense involved large quantities. Thousand kilo deals in South Florida are not uncommon.

Some years back I represented an 18 year old defendant (with no criminal history) who was tending to some pets at a friends house. He was asked by the friend to help him translate a conversation he was having with a visitor. The conversation ended up relating to a 10 ton cocaine importation deal. Of course, my client realized what was going on but he figured that he was just translating. It turns out the visitor was a wired CI and when he was arrested he could not understand how he could be facing ten years in jail with no possibility of parole. As this case was pre safety valve even pleading guilty would have resulted in a ten year sentence. Compare this to the guy who has multiple arrests for selling crack on a street corner and who has never served a day in jail (the usual result in the state system). In other words, role adjustment and acceptance of responsibility still don't balance the scales.

I only hope that the "simplification" process only means harsher sentences for the mopes and mules we all too often see hammered by the system.

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Wed Oct 2 16:30

Subject: Good or Bad Precedent?

The 1984 Sentencing Reform Act and the sentencing guidelines it spawned are perhaps the most dramatic change in sentencing law and practice in this country's history. The purpose of the Act was to create a comprehensive and coordinated authority for

sentencing. A primary goal was just punishment, deterrence, incapacitation, and rehabilitation. A second goal was to eliminate sentencing disparity and to enhance crime control by having an independent sentencing commission. A third goal was to be able to amass a body of knowledge about criminal behavior generally. Despite the debate, the guidelines became mandatory, not discretionary. The Commission ultimately settled on a guideline scheme that basically uses offense levels to describe the relative seriousness of an offense. Criminal history points and categories go to the relative seriousness of a defendant's prior record. The sentencing table contains ranges that in each instance are the maximum width allowed. Congress envisioned that the guideline ranges for a particular offense would be tied to one or more variations in relevant factors with no one particular guideline range varying by more than 25 percent.

Given this history, still at issue is whether it is consistent with the Act and congressional intent to allow a discretionary choice among multiple offense levels or criminal history categories for similarly situated defendants, given a sentencing table that also provides ranges of the maximum width.

There is also a sense that revising the guideline system to give sentencing courts more discretionary choices among an array of possible offense levels might result in less litigation at the district and appellate levels. Is this true? Won't appellate courts have to litigate and establish the appropriate standards of appellate review for such discretionary

determinations? The courts would still have to decide when and how to create a common law of sentencing.

What of this 25 percent rule? Is it unduly constraining, as the Commission in its draft paper suggests? How should the 25 percent rule be modified? How does it really work in real cases?

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From: Tom Hutchison -- Fed Pub Commun Defnd - Was

Date: Thu Oct 3 17:13

Subject: RELEVANT CONDUCT -- OVERVIEW

Last Append: Tue Oct 8 16:17:27 1996

One of the issues confronting the Sentencing Commission when it began its work was whether to determine offense severity on the basis of the conduct that constituted the elements of the offense of which the defendant had been convicted -- known as a "charge offense" system -- or on the basis of the defendant's actual conduct, without regard to the offense of conviction -- known as a "real offense" system. The Commission decided to do a little of each and set up a mixed system. The offense of conviction is used to determine the applicable offense guideline of chapter two of the Guidelines Manual, and the defendant's actual conduct is used to determine the offense level under that guideline and any adjustments under the guidelines of chapter three of the Guidelines Manual.

The court determines the defendant's actual conduct and other factual matters on a preponderance standard. The court can consider conduct that has not been charged, has been charged but the charge has been dismissed, and (except in the Ninth Circuit)

conduct covered by a charge of which the defendant has been acquitted. (For example, a defendant is charged with drug distribution and use of a gun during and in relation to a drug distribution offense and is convicted of the distribution offense and acquitted of the gun offense. The court, except in the Ninth Circuit, can increase the offense level under the drug distribution guideline for gun use (sec. 2D1.1(b)(1)) based upon a finding by a preponderance that the defendant used the gun.)

The actual conduct for which a defendant is held accountable is set forth in sec. 1B1.3 ("Relevant Conduct"). Sec. 1B1.3 holds a defendant accountable for the following:

1. The defendant's own conduct, and the conduct of others that the defendant aids and abets, if the conduct took place during preparation for, commission of, or attempting to avoid responsibility for the offense of conviction.
2. The reasonably foreseeable conduct of others in furtherance of "jointly undertaken criminal activity," which the Commission defines to be a criminal plan undertaken by the defendant in concert with others, if that conduct took place during preparation for, commission of, or attempting to avoid responsibility for the offense of conviction.

For example, defendants A and B rob a bank and, unbeknownst to A (who is waiting in the getaway car) defendant B brandishes a gun during the robbery. The court can

enhance defendant A's offense level under the robbery guideline (sec. 2B3.1(b)(2)) based upon defendant B' conduct.

3. If the offense is of a type for which the Commission has based offense severity on quantity or a similar measure of aggregate harm, the defendant's own conduct, the conduct of others that defendant aids and abets, and the reasonably foreseeable conduct of others in furtherance of jointly undertaken criminal activity, if that conduct was part of the "same course of conduct" or "common scheme or plan" as the offense of conviction. For example, a defendant is convicted of distributing drugs on January 15, 1996, and the government can show that the defendant also distributed drugs on February 1, 2, and 3, 1996. The court can use the three distributions in February when calculating the defendant's offense level for the January 15 offense.

Over the years, most of the complaints about sec. 1B1.3 have been that it is too inclusive, that it holds a defendant accountable for too much. The Commission has responded to the complaints by narrowing sec. 1B1.3.

Appended by: Eleanor Kerlow -- DC Counsel Connect - Washington

Date: Sun Oct 6 21:21:58 1996

Subject: narrowing the guideline

The Sentencing Commission's staff paper on Chapter Three (a copy of which is in the Library of this hearing) states that "because of consistent narrowing of the scope of the relevant conduct guideline, not all participants in the offense are held for the same relevant conduct and often the common basis for comparison is lost."

This is a sharp change from when the guidelines were originally established. Then the scope of relevant conduct was at least as broad as criminal liability. Commentary was added to the guideline saying that the governing standard should be liberally construed in favor of considering information generally appropriate to the sentence.

According to the guideline, relevant conduct included "all acts or omissions committed or aided or abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that (1) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction. There was no co-defendant distinction.

All co-defendants in a drug conspiracy likely were held for the same drug amounts and had the same offense level from Chapter Two. The role analysis was to compare the acts of the defendant to those of the group. So a minimal participant (a level 4 reduction) was

intended to cover defendants who are among the least culpable of those involved in the conduct of the group.

What's happened it is that as the scope of relevant conduct began to narrow, significant co-defendant distinction began to arise. Other amendments continued to narrow the scope of this guideline.

As the Sentencing Commission notes in its own report: "These changes confound the operation of the role [in the offense] guidelines, especially mitigating role . . . the question about the interplay between relevant conduct and role remains unanswered."

Do you agree with this staff report? What should be the interplay between relevant conduct and role in the offense?

Appended by: David Yellen -- Hofstra Univ. Law - Wayne

Date: Mon Oct 7 20:53:11 1996

Subject: Relevant Conduct -- Overview

The relevant conduct guideline stands alone among the sentencing systems throughout the country. Particularly in combination with the guidelines' overreliance on quantity (drugs, money, etc.), relevant conduct distorts sentencing and distracts from an attempt to measure the defendant's true culpability. Thus, it is very disappointing that when the Sentencing Commission has finally turned its attention to this issue, they have only put on the agenda minor tinkering with the guideline. Even restricting the use of acquitted conduct, which the Commission is considering, is more important symbolically than in reality.

I would like to hear a defense of why the Commission is not looking more carefully at this much-maligned aspect of the guidelines. In particular, why not take the modest step advocated by Judge Newman and count relevant conduct less than conduct of which the defendant has been convicted?

Appended by: Julie O'sullivan -- Georgetown Law - Washington

Date: Tue Oct 8 16:17:27 1996

Subject: Relevant Conduct

David:

I have a very lengthy (attempted) defense in the works (for the N.W. Symposium) - perhaps we could discuss point by point the specific problems that you see with relevant conduct. Just as a preliminary shot at the subject -- on the whole, I think that the consideration of relevant conduct is absolutely necessary to the crafting of a sentence that furthers both the purposes of sentencing and the purposes of sentencing reform (principled uniformity/proportionality). E.G., whether a defendant engaged in one isolated fraud or was regularly bilking a series of little old ladies out of their life savings seems to me a critical fact if one is accurately to assess a defendant's blameworthiness/dangerousness, as well as the group of defendants with whom he is similarly situated. E.g., we need to know, if we are to assess a penologically meaningful sentence whether a defendant simply possessed with his brother 1K of cocaine or engaged with 15 others in a long-term and sophisticated drug smuggling operation. The alternative, some form of charge-offense sentencing strikes me as procedurally unassailable but substantively bankrupt because failing to account for the significant differences among defendants (as our existing code definitely does not do) that are relevant to the purposes of punishment means that the defendants will receive only superficially uniform (overaggregated) and penologically meaningless sentences. Further, to the extent that many critics take the present guidelines to task for failing properly to cabin the sentencing effects of prosecutorial discretion -- WATCH out if relevant conduct is removed.

Julie O'Sullivan

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From: Tom Hutchison -- Fed Pub Commun Defnd - Was

Date: Thu Oct 3 17:46

Subject: Relevant Conduct - Some questions

Last Append: Tue Oct 8 15:54:56 1996

1. Is the defendant's accountability for the acts of another that were part of "jointly undertaken criminal activity" (sec. 1B1.3(a)(1)(B)) too narrow or too broad? For example, a conspiracy has imported and distributed 200 kg of cocaine (yielding an offense level of 38 under sec. 2D1.1) and defendant C agreed to distribute 75 grams for the conspiracy. If that is the scope of defendant C's accountability, C would have an offense level of 16. Should C be held accountable for the entire 200 kg? If C is accountable for the entire 200 kg, C is being held accountable for the same quantity as the head of the conspiracy, who would seem to be more culpable.

2. Judge Newman has pointed out that "one of the bizarre aspects of the Sentencing Guidelines regime is that a defendant can receive the same sentence whether he is convicted or acquitted. . . . Frias was convicted of two firearms violations and convicted of a drug conspiracy violation. His applicable guideline range based solely on the convicted conduct would have been 12 to 18 months. His actual guideline range, based in part on the drug conspiracy of which he was acquitted, was 210 to 262 months. This is the same range that would have been applicable had he been convicted of the drug conspiracy. . . . A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal." *United States v. Concepcion*, 983 F.2d 369, 395-96 (2d Cir. 1992) (Newman, J. dissenting from denial of rehearing en banc). Should the sentencing court be permitted to use acquitted conduct? (The question is one of policy. As a matter of law, the jury's failure to find

beyond a reasonable doubt that the defendant engaged in certain conduct does not preclude a court from concluding on a preponderance standard that the defendant did engage in that conduct.)

3. Should the burden of persuasion be changed? At present and with a narrow exception, the government must establish, by a preponderance of the evidence, the existence of a factor that enhances the offense level. Should the government's burden be raised across the board? with respect to conduct that occurs outside of the offense of conviction? What about the defendant's burden? (The defendant must establish, by a preponderance of the evidence, the existence of a factor that reduces the offense level.)

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Thu Oct 3 19:04:23 1996

Subject: Relevant Conduct - Some ques.

I think the Sentencing Commission has made a lot of inroads into clarifying what constitutes relevant conduct in the context of a conspiracy. The clarifying amendments of the past few years have decreased the instances in which I felt that a defendant was being held accountable by the guidelines for conduct that he was not involved in.

One of the interesting issues that has been cropping up is the sentencing entrapment practiced by some law enforcement agents and C.I.s. Is it fair when the C.I., for example, who is offering transportation services insists on a certain amount which invariably ratches up the guideline level? I have recently had several cases where the CI himself set up the defendants by staging an apparent rip off of the drugs so that the defendant are spurred to take more aggressive steps which include the use of weapons. This results in 941s or two level adjustment being made. Is this fair? How many of you have had cases where the Government insisted on a five kilo deal where the client only wanted to buy four? These issues are not addressed by the guidelines and the case law on this issue is only now beginning to develop yet I see more and more cases like this.

Appended by: Mary Jo Arflack -- US Probation Office - Tampa

Date: Fri Oct 4 13:59:40 1996

Subject: Relevant Conduct - Some ques

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1. Is the defendant's accountability for the acts of another that were part of "jointly undertaken criminal activity" (sec. 1B1.3(a)(1)(B)) too narrow or too broad?

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As has been noted, recent amendments to the relevant conduct guideline appear to be limiting the scope of application of this provision in a way that is favorable to the defendant and, in my opinion, leads to a more just result. In this office, we have moved toward a position that requires the defendant to have knowledge of the offense behavior and some sort of agreement to participate to that degree, if only a tacit agreement established by his presence at the scene.

Thus, if the defendant agreed to distribute a limited amount of cocaine but was present at the offload site for the full 200 kgs, we would likely hold him accountable for the full shipment. If, however, he was not in the presence of the full shipment, but only knew that his 75 grams came from a much larger quantity imported by his supplier, we would limit his involvement to what he agreed to distribute. Even if he knew there were other distributors we probably would not hold him accountable for greater amounts unless he personally was somehow involved with those distributions. I believe this more narrow approach is supported by recent amendments and leads to a more just result.

The issue raises interesting questions in another area as well: I recently worked on a telemarketing case in which the top 5 telemarketers were prosecuted along with the organizers of the fraud. The organizers clearly can be held responsible for all of the losses suffered by the victims who fell prey to the telemarketers scam, but should the individuals pitching the scam be held accountable for the success of their coworkers? In this situation, they worked elbow-to-elbow in a phone room so there is no question of their knowledge, but is it fair to hold each of them responsible for the total sales?

Does it affect your opinion if the individual sales totaled a few hundred thousand while the total sales were in the millions? If it makes the difference between a probation term and a term of imprisonment? Should it matter if this is the defendant's first telemarketing job and the coworkers have made a career (years) of telemarketing fraud?

Appended by: Alan L. Zegas -- Attorney - West Orange

Date: Sun Oct 6 20:53:31 1996

Subject: Stale Evidence

I recently had a case where defendant, a 67-year old man, who had a history of health problems and no prior convictions, pled guilty to bribing an IRS agent. The government, at sentencing, claimed that between 10 to 31 years ago, the defendant and his father (without differentiating between them) committed other acts of bribery on tax-related matters. The government did not seek an upward adjustment, but it did seek to have defendant sentenced at the maximum of the range and to have his request for a split sentence denied. The judge said he would not consider the prior acts, rejected defendant's request for a split sentence and sentenced him to a 13-month term, which fell in the middle of the 10 to 16 month range.

Although the judge said he was not considering the allegations of prior misconduct, he may well have been influenced by them. Should allegations of prior acts of misconduct even be brought to the court's attention if they are beyond a certain age?

With respect to standards of proof, I for one, think the burden should be on the government to prove sentencing adjustments, at a minimum, by clear and convincing evidence. In the case of substantial departures, I would advocate proof beyond a reasonable doubt. There is a heightened need for reliability when a defendant faces a substantial loss of liberty at sentencing. In *U.S. v. Kikumura*, the Third Circuit held that the clear and convincing standard would apply to requests for significant upward departures.

Appended by: Jonathan Groner -- Legal Times - Washington

Date: Tue Oct 8 11:58:25 1996

Subject: Relevant Conduct - Some ques.

Or what if the government induces the defendant to "cook" powder cocaine into crack?

That certainly would have a major impact on the sentence, but at least one court did not seem impressed with

the "entrapment" type of argument. See the following (excerpted) article from Legal Times.

LEGAL TIMES DECEMBER 11, 1995

Court Flips Ruling That Crack Sentences Were Unconstitutional

An appeals court has tossed aside a groundbreaking 1994 decision that concluded that long jail sentences for two small -time crack dealers were unconstitutional.

The decision by a unanimous three-judge panel of the U.S. Court of Appeals for the D.C. Circuit, issued Dec. 8, reverses Senior Judge Louis Oberdorfer of the U.S. District Court for the District of Columbia. He said that the punishment for the two drug defendants violated the Eighth Amendment's ban on cruel and unusual punishment.

The appeal arose from a 1992 trial where defendants Riley Walls Sr., Jerome Jackson, Charles Campbell, and Karen Blakney were convicted of charges of distributing and conspiracy to distribute 538 grams of crack. Walls originally tried to sell powder cocaine, but two undercover police officers insisted that he cook the drug into crack_thus triggering the stiffer penalties.

Walls and Jackson, who had long criminal records, received mandatory minimum sentences of life in prison. But Judge Oberdorfer said it would be "manifestly unjust" to sentence Campbell and Blakney to the mandatory minimum terms in such crack cases_20 and 10 years, respectively_when they would have received less than three years for distributing the same amount of powder cocaine. Instead, he handed down a 33 -month sentence for Campbell and a 30-month term for Blakney.

* * * * *

But the D.C. Circuit, calling Oberdorfer's analysis "untenable," said last week in *United States v. Riley Walls Sr.* that the Eighth Amendment "does not command individualized sentencing and it does not require consideration of mitigating factors in non-capital cases."

The trial judge erred in concluding that the stiffer penalties would be " 'arbitrary and capricious' for these particular defendants in view of the particular circumstances of their offenses," Judge A. Raymond Randolph wrote for the circuit.

The opinion, in which Randolph was joined by Judges David Sentelle and Stephen Williams, affirmed the convictions of all four defendants and remanded the case to the District Court for the resentencing of Campbell and Blakney.

--Bruce D. Brown

Appended by: Julie O'sullivan -- Georgetown Law - Washington

Date: Tue Oct 8 15:54:56 1996

Subject: acquitted conduct

The question of whether acquitted conduct should be used to enhance a defendant's sentence seems to me a particularly tough one. If we accept the premise of the guidelines -- that the use of such conduct in sentencing on the offense of conviction is not "punishment" for the acquitted conduct, but rather permits sentencing on the offense of conviction that reflects the full degree of a defendant's dangerousness and blameworthiness -- it seems to me that this conduct should be included. If the government proves that a defendant did use a firearm during the course of a drug conspiracy but the jury decides to nullify on that count, don't we as a society nevertheless have an interest in seeing that the defendant receives a sentence reflecting that he is more dangerous and more culpable than the verdict reflects?

Reliance on this type of "real" information at sentencing also does not present the same procedural fairness issues that most relevant conduct consideration does -- this information was proved to the sentencing judge during trial -- with all of its attendant safeguards (although a lesser burden of proof). Some argue that use of acquitted conduct undermines the jury's role because a defendant may receive the same sentence after a partial acquittal as he would after conviction on all counts. I am not persuaded that this is a valid argument. First, the defendant has been acquitted of those counts; he is not

"stigmatized" by a criminal conviction, and does not bear the continuing disabilities associated with a criminal conviction. Second, as I understand it, the rationale for criminal jury trials is not that they are necessary to the reliability of the result, but rather that they will express the will of the community (nullify) where appropriate to prevent governmental oppression and they provide credibility to the result reached. One could argue that the will of the community is expressed in the guidelines, that the modified "real-offense" nature of the guidelines largely eliminates the extent to which prosecutors may overreach regarding sentence, and that the purpose of the guidelines -- enhancing uniformity/proportionality -- is defeated as much by jury nullification in individual cases as by ad hoc judicial or prosecutorial decisionmaking.

Julie R. O'Sullivan

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Sun Oct 6 21:28

Subject: Washington Post Series

A testament to the timeliness and seriousness of the issues being discussed in this hearing, The Washington Post today began a five part series on the sentencing guidelines. The first installment, was headlined, "Despite Overhaul, Federal Sentencing Still Misfires."

Over the course of one-year, The Post analyzed 79,000 criminal sentencings and 300 court opinions--and reached many of the same conclusions being discussed here. In fact, we can actually say that we beat the Post--launching our discussion before the series began.

I will put the Post series online as soon as I can.

Elli Kerlow

Executive Editor

Counsel Connect

Washington, D.C.

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Mon Oct 14 09:36

Subject: DEPARTING FROM THE GUIDELINES

Last Append: Tue Oct 22 09:12:07 1996

From Dan Freed, Yale Law School, New Haven

Departure practice is pivotal to determining where the federal guideline system stands in the spectrum between mandatory sentences, on one hand, and guided judicial discretion on the other.

Some of the many issues participants in this symposium might address, especially on the basis of local practice in their own districts, include:

- How broad or narrow is the Congressional authorization of sentencing departures?
- To what extent has the Guideline Manual discouraged judges from individualizing sentences based on offender characteristics apart from criminal history?
- To what extent do individual judges prefer to sentence within the guidelines, or to struggle with justifying sentences outside a guideline range?
- What explains the tremendous surge in substantial assistance departures in some districts in recent years, compared with their meager use in other places?
- To what extent are formal departure methods being stretched by practitioner and judicial techniques of "circumvention and evasion"?

-What is the meaning of the Supreme Court's decision in Koon: in defining the boundaries of permissible departures, and in laying down a new test for appellate review of departures?

-What explains the large increase in departures from the guidelines listed in the Commission's annual reports over the past eight years?

-What explains the enormous disparities in departure practices--district by district, and circuit by circuit--that are displayed annually by the Commission. See, for example, Table 31 in the 1995 Annual Report.

When discussing departures, familiarity with several provisions of law and terms of art is essential. The basic statutory section governing judge initiated departures--above or below a guideline range--is 18 USC =A73553(b).

A second kind of departure--based on "substantial assistance"--may be initiated only by a prosecutor: under 18 USC =A73553(e), Congress authorizes judges to depart below a statutory mandatory minimum sentence if the U.S. Attorney files a motion stating that the defendant has provided "substantial assistance in the investigation or prosecution of another person." Related provisions are found in 28 USC =A7994(n) and policy statement =A75K1.1.

The Commission's basic policy statement governing judge-initiated departures is =A75K2.0. Various "encouraged" departures are listed in the remaining subsections of subchapter 5K. A set of "discouraged" departures, on the other hand, is found in subchapter 5H of the Guidelines Manual: policy statements =A7=A75H1.1 through 5H1.12 declare a variety of offender characteristics to be "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."

Departures need to be distinguished from factors that affect base offense levels, listed in Chapter 2; and from adjustments to offense levels, set forth in Chapter 3.

The "heartland" concept, mentioned in the introduction to the Guidelines, supposedly distinguishes ordinary cases--to which the guidelines are to be applied literally--from unusual cases, in which guideline departures may be appropriate. The Supreme Court had much to say this past June about the heartland idea in *Koon v. United States*, but commentators and judges have expressed wide disagreement as to how much clarity or confusion *Koon* brings to guideline administration.

In this Symposium, contributors may have much to say about departure issues like those mentioned above. In addition, some of you may be able to shed important light on current departure practice in your respective districts, or have useful suggestions about the direction in which reform of the guidelines might

proceed in the future.

It may be instructive, before telling us what is happening in your own district, for you to take a few minutes to examine Table 31 in the Annual Report and see how your own district and circuit compare with the departure records of other districts and circuits. If you don't have an Annual Report at hand, try looking for it online at the Sentencing Commission's web site.

Dan Freed

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Appended by: Ron Wright -- Wake Forest Univ. - Winston-Salem

Date: Thu Oct 17 13:31:45 1996

Subject: Departing From the Guidelines

Departures raise so many questions. This is what one might expect, given that departures are the primary method the sentencing courts have of communicating with the Sentencing Commission. Where the sentencing guidelines fit poorly with reality and with a sense of justice in individual cases, a sentencing court can flag the difficulty for the Commission by departing.

Early in its history, the Commission responded to departures in a less and helpful way. It seemed that every new ground for departure appearing in a wide range of cases was viewed as a rebellion to be squashed, not an indication of real trouble with the guidelines. Too often, the Commission's only response to a new departure ground that was gaining support among district courts was to amend the guidelines or the commentary to explicitly reject the new departure ground.

How should a court respond to a Commission decision to discourage or prohibit departures on specified grounds? I would suggest that it is not enough for a court to say "The Commission has resolved the question; end of case." After all, the departure statute (section 3553) says that departures can be based on factors not "ADEQUATELY considered" (emphasis added) by the Commission. What does adequate mean? A healthy dialogue between the courts and the commission can go much further if courts read "adequately" to mean that the Commission must give some evidence and reasoning to support its conclusions that a particular departure ground should be discouraged or

prohibited. A conclusory invocation of the need for uniformity, or to avoid undue disparity, should not be enough without more specific analysis.

Alas, there is very little case law offering examples of this practice. Courts, in my opinion, have been far too deferential in accepting unexplained (and perhaps unsupportable) declarations by the Commission that certain departure grounds are off limits.

What will convince courts to hold up their end of a sentencing dialogue with the Commission when it comes to departures?

Appended by: Julie O'sullivan -- Georgetown Law - Washington

Date: Thu Oct 17 16:16:33 1996

Subject: Departures

I have a slightly different perspective on departures. It seems to me that we see a slightly skewed picture of what is truly going on out there by looking at published district court and courts of appeals decisions. By and large, (although I cannot prove this empirically),

I imagine that most departures are not the subject of opinions; I think the government regularly declines to take up departures that the assistant thinks he/she can live with (whether or not they have a principled basis in the Guidelines). It was my impression as an AUSA (admittedly anecdotal) that judges fairly often made departure "cocktails" that often were not appealed, and as I read Koon, are not likely to be overturned on appeal even if they are. By "cocktails" I mean cases where the judge can find three or four "discouraged" grounds for departure that he/she finds sufficiently extraordinary in combination that a departure is warranted.

The government can live with this in cases where the departure is not extreme (and appears just to the assistant) because they do not serve as troubling precedents to haunt the assistant in later cases (the combination being stated on the record to be unique to the defendant). I think that the increasing statistical count of departures reflects the fact that district courts are using their departure powers to mitigate what they perceive to be overly harsh sentences on a fairly regular basis; Koon, in my opinion, can only fuel this trend. I know that the weight of critical commentary these days is looking with a far more benign eye on judicial discretion in sentencing than was the case 10 years ago, but I personally still am not sold.

Judges before whom I appeared had widely divergent attitudes about the relevance of many offender characteristics -- I just don't see why we are looking to reintroduce these disparities. It strikes me that what people really object to is the fact that sentencing under

the Guidelines is harsh -- the sentences, in many people's view, are just too long. As long as the judges are using their discretion to shave sentences, then, it seems like a good thing (regardless of the fact that those defendants who receive the norm may find this to be an inequitable and unfair practice). The trouble is there appears to be no scientifically discernable "just" sentence for a particular defendant; it would appear that at least from a just deserts perspective, the defendant fairly should get what the consensus believes is proportionate to his perceived blameworthiness. And, according to public opinion polls, our citizenry believes that criminal sentences are not harsh enough (although I think that if they were ever to sit in judgment, even the most bloodthirsty would have a different reaction when faced with a person than when asked in the abstract what a certain type of offender should get).

Appended by: Jim Bishop -- US Probation Office - Tampa

Date: Tue Oct 22 09:12:07 1996

Subject: Departing From the Guidelines

Mr. Freed has posed some interesting questions about departures. First, I want to comment on the difference between "guided" and "unguided" departures. There is a good explanation of the difference in Ch.1, Part A, 4 (b). Additionally, the Commission recognized that there may be cases in which a departure outside suggested levels is warranted, albeit, infrequently. The Commissions Annual Reports for FY 1992 and FY 1995 for Florida Middle revealed the following: FY 1992 departures for FL/M were 31% of total cases; for U.S. were 23%; for FY 1995, the departures for FL/ M were 28% of total cases; for U.S. were 29%. Departures for substantial assistance in FL/M have always constituted the greatest percentage of total departures; I think this is due to the high percentage of drug related convictions, coupled with the fact that cooperation by defendants in drug cases is generally the best offering the U.S. Attorney can make to defendants who plead guilty. The government frequently recommends 5K1.1 departures for drug cases. Drug cases in FL/M were 49% of total in FY 1992, 41% in FY 1995.

Also, it seems to me that as the judges became more familiar with the guidelines and the bottom line sentencing determinative outcomes, they became far more likely to seek and find acceptable ways to find reasons supported by the guidelines to exercise their departure authority. Perhaps, too little, in the view of some judges. Additionally, as circuit case law evolved, there were more examples of various departures under available provisions of the guidelines which were upheld, thus, increasing judicial use by both experience and circuit upholding of departures for specific factors.

I favor the commission's proposal for establishing a range of one to six levels for Chapter Three role adjustments depending on the absence or presence of established factors, especially as to minor or minimal participants in drug cases who have a criminal history category of I. However, I think it should remain a Chapter Three issue, and not moved into the category of "departure". I oppose the idea of eliminating Chapter Three factors (except for acceptance of responsibility) and moving them to Chapter Five factors for departure consideration, unless they remain specific and guided as they now are in Chapter Three. The judges already have quite a tedious task of making specific statements on the record for departures and providing justification that complies with guidelines, policy statements, and other directives. To lump various additional factors for departure consideration by judges without clarity and specificity may just cloud what was done and why; it may not present a clear record and give the court a simple process for greater exercise of judgement. The Pennsylvania process doesn't impress me as described.

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From: Tom Hutchison -- Fed Pub Commun Defnd - Was

Date: Fri Oct 11 16:38

Subject: Drug guideline offense levels

Sec. 2D1.1, the offense guideline for drug trafficking offenses, is quantity-driven. The main determinant of the defendant's offense level under sec. 2D1.1 is the quantity of drug attributable to the defendant. The Commission has assigned offense levels based upon the quantity used by Congress in the mandatory minimums. The Commission assigned level 26 to quantities that call for a 5-year mandatory minimum (such as 500 grams of cocaine powder) and level 32 for quantities that trigger a 10-year mandatory minimum (5 kilograms of cocaine powder). The Commission assigned offense levels for other quantities based upon the relationship to the mandatory minimum quantities. (Level 26 produces a guideline range of 63-78 months for a defendant in criminal history category I, and level 32 produces a guideline range of 121-151 months for such a defendant. The Commission could have used offense levels 24 and 30 instead, as those levels produce a guideline range in criminal history category I that includes 60 months and 120 months. The Commission has not indicated why it selected offense levels 26 and 32 instead of offense levels 24 and 30.)

The Commission adjusts for a defendant's level of involvement in the offense in guidelines in Chapter Three of the Guidelines Manual. Sec. 3B1.1 enhances the offense level by 4 levels if the defendant organized or led criminal activity involving 5 or more participants and by 2 levels if the defendant was a manager or supervisor in criminal activity involving 5 or more participants. Sec. 3B1.2 reduces the offense level by 4 levels if the defendant was a "minimal participant" in the criminal activity and by 2 levels if the defendant was a "minor participant" in the criminal activity.

For example, a boat containing 1,500 kilograms of marijuana is unloaded. Defendant A, the person who arranged the shipment and who will oversee the sale of the marijuana to others, is accountable for 1,500 kilograms and gets an offense level of 32 under sec. 2D1.1. Defendant B, who helped unload the boat by carrying off 40 kilograms of marijuana, is also accountable for 1,500 kilograms (under the relevant conduct rule of sec. 1B1.3(a)(1)(A)). Defendant A will get a 4-level enhancement under sec. 3B1.1, for an offense level of 36. If defendant B gets a 2-level reduction under sec. 3B1.2 (not a sure thing), defendant B will have an offense level of 30. If both are first offenders, defendant A will have a guideline range of 188-235 months and defendant B will have a guideline range of 97-121 months.

The Federal Public and Community Defenders has suggested that the drug trafficking guideline produces offense levels that are too high for low-level participants. They have

suggested capping the offense level for a minimal or minor participant based upon the type of drug. Thus, for a marijuana trafficking offense, a minimal participant could not have an offense level greater than 16 and a minor participant could not have an offense level greater than 22. For a cocaine trafficking offense, a minimal participant could not have an offense level greater than 20 and a minor participant could not have an offense level greater than 26.

Some have suggested that quantity should play a greatly reduced role in determining the offense level under sec. 2D1.1. They believe that other factors should be accounted for in the guideline. The difficulty is that such an approach must routinely produce offense levels that are consistent with the mandatory minimums or else the mandatory minimums will override the guideline range.

SOME QUESTIONS. What is the appropriate measure of the severity of a drug trafficking offense? Is quantity relevant at all? If quantity should not be as important as it is now, what other factors should be accounted for in the guideline? Should purity be a factor? Are the mitigating role adjustments sufficient to bring about appropriate offense levels for low-level participants?

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From: Alan L. Zegas -- Attorney - West Orange

Date: Sat Oct 5 00:44

Subject: Probation Dept. As Thorn

Last Append: Thu Oct 10 16:47:54 1996

I have had experience in several cases since the Guidelines came into existence with the Probation Department disagreeing with stipulations reached between the defendant and the government on sentencing adjustments. What is particularly troublesome is that the probation officers meet ex parte with the judges and discuss their views of the case, often immediately before the sentence is meted out. When this situation arises, the Probation Department is a second adversary to the defendant. Indeed, the government may not fight

hard to enforce the stipulation if it knows that it may get an even better bargain if the court agrees with the position of Probation.

If the judge adopts the position urged by Probation and imposes a sentence in excess of the stipulated offense level, the problem is compounded on appeal. Can the government properly argue on appeal that the judge acted within his discretion in agreeing with probation when the government stipulated to a set of facts contrary to those found by the court? In one of my cases this is exactly what occurred. Also, should Probation Officers be permitted to meet ex parte with judges? They are, after all, participants to the sentencing process? Do such ex parte meetings violate a defendant's due process rights?

Appended by: Fred W. Bennett -- Catholic U Law Schl - Washington

Date: Sun Oct 6 17:07:11 1996

Subject: Probation Dept. As Thorn

Under pre-sentencing case law, courts have held that it does NOT violate due process for a probation officer to meet with the court before sentencing--even ex parte. I am not aware of any recent case law in the area and perhaps you can make the case that under the guidelines if you have objections to the P.S.I. with a contested sentencing hearing in the

offing it would be improper for the Probation Officer to meet ex parte with the judge prior to the sentencing hearing.

This practice always offended me when I served as the Federal Defender in Maryland but I could never convince the Judges to refrain from it.

Fred W. Bennett

Associate Professor of Law

Catholic University of America

Appended by: Alan L. Zegas -- Attorney - West Orange

Date: Sun Oct 6 20:31:40 1996

Subject: Due Process Violation

The problem is particularly troublesome because the probation department is an arm of the court. Thus, when probation takes any position contrary to either the defendant or the government the court is placed in an adversarial capacity with one of the parties. In my

view, if the government and probation stipulate to either a factual or legal position, the stipulation should not be disturbed by Probation. In addition, probation should never be speaking with the judge outside the presence of counsel, particularly when it is acting in an adversarial capacity. To my mind this practice is very wrong, yet it is so ingrained in the system that it is not challenged.

Appended by: Jim Bishop -- US Probation Office - Tampa

Date: Tue Oct 8 16:49:08 1996

Subject: Probation Dept. As Thorn

I think the Guidelines adequately and clearly covered the roles of the three essential parties - the prosecutor, the defense, and the court. Chapter Six of the Guidelines Manual deals with Sentencing Procedures and Plea Agreements, with specific policy statements governing plea agreements articulated in Part B. Certainly, the Congress intended the court to be the fact finder when there are disputed issues of factual information or guideline application. The Comprehensive Crime Control Act recognized the need for judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983) as quoted in Introductory Commentary. Also Rule 32

clearly describes and anticipates situations where there is not unanimous agreement between the parties at sentencing and gives the court the discretion to rule on any unresolved objections to the presentence report, and for each matter requires that the court make either a finding on the allegation or a determination that a finding is unnecessary if the court will not take it into account or that it will not affect sentencing. FRCP Rule 32(c)(1).

The probation officer's role is or should be one of neutrality, and sometimes applications and facts will fall on the side of defense, sometimes on the side of the prosecution, or some on both. However, the probation officer must never a defender or prosecutor be. I think probation officers have come to accept that role, tough though it is, but more importantly, they recognize that the facts of the investigation which are placed in the report and the application of the guidelines both are subject to findings of the judge. Certainly, probation officers know for whom they work, and that the Court is the neutral party. How could it be otherwise?

The real difficulty you are describing is a matter of opinion not fact. The prosecutor and defense may agree on stipulations as to sentence, facts, or guideline applications based on a calculated compromise, with all the information held by both when the plea is negotiated. Often times, additional information comes to light through the probation officer's investigative work and/or discussions with case agents, or through arrest and debriefing of other codefendants or co-conspirators. If it hurts a given defendant or the

prosecution, that party is most likely and expected to howl a little. What would definitely controvert and frustrate the goal of the guidelines and the ends of justice is for the probation officer not to do what the court needs to have all information available, or for the court to sit like a potted plant and agree to negotiated pleas which obviously hide a smoking gun.

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Appended by: Eleanor Kerlow -- DC Counsel Connect - Washington

Date: Tue Oct 8 17:38:50 1996

Subject: Probation Dept. As Thorn

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What would definitely controvert and frustrate the goal of the guidelines and the ends of justice is for the probation officer not to do what the court needs to have all information available, or for the court to sit like a potted plant and agree to negotiated pleas which obviously hide a smoking gun.

<<

I would think that given how financially stretched various probation offices are these days and how back-logged judges' dockets are that it may not be all that uncommon for there to be probation officers who make their determinations without all of the information available and for there to be judges who rubber stamp negotiated pleas, which may contain a smoking gun.

Appended by: Alan L. Zegas -- Attorney - West Orange

Date: Tue Oct 8 23:14:52 1996

Subject: Reality v. Theory

My experience has been that the probation department is professional and the people who work for it honorable. No matter how well I might think of the people, however, I think there are systemic problems that cannot be ignored. Notably, while probation is supposed to be neutral, in fact, it takes positions. It may take a particular position believing it is acting objectively, and it may well be acting just that way. Nevertheless, it is asserting a particular position, sometimes one at variance with the government and the defense. When it acts in this way, particularly, it should not be addressing the judge in private. In camera communications create an appearance of non-neutrality.

Thus, in my view, if probation wants to express itself, fine. If it wants to provide the judge with information, good. But if it is going to do these things, it should do it the same way as the government and defense do, through written communications to the judge, with copies sent to the parties. No ex-parte stuff. It smells bad. It creates a bad appearance. I don't know what the probation officer is whispering in the judge's ear and I don't know what the judge is saying to the probation officer. I do know, however, that this process of communication is extraordinarily serious and it is my client's liberty that is being directly effected.

Appended by: Mary Jo Arflack -- US Probation Office - Tampa

Date: Wed Oct 9 13:30:44 1996

Subject: Reality v. Theory

I have been in this job for 6 years and have had dozens of "ex-parte" communications with our judges. I have not, however, been asked to provide information in private which

was not shared publicly. The primary reason I have been invited into chambers (which is not routine in this division) is for the Judge to express what he or she has decided to do with respect to one or more of the objections noted in the Addendum to the Report (which was furnished to everyone). Usually, the Judge wants to confirm what the outcome will be once the ruling is made. In cases where the sentencing range falls within Zone B or C of the chart, the Judge often wants to confirm what the sentencing options are. On rare occasions, a Judge has expressed what he or she wants the outcome to be and has asked for assistance in confirming his or her opinion as to how to get there. This is almost always in the defendant's favor and usually involves departure issues based upon facts which are in the record and available to all.

In truth, I have never shared, or been asked to share, any information in chambers which had not been published in my report. We have policies against such behavior. I am happy to meet with our judges and enjoy providing the types of assistance which are described above. I do not feel that anyone is prejudiced by these meetings.

I understand that policies vary widely throughout the country and what is true here may not be true elsewhere. We are encouraged to express our position fully in our reports, at the position of parties meetings held to resolve disputed issues, and in the addendum which is attached to the report and furnished to all. I do not believe it is my job to be "neutral" but I do believe I am to be as objective as possible, even when that means I adopt a position at odds with a bargain struck by the prosecutor and defense counsel. I

agree that my efforts to support my position should be limited to the written papers which are available to all, unless the judge calls upon me in open court for an explanation of the position adopted by the probation office. I agree wholeheartedly that the probation office should not be allowed to advocate in secrecy.

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Wed Oct 9 17:01:54 1996

Subject: Role of probation officers

It would be a serious mistake to try to limit the role of the probation officers in sentencing. There is a tendency for the prosecution and the defense at times to try to work a deal that will settle a case. While it is very rare for there to be actual misstatements in settlements, there are often shadings. The probation officer must be the neutral arm of the court to insure that the court can make an informed judgment on accepting a plea and sentencing.

It would be improper for a probation officer to put one thing in the PSI and tell the judge something else. However, the court must be able to discuss the case with the courts probation officers. I am not aware in over thirty years doing criminal cases of that happening.

Everything that a defense attorney thinks may increase a sentence is not a due process violation. The present system is far more open than the pre guidelines system. The real complaint by both defense and prosecuting attorneys is that they do not have absolute control and there is an independent review by probation.

I think in some cases probation has a far too expansive view of Relevant Conduct but that is a separate issue from their role in preparing a PSI so long as they fully disclose their recommendations in the PSI.

Both sides will be careful with stipulations and plea if they know there will be an independent examination of the agreement. The court would be a rubber stamp if there was no evaluation and recommendation by probation.

Appended by: Alan L. Zegas -- Attorney - West Orange

Date: Wed Oct 9 23:47:06 1996

Subject: Conflicting Roles

The systemic problem I see with Probation is that, because it is an arm of the court, the court has placed itself in the business of not merely adjudicating the appropriate sentence, but of investigating it as well. I do not think that the Court should be both investigator and adjudicator. To my mind, this creates a conflict, particularly when the source of the facts relied upon by the court in fashioning a sentence derive from the court's own investigation, and those facts are at odds with the facts agreed upon by the prosecution and the defense.

When the court favors its own fact-finding it creates an appearance of non-neutrality. We have an adversary system: in virtually every other instance, the Court adjudicates between the positions drawn by the defense and prosecution. (One exception I can think of is the role played by Pretrial Services in determining bail. Here too, I have a problem with the court both investigating and adjudicating whether a presumptively innocent individual is a danger to the community or a risk of flight. In my view, the government

should be arguing the risks of bail, the defendant should be arguing against the risks urged, and the court should be deciding, not investigating the issue.)

Accepting, however, that probation is going to continue to serve under the auspices of the Court, and separately investigate "the facts", then the probation officer should not be meeting privately with the judge. Even if the probation officer is in the judge's chambers to offer a perfectly neutral and objective opinion, there is an appearance of non-neutrality created by the ex parte meeting. Therefore, if probation is going to serve as fact-finder, its factual findings and opinions should be presented in writing to the court and parties, and any oral opinion it wishes to offer to the judge should be offered in open court at sentencing, at the same time that the defendant and government get to speak.

Doesn't this proposed procedure preserve the appearance of neutrality, which is essential to the integrity of the sentencing process, yet permit probation to function independently?

Appended by: Jim Bishop -- US Probation Office - Tampa

Date: Thu Oct 10 16:47:54 1996

Subject: Conflicting Roles

I think the role of probation officers as investigators who seek facts about the defendant, the defendant's criminal history, and other areas as included in the FRCP, Rule 32(c)(1),(2) is essential and serves the best interests of the prosecution, defense, and the court. It would be non-essential only if defendants provided complete, truthful disclosure, or in the absence of accepting that as a plausible presupposition, if either the government or the defense could take over uncovering many facts essential to a judgement by the court which heavily impacts a defendants life.

I'm hopeful that as these valuable discussions continue, we may focus on ideas, proposed changes or alterations to the guidelines which will make them work more efficiently. I have been involved personally in too many cases where both government prosecutors and defense counsel relied on inadequate investigation of criminal convictions and had defendants enter pleas based upon both those brief checks and a less than forthcoming defendant only to discover that once the probation officer disclosed the report, they had a defendant who was a career offender. Certainly, that is not a desirable outcome for any party involved in resolution of the case.

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From: Gerald Shargel -- Atty-Gerald Shargel - New

Date: Fri Oct 4 05:17

Subject: Calculations & Predictions

Last Append: Wed Oct 9 15:47:48 1996

One of the comments raised the problem of inexperienced lawyers wrongly predicting or estimating the applicable adjusted offense level. The cases have held that an erroneous prediction or calculation by counsel does not entitle the defendant to any relief. Let me make three points. First, while the guidelines may be murky and complicated, they are not, particularly with the help of commentary and interpretive case law, that difficult to comprehend and apply. If anyone finds the guidelines too complicated, try the law on preservation in habeas cases.

Second, it is helpful, and it has generally been the practice in New York, to have the plea agreements contain at least the government's prediction of the applicable offense level and adjustments. This does not mean that the defense or even the probation department agrees with the calculations, but you at least start with a strong point of reference.

Third, the real problem is found where the defense lawyer does not or cannot predict what will happen after conviction at trial. The Second Circuit recently denied rehearing in *U.S. v. Gigante*, where two defendants had guideline ranges of 3-4 years but were sentenced to 16 or 17 years after trial with a finding by something "more than a preponderance" that they were involved in murdering potential witnesses. And there is always uncertainty as to the finding of fraud loss, drug weight, or tax loss where the question is not resolved before a sentencing hearing.

But even with this complexity, I would rather have the compass provided by the guidelines than a situation after trial where the defendant is facing 240 years or so after a multi-count conviction and I have no idea what sentence will be imposed, as it was under the old law.

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Fri Oct 4 22:27:46 1996

Subject: Calculations & Predictions

<<Second, it is helpful, and it has generally been the practice in New York, to have the plea agreements contain at least the government's prediction of the applicable offense level and adjustments. >> While this is true for New York and some other jurisdictions where I have had cases it is not true, for example, in the Southern District of Florida. But the point is well made. Perhaps there should be some requirement that all plea agreements contain the parties prediction of the applicable guidelines.

The difference between these two jurisdictions brings up a different point. Having practiced in a variety of districts I am always amazed by the differences in approach between them. For example, in So. Florida when there are two defendants in a case both of them can not receive a minor role adjustment. Yet, only a few hundred miles away in Tampa I recently had a case where both defendants received the adjustment. Prosecutors in some districts are more willing to play with the facts than in other districts. Some districts calculate substantial assistance departures differently as well (percentage reduction v. # of level reductions). The list goes on. It is ironic that the guidelines stated purpose of consistency of sentencing is constantly subverted by different approaches in different districts. Go figure. <g>

Appended by: Fred W. Bennett -- Catholic U Law Schl - Washington

Date: Sun Oct 6 16:59:31 1996

Subject: Calculations & Predictions

The differences between the Districts is also pronounced in the area of waiving your right to appeal. In the Eastern District of Virginia, at least in Alexandria (where, by the way, they have resisted having a Federal or Community Public defender system) it is my understanding that you must waive your right to appeal (except for an illegal sentence) on any guilty plea. This is not the practice in neighboring jurisdictions (Maryland and the District of Columbia) where guilty pleas do not include a waiver of the right to appeal a sentence.

Variations from District to district also include practices in the area of cooperation (unlimited departures in Eastern District of Virginia ; two or four levels in Maryland), role in the offense (downward adjustment for "Minor role" in drug cases for couriers in the Eastern District of N.Y. I am told vs. no downward adjustment in Md. on the same

facts) and in other areas. This just makes the time to be served dependent upon the District where the crime occurs.

These variations are widely known around the country and is not a healthy sign for attempting to achieve uniformity in sentencing.

Fred W. Bennett

Associate Professor of Law

Catholic University of America

Appended by: Gerald Shargel -- Atty-Gerald Shargel - New York

Date: Mon Oct 7 19:59:06 1996

Subject: Calculations & Predictions

It's quite true that there are substantial and significant differences between and among the various districts. The list goes on and on. Will the district take a plea and agree not to introduce it against non-pleading co-defendants? Will the district agree not to prosecute other offenses not yet indicted? Can the plea be taken pursuant to Rule 11(e)(4), allowing

withdrawal if the court doesn't follow the sentence recommendation? My experience is that where the prosecutors want the plea, "policy" is just another point to negotiate and exceptions to the rule are made.

While disparity among districts seems to offend at least the spirit of the guidelines, I think that if all of these kinds of issues were addressed by a national uniform policy, criminal defendants would come out the losers. I think its easier to deal with the ragged edges of "policy."

Appended by: David Yellen -- Hofstra Univ. Law - Wayne

Date: Mon Oct 7 20:45:45 1996

Subject: Calculations & Predictions

There is a troubling relationship between predictions of sentencing ranges, allowing withdrawals from guilty pleas, and waivers of appeal. There is, of course, no requirement that plea agreements contain a binding, or even nonbinding, estimate of the applicable sentencing guideline range. However, if courts more commonly followed the policy statement in section 6B1.1(c), and deferred accepting plea agreements until the

preparation of the presentence report, many misunderstandings could be avoided. (I wrote a short article on this point a few years back in the Federal Sentencing Reporter).

Meanwhile, the courts do not allow a defendant to withdraw a guilty plea when an estimated guideline range turns out to be inaccurate, or when the judge decides to depart above the applicable range. In such circumstances, the bargain may be illusory from the defendant's standpoint. Finally, in those jurisdictions which require waivers of appeal, the defendant may: 1) receive an inaccurate estimate of the guideline range; 2) have the judge misapply the guidelines; and 3) be barred from withdrawing the plea or bringing an appeal.

Are these the markings of a fair system?

Incidentally, I am not sure what Fred Bennett meant when he said that in the E.D. of Virginia defendants must waive the right to appeal, except for illegal sentences. In reality, only illegal sentences can ever be appealed, because a sentence imposed in violation of the proper application of the guidelines is in fact an illegal sentence. Did you mean that the defendant must waive issues about the application of the guidelines, but not other illegal sentences?

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Mon Oct 7 20:54:49 1996

Subject: Calculations & Predictions

Again, I agree with Mr. Shargel. Uniformity in sentencing uniformly prejudices defendants. Still, it sometimes seems to me that this whole effort to promote consistency in sentencing is like trying to fit a square peg in a round hole. The fact of the matter is that no matter how much one tries to quantify criminal conduct and criminal defendants not all crimes are alike and not all defendants are the same. While the whole concept of mandatory sentencing through guidelines may be helpful in advising clients of their potential penalties it all too often results in harsh and unreasonable sentences. Our nations zeal to stem crime has resulted in the infliction of great pain and suffering on many defendants and their families who otherwise would not have received such harsh sentences if the judges would have had their druthers. (I'm sure we could e-mail all day about clients who received sentences far in excess of their actual conduct.) Then again, given the current political climate I am whistling in the wind. Maybe one day I'll see the pendulum swing the other way.

Appended by: Julie O'sullivan -- Georgetown Law - Washington

Date: Tue Oct 8 16:05:14 1996

Subject: uniformity

It seems to me that "uniformity" does not necessarily mean harsh sentences -- it does given the penalties enacted by Congress and the ranges selected by the Commission, but that is not a necessary part of a guidelines system. It has always seemed to me that much of the criticism that is directed at the structure of the Guidelines is misdirected; that if the ranges were cut by 1/3, people would think the uniformity and predictability introduced by the Guidelines were a help.

With respect to disparities between districts, do you find that these are disparities in substantive charging or plea bargaining practices or differences in policies regarding the provisions included in plea agreements and the like (e.g., waiver of appeal rights, agreements not to request or appeal departures, etc.)? Many commentators over the years have suggested creating prosecutorial guidelines to provide some consistency and predictability to DOJ choices. We have the USA Manual and the Principles of Federal Prosecution -- but it appears that they are not addressing the matters we are talking about. Would a more detailed DOJ policy assist us here? Or are the disparities between districts

the result of (inevitably) differing enforcement priorities/crime profiles in different districts? How do you think DOJ policies should be enforced?

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Tue Oct 8 21:28:17 1996

Subject: Calculations & Predictions

<<It has always seemed to me that much of the criticism that is directed at the structure of the Guidelines is misdirected; that if the ranges were cut by 1/3, people would think the uniformity and predictability introduced by the Guidelines were a help.>>

If they were cut by 1/2 then maybe I would agree with you. <g>

But seriously, I don't have a problem with the ranges in the guidelines until you encounter first time offenders with relatively minor roles in very large drug conspiracies. Then, it seems to me, the guidelines seem to lose their reasonableness. Even with minor role

adjustments and even safety valve adjustments the final sentences are often still way too harsh.

<<With respect to disparities between districts, do you find that these are disparities in substantive charging or plea bargaining practices or differences in policies regarding the provisions included in plea agreements and the like (e.g., waiver of appeal rights, agreements not to request or appeal departures, etc.)?>>

Both. In response to your suggestion regarding policy manuals, etc. I am not sure that the current manuals don't already cover some of these issues except the local districts either chose to ignore them or have developed different interpretations of them. I think these disparities are inevitable. As long as the local districts have some degree of independence it is natural for each to develop its own way of doing things. The same holds true for the probation departments. I have seen significant variations in the manner in which PSI are prepared and in the content they have.

Appended by: Russ Clemts -- US Probation Office - Tampa

Date: Wed Oct 9 15:47:48 1996

Subject: Calculations & Predictions

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If courts more commonly followed the policy statement in section 6B1.1(c), and deferred accepting plea agreements until the preparation of the presentence report, many misunderstandings could be avoided.

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Deferring acceptance of a plea agreement until after the receipt of the presentence report makes perfect sense. Using this procedure would allow the court's independent investigator (the probation officer) to review the case objectively and to submit a presentence report containing factual, rule-related assertions regarding guideline applications. The court could then review the plea agreement for groundless or illogical guideline application recommendations and decline to accept the agreement until such recommendations are removed. On the other hand, if the court reviews the plea agreement and finds that accepting it would not undermine the sentencing guidelines or defeat the statutory purpose of sentencing, the court can accept the plea agreement and proceed with sentencing. Since this procedure would afford defense attorneys and prosecutors the opportunity to see where the judge stands in relation to the plea agreement, there would be no need for sentencing predictions or estimates. Indeed, the attorney could advise the client with much more certainty what type of sentence to expect. The simplification process should definitely include a review of plea agreement

practices. In fact, one of the stated goals of the Sentencing Commission is to "study plea agreement practice under the guidelines and ultimately to develop standards for judges to use in determining whether to accept plea agreements."

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From: Alan L. Zegas -- Attorney - West Orange

Date: Tue Oct 8 23:36

Subject: Secret Sentencing Letters

Last Append: Wed Oct 9 12:57:33 1996

Ex parte communications between the judge and others bother me tremendously. I think they create palpable appearances of unfairness. I expressed my objection elsewhere to ex parte meetings between probation and the judge, now here's another gripe: judges receiving letters from the public at sentencing, without disseminating copies of them to counsel. I was involved in a case in which a judge had substantially departed from the Guidelines in a bank fraud case. The judge stated that he received letters from the public condemning the defendant's conduct. The judge read excerpts from various of the letters, and these excerpts made for great newspaper copy the next day. Copies of the letters were requested from the judge. The judge turned over only those letters read aloud at sentencing, but he refused to turn over any others. To my surprise, though the judge was reading excerpts from separate letters, and one would think that each letter was different, the letters were in fact verbatim copies of each other, with each purportedly signed by a different person. There was obviously a coordinated campaign against the defendant, something which defendant would never know had he not seen the letters.

The judge received other letters from the public about my client, but he stated that because he was not relying upon the letters, he would not even allow me to see them. On appeal, I argued that the judge's refusal to make all the letters available to defendant violated his rights to due process. The practice, at minimum, created an appearance of unfairness: the defendant was not able to confront his accusers, who may have had an influence on the judge's sentencing decision.

I lost the case, on a judgment order (another practice I am critical of that I think permits appeals judges to avoid having to explain themselves on a difficult issue, but that complaint is for another day and another forum.)

My question today is, should judges be obligated to disclose to all counsel copies of all letters received from the public, which relate to sentencing?

Appended by: Mary Jo Arflack -- US Probation Office - Tampa

Date: Wed Oct 9 12:57:33 1996

Subject: Secret Sentencing Letters

At least one of the judges in our district routinely files with the clerk's office all letters mailed to him from the public. Copies are sent to the parties and to the probation office. Letters received by the probation office are provided to the Court, but we not not routinely furnish copies to anyone. Until recently, we did not recognize it as an issue. (Letters received by us are almost always on behalf the of the defendant.)

Not too long ago, I was involved in the sentencing of a very high profile individual who had a number of friends on the federal bench. He asked the probation office to request information from them. The defendant furnished us with names and addresses of individuals who would likely want to provide information as to his character, etc. Many of these individuals were federal appellate court judges. The probation office sent a letter to each of the judges inviting them to provide any information they deemed relevant to the sentencing court. Although some of the judges declined to become involved, probably two dozen responded to the invitation. The prosecutor was told of this and asked to have copies of the letters. The letter writers had not been told that their letters would be disseminated to anyone other than the sentencing judge. We asked the sentencing judge what to do and she directed us to contact the writers and see if they had any objection to the letters being released generally. The judge determined that she would review only those letters which could be released to all parties. All but one of the authors agreed to dissemination. That person's letter was returned to him. The government and the defendant were then provided with copies of all letters furnished to the judge.

I agree that the defendant and the government should have full access to any letters considered by the judge. Although most letters received in this office are from family members and friends of the defendants, I do not think the judge should review information which has not been disclosed to the government and the defendant. (Whether it is in the form of letters or "ex parte" communication between the court and the probation office.)

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From: Christina Cooley -- Counsel Connect - Atlan

Date: Fri Oct 11 09:38

Subject: 11TH CIR. COCAINE RULING

Last Append: Mon Oct 21 17:20:02 1996

Today's Daily Report contains the following article discussing the effect of this week's 11th Circuit decision, upholding the distinction between crack and powder cocaine in the Sentencing Guidelines. Finding the two forms chemically indistinguishable, the district court had essentially voided the Guidelines' provision providing for stiffer penalties for crack.

Opponents of the distinction argue that the Guidelines are racially biased, in that more crack offenders are black and more powder offenders are white.

Is this distinction sound? What, if anything, should the Commission do about the disparity in sentencing between the two forms of cocaine?

Side Effects of a Cocaine Ruling

11th Circuit Case Bodes Ill for Other Crack Attacks

Fulton County Daily Report, Oct. 11, 1996

BY EMILY HELLER

Staff Reporter

When the 11th U.S. Circuit Court of Appeals this week approved harsher sentences for crack cocaine offenses than for the powdered variety, it rejected an idea U.S. District Court Judge J. Owen Forrester made popular two years ago.

In 1994 Forrester rejected Congress' distinction between cocaine and cocaine base, or crack, because the two are chemically identical. Finding the law's distinction arbitrary, Forrester applied the rule of lenity, which calls for construing ambiguity in favor of lenience in sentencing. For Forrester, that meant voiding the crack law.

Such a reading of the law seemed to fortify proponents of the belief that the law unfairly singles out crack users, generally blacks in inner cities, while going easy on patrons of powder, typically better-heeled whites.

Forrester's reasoning gained some currency. It may well have inspired a similar ruling by his Northern District colleague Judge Clarence Cooper. And it has come under consideration in at least four other circuits--the 4th, 7th, 8th and 9th.

But it didn't fare well in those jurisdictions, and though this week's 11th Circuit ruling deals with a different case, Forrester's holding is now plainly out of favor and as good as dead.

Forrester's case, *United States v. Davis*, 864 F.Supp. 1303 (N.D.Ga. 1994), and Cooper's similar holding in *United States v. Culpepper*, No. 1:95CR15-1CC (N.D.Ga. order Nov. 29, 1995), have yet to come before the 11th Circuit. Instead, the appellate court took the matter up in a third case, *United States v. Sloan*, No.94-2101 (11th Cir. dec'd Oct. 7, 1996).

'Mental Gymnastics'

In appealing their crack sentences ranging from 60 to 70 months, defendants Roy Sloan, Hein Van Phung, Hoang Ngo, Tai Nguyen and Bao Vuong cited Forrester's ruling and sought to consolidate their case with the government's Davis appeal.

But the 11th Circuit would not combine them and stayed Davis pending its ruling in this case.

The Sloan ruling is the 11th Circuit's first look at Forrester's rationale.

The 11th Circuit's conclusion is proper, says the prosecutor in that case, Assistant U.S. Attorney Robert P. Marcovitch, saying "the court's reasoning is correct and it is in accord with other Circuit Courts in the country."

However, two defense attorneys who did not participate in the case don't like the court's analysis.

"This is mental gymnastics on the part of the court," says Aimee R. Maxwell, an Atlanta attorney with the Georgia Indigent Defense Council and president of the Georgia Association of Criminal Defense Lawyers.

Moreover, Augusta defender Michael C. Garrett says the court's focus on Congressional intent makes the analysis more political than legal.

The defense attorney who handled the appeal, Gregory S. Smith, staff attorney in the Federal Defender Program, says the ruling is significant because it rejects the underpinnings of Davis and Culpepper.

But, he says, the opinion leaves questions. "The issue that nobody seems to answer is, ... what is crack?" he says. He points to testimony from a U.S. Drug Enforcement Administration agent who said that crack would no longer be crack if ground to a powder: "That to me was, we thought, the killing blow," Smith says. "That to us is an irrational distinction."

Crack Intentionally Singled Out

Congressional intent to punish crack possession more severely "must guide" the court's decision to evaluate the distinction between cocaine and cocaine base, wrote 11th Circuit Judge Phyllis A. Kravitch for the panel in Sloan.

Indeed, she noted, Congress passed the tougher sentences amid the growing concern in the mid-1980s over crack abuse and intended to single out cocaine base for harsher treatment, she wrote. Congress could have been more precise, she wrote. Other appellate courts have recognized that the 1986 law imposing tougher penalties for crack may have "some facial ambiguity," she wrote. But that does not mean that lenience automatically kicks in, she wrote.

That fact "does not compel the conclusion that the statute Congress chose to enact is so ambiguous that the rule of lenity applies," Kravitch concluded. Senior Judge Thomas A. Clark and Judge Emmett R. Cox joined her.

Moreover, the panel in one paragraph rejected as meritless the defendants' constitutional attack on the sentencing disparity, citing its 1995 opinion finding that Congress singled out crack for harsher treatment for its availability and effects, not for discriminatory reasons. *United States v. Terry*, 60 F.3d 1541.

Cox wrote a special concurrence saying that the court should not have entertained the defendants' constitutional attack because they did not make those arguments before the trial court. Even though Forrester's view of disparate sentencing hasn't gone over well with federal appellate courts, the U.S. Sentencing Commission recommended last year that the sentencing disparity be eliminated. Congress, however, rejected the proposal.

Emily Heller's e-mail address is eheller@counsel.com.

Appended by: Julie O'sullivan -- Georgetown Law - Washington

Date: Thu Oct 17 17:03:11 1996

Subject: Request for info

I am interested in knowing more about the statistical case for the racial disparity between crack and cocaine -- can anyone give me a cite? I also wonder if the disproportionate racial sentencing impact may due in part to prosecutorial selectivity (see the Supreme Court's recent decision in Armstrong). Does anyone know of any studies that document the racial breakdown of crack users/dealers (to the extent discernable), the patterns of state/federal referral/diversion, and the sentencing results? Any help would be appreciated. Julie O'Sullivan (osullivj@law.georgetown.edu)

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Mon Oct 21 17:20:02 1996

Subject: Crack Issue

The main argument involved in the crack issue is with congress. Prosecutors and the sentencing comission work with the laws that congress pass. In this case the congress has set crack sentences much higher than powder cocaine. The Comission tried to change that and from a political view blew it by making them equal. Congress promptly rejected that. Had the comission tried to set the difference at 10 to 1 their amendmant might have stuck. Crack from all that I can understand does have an addictive effect far beyond that of powder cocaine. That can justify a difference. What I have not seen is a study that shows some solid basis for making it 100 to 1. That does produce unbelievable differences in sentences dependin g on the drugs classification.

I have seen no evidence that prosecutors are targeting defendants on the basis of race. Congress has said crack is a serious problem and provided stiff penalties for individuals who sell it. Prosecutors are doing what congress told them to do.

If the results are too harsh then the argument is with congress not the prosecutors or the comission.

Maybe congress will reexamine the difference between crack and powder cocaine after the election. It does need a carefull study.

We need to work on both demand and supply to fight the drug problem.

Joe Brown

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From: Christina Cooley -- Counsel Connect - Atlan

Date: Thu Oct 17 21:35

Subject: ADM PLEA

Last Append: Mon Oct 21 17:05:25 1996

Participants may be interested in these two Memos of the Week, which discuss the Archer Daniels Midland antitrust plea agreement in the context of the Sentencing Guidelines. (Memos of the Week are archived in the LIBRARY.)

ANTITRUST

[Editor's Note: Counsel Connect's featured Memo of the Week is in two parts: analysis of this week's DOJ-ADM Plea Agreement prepared for Counsel Connect members by Theresa Arnold, inhouse counsel for Amoco Corporation who regularly conducts seminars on corporate compliance, and Gregory Wallance, an expert in white-collar criminal defense and partner with New York's Kaye, Scholer, Fierman, Hays & Handler, LLP.]

Some Observations About the Plea Agreement Between ADM and DOJ

October 16, 1996

by Theresa Arnold, Esq.

Amoco Corporation

Chicago, IL

On a close reading the Plea Agreement looks like a terrific deal for ADM. After all, how often does the government get the whole conspiracy on videotape? It is apparent that the company is attempting to put as much of the price fixing investigation behind it as possible. To the extent ADM has succeeded, \$100 million plus the \$110 million ADM has already agreed to pay to settle civil class actions does not seem that high a price for such a fundamental compliance failure. 1/

Some people have expressed astonishment that the settlement of the criminal charges against the company "broke the \$10 million barrier." No such barrier existed after the effective date of the U.S. Guidelines for Organizations. Under the Sentencing Guidelines the government may seek fines of twice the pecuniary gain or twice the pecuniary loss as an alternative to the \$10,000 statutory fine. One could only surmise that the government chose not to get bogged down in items of proof necessary to establish larger fines when it had a guilty plea and the statutory fine in hand. In my compliance seminars I treat the \$10 million fine as the minimum dollar exposure for the corporate criminal antitrust defendant.

The settlements ADM reached in the civil cases provided the government with some guidelines in negotiating the criminal fines in the Plea Agreement. Under the Sentencing Guidelines, the government could have sought restitution in addition to the \$100 million fine. The plea agreement foregoes the restitution remedy under the Sentencing Guidelines because ADM had "already paid or agreed to pay" restitution in two major class actions brought in by the lysine customers and the citric acid customers.

The government explicitly foregoes seeking any term of probation, a truly scary penalty under the Sentencing Guidelines for Organizations. Probation basically turns a company over to a magistrate, and is one very good reason for a company to have its own compliance program. What is surprising is that I could not find any reference in the plea agreement to a requirement that ADM establish an antitrust compliance program. This has been one of the hallmarks of the DOJ settlement of civil antitrust investigations, with the compliance program required in the NASDAQ settlement serving as a somewhat extreme example. The Plea Agreement expressly disavows the existence of any other agreement. I find the absence of a mandatory compliance program for a criminal defendant with such a spectacular compliance failure inexplicable. (According to "Compliance Programs: What the Government really Wants," by Kirk S. Jordan and Joseph E. Murphy, Counsel Connect's Memo of the Week, August 28, 1996, it shouldn't matter whether the investigation is criminal or civil. I have wondered if there is some nuance of criminal procedure that kept the compliance program language out when the DOJ has

explicitly foregone the probation remedy).

The Japanese and Korean companies involved in the Lysine conspiracy have been able to sign plea agreements and pay criminal fines of "over \$20 million." (The Wall Street Journal, August 28, 1996.) At the time it seemed astonishing that there was no mention of anyone among the Japanese and Korean co-conspirators doing jail time. The federal prosecutors clearly intend to indict Michael Andreas and Terrance S. Wilson of ADM; the DOJ will rely on ADM cooperation pursuant to the plea agreement in pursuing its criminal case against these individuals.

If one reads this in the context of the DOJ agenda, it couldn't have invented a better case to make some of the points Anne Bingaman was been trying to communicate during her tenure. The DOJ takes price fixing seriously. No one should have doubted that. The DOJ has the weapons with the U.S. Sentencing Guidelines to extract some headline grabbing fines. Earlier cases in which the DOJ deployed some of its arsenal were noted only in the specialized antitrust press, not on the front page of The Wall Street Journal. The DOJ will vigorously pursue international price fixing cartels, as one example in Canada clearly shows. As part of the Mutual Legal Assistance Treaty between Canada and the United States for criminal matters there is a Memorandum of Understanding regarding antitrust enforcement. This is the only one of many mutual assistance agreements to which the United States is a party which has been used in antitrust criminal enforcement. In June 1994, the DOJ obtained criminal plea agreements from three manufacturers of plastic

dinnerware and four executives. They allegedly conspired to fix prices of plastic dinnerware to large purchasers. The Royal Canadian Mounted Police cooperated and assisted in the investigation by seizing documents located in Canada. Criminal fines exceeded US \$8million. The president of one of the manufacturers entered a guilty plea and was recently sentenced to 21 months in prison and a US \$90,000 fine. This joint DOJ-Canadian enforcement didn't receive much press, perhaps because the fines were within the mythical \$10 million comfort zone.

The ADM Plea Agreement provides terrific attention getting numbers for antitrust compliance seminars.

ENDNOTE

FN 1: Some civil plaintiffs have opted out of the class action settlement and the final mopping up operations may take several years.

ARCHER-DANIELS-MIDLAND GUILTY PLEA SETS RECORD CORPORATE
ANTITRUST FINE

By Gregory J. Wallance*

The Department of Justice announced this week that it had entered into a plea agreement with Archer-Daniels-Midland Company ("ADM") under which ADM will pay a \$100 million fine for antitrust violations arising from sales of citric acid and livestock feed additive lysine. The significance of the fine, which shatters by \$85 million the existing record for a corporate antitrust fine, is that the Organizational Sentencing Guidelines dramatically have raised the antitrust fine ceiling. Corporations should accordingly take note of the special need to vigorously self-police against antitrust violations.

The Guidelines do not change the statutory maximums under the Sherman Antitrust Act, 15 U.S.C. 1, which provides for a corporate fine of \$10 million. The Guidelines provide a sentencing range within the statutory maximum. However, the Fines Enhancement Act, 18 U.S.C. Sec. 3571, states that, in lieu of the specified statutory maximum, a Federal District Court can impose a fine equal to twice the gross pecuniary gain derived from the crime or twice the gross pecuniary loss caused to the victims of the crime. Under the antitrust provisions of the Guidelines, a percentage of the affected volume of commerce is deemed to be the "loss." The Fines Enhancement Act doubles the "loss" from a high volume offense such as ADM's to create a much higher statutory maximum than \$10 million. The Guidelines'

calculations, which reflect aggravating circumstances such as high level officer involvement in the offense, therefore can result in sentences in a range whose minimum is far in excess of \$10 million.

The potential exposure from the interplay between the Guidelines and the Fines Enhancement Act had to be a factor in ADM's decision to plead guilty, and was the basis for the plea's fine provisions. ADM agreed to plead guilty to separate conspiracies, one to eliminate competition by fixing the price of lysine and the other to fix the price of citric acid. ADM further agreed that "the volume of affected commerce attributable to the defendant is in excess of \$100 million both in the lysine market and in the citric acid market." (Plea Agreement Para. 7). ADM further agreed to a sentence pursuant to the Fines Enhancement Act and the Organizational Sentencing Guidelines, wommend that the Court impose a \$70 million fine for the lysine conspiracy and a \$30 million fine for the citric acid conspiracy.

Antitrust violations affecting a substantial volume of commerce expose a corporation to potentially staggering fines. Gary Spratling, Deputy Assistant Attorney General for antitrust enforcement, stated, regarding the ADM fine, this is not the last one that s going to come in over \$10 million. Companies that do business in areas susceptible to antitrust violations should re-evaluate their antitrust compliance program and, where appropriate, upgrade or implement a compliance program that will qualify the company for lenient treatment under the Organizational Sentencing Guidelines. See

Guidelines, Para. 8C2.5(f). But see Application Note Para. 8C2.6 (antitrust offenders with an adequate compliance program may not receive the same reduction in fine as other categories of corporate offenders). The company's counsel should also be familiar with the Antitrust Division's corporate leniency policy which, under appropriate circumstances, enables the company to avoid antitrust prosecution by disclosing the antitrust violations before the Division has begun an investigation.

ENDNOTE

* Gregory J. Wallance is a partner at the law firm of Kaye, Scholer, Fierman, Hays & Handler, LLP, a former Assistant United States Attorney and co-moderator of the Counsel Connect criminal law discussion group.

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Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Mon Oct 21 17:05:25 1996

Subject: ADM Plea

I agree that it seem strange there was no use of probation or a requirement that the compnay establish an efective compliance program. While I am not aware of the facts leading up to the plea, given the magnitude of the offense and its apparent widespread nature at the highest levels of the company these provisions should normally be considered.

Again, under the guidelines the judge has the duty to study a plea and reject it if if it undermines sentencing guidelines etc. In too many cases judges are glad to see a big case settle and do not make a searching inquiry into the plea. In this case the fine was large although given the size of the compnay not that big a percentage of their net worth. It would be interesting to know if the judge asked about those items or considered adding them in as a condition of accepting the plea.

Joe Brown

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From: Serena Yam -- CC - Consultant - New York

Date: Tue Oct 15 12:50

Subject: LOSS CALCULATIONS

Last Append: Thu Oct 24 19:23:06 1996

Posted for: Samuel Buffone of Ropes & Gray, located in Wahington,

DC

The Guidelines use loss as the primary determinant of sentences for fraud and theft type offenses. The majority of white collar cases are accordingly sentenced based on determinations of loss. A variety of problems have plagued sentencing court efforts to determine loss resulting in a large number of often inconsistent appellate decisions which attempt to bring some clarity to the difficult task of computing loss in complex white collar cases.

Sections 2B1.1 (theft), 2F1.1 (fraud) and 2T1.1 (tax) each rely on a determination of loss to fix a sentence. Typically the offense level is increased based upon an escalating scale. For example a theft offense can be increased as much as 20 levels depending on the amount of loss. Loss is defined for most purposes in Section 2B1.1. Its terse definition provides little clarity for the variety of complex loss calculations that can face a sentencing court. While other guideline provisions provide additional definition many circumstances remain undefined. Despite this reliance on loss the Guidelines provide that loss need not be determined with precision and that a court must only make a reasonable estimate given the available information.

The Commission has indicated that its reliance of loss is based upon its reviews of pre-guideline practice and its conclusion that sentencing courts most often relied on the amount of the losses and if the conduct was isolated, repeated or sophisticated.

Loss issues:

1. Is loss an accurate determinate of the seriousness of fraud and theft offenses? Should courts be encouraged to consider a variety of other factors where loss is not an accurate reflection of seriousness? Is departure authority adequate to deal with this issue?
2. Did the Commissions 10,000 case pre-guidelines sample accurately reflect the prior importance of loss or where white collar cases driven largely by other factors including offender characteristics? Do the Guidelines adequately consider isolated, repeated or unsophisticated conduct as a mitigating factor?
3. Is fairness in sentencing achieved by permitting enhancements of up to 20 levels based upon a reasonable estimate of loss or should courts be required to determine loss with greater precision? Is this method of fact finding fair in view of the importance of loss to modified real offense conduct in white collar cases?

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Wed Oct 23 17:17:10 1996

Subject: Loss determinations

The guideline could be simplified by combining the fraud and theft tables. There is no real reason to have two when in general the results are the same regardless of which one we use. Loss or intended loss is usually a valid measure of the seriousness of the crime and should be a factor in the sentence.

There are a lot of problems in cases involving false bank application to secure loan on how to determine the loss. The easy answer is that it is the amount of the loan.

Unfortunately that would overstate the seriousness of the crime in many cases where the false statement is used to help get the loan, but there is a real intent to repay and in fact there is substantial repayment. On the other hand an intent to repay does not help much when there is in fact no repayment.

The commission in light of a number of court cases should consider combining the theft and fraud guidelines and trying to synthesise a workable definition of actual or intended loss. Specific examples from real world cases would be of great help.

The fact that loss does not have to be determined with great precision is a practical answer to the fact that in many cases we cannot determine loss exactly and an effort to prevent long mini trials on that issue. This is an area where we must accept the judgment of the court where there is a reasonable basis for the determination. Since this is an enhancement, if there is doubt the lower reasonable amount should be used.

There has to be some room for departures to take into account the defendants intent. The thief who breaks open a safe has the same criminal intent whether the safe is empty or contains a million dollars. Unfortunately how to structure a reasonable departure in that case is very hard.

One possibility may be to raise the base level several levels and then use fewer but wider steps up. This approach would punish the initial criminal intent and effort whether it was successful or not and would decrease to some degree the pure amount driven guideline.

In general, I think the base levels for these guidelines as well as the tax guideline are set too low. If the case is serious enough to warrant a felony conviction it should usually warrant some jail time.

The tax guideline for evasion should have a much higher base with less emphasis on the overall loss. This is one area where deterrence is desperately needed. We have too many people who think they can cheat on taxes and so long as they don't get too greedy they will escape any serious penalty. In most cases they are right.

Joe Brown

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Thu Oct 24 19:23:06 1996

Subject: Loss Calculations

Mr. Brown is right on point regarding combining the theft and fraud guidelines. This is probably the easiest call on this simplification effort.

Likewise, his points on clarifying and furnishing examples on how to calculate loss are right on. Right now I am dealing with a case regarding the sale and manufacture of "black boxes" which are used to decode the premium and pay-per-view channels on cable. My research has revealed any number of approaches in determining the loss, many of which have been used by courts. Imagine the difficulty in advising the client of his potential sentence. It's near impossible. Is the loss the value of the boxes (\$250.00 each) as some courts have suggested. Or is it the statutory fine as provided by the statute (\$100,000 per box) which one court used. Or is it the estimated loss by HBO as one court used. Each of these methods can yield widely different results. As you can see in just this case this is one area where clarification and simplification would be very welcome.

Ruben Oliva

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From: Fred W. Bennett -- Catholic U Law Schl - Wa

Date: Tue Oct 15 19:28

Subject: Acceptance of Responsibility

Section 3E1.1 of the Guidelines provides for an up to three (3) level reduction of the offense level for acceptance of responsibility, provided the offense level before any adjustment is 16 or higher.

The current guidelines provide two (2) levels for acceptance under U.S.S.C. Section 3E1.1(a) and one additional level under Section 3E1.1(b) for either timely providing information concerning the defendant's involvement or timely notifying the government of the defendant's intention to enter a guilty plea.

Some of the issues that continue to be litigated under Section 3E1.1 include the following:

1. What are the types of "rare situations" where a defendant, who is convicted after a jury trial, can still qualify for Acceptance of Responsibility. See, *United States v. Jaramillo*, ___ F.3d ___, 1996 WL 570165, * 5 (10th Cir. 1996) ?
2. What are the "extraordinary " cases where a defendant receives an upward adjustment for obstruction of justice can still qualify for Acceptance of responsibility?
- 3.-6. To be continued on new posting.

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From: Fred W. Bennett -- Catholic U Law Schl - Wa

Date: Tue Oct 15 19:52

Subject: Acceptance of Responsibility

Last Append: Tue Oct 22 16:12:57 1996

3. (continued from first posting) When can a defendant properly be denied any credit for Acceptance of Responsibility merely because he/she denies culpability for any criminal conduct beyond the specific offense charged. See, *Kinder v. United States*, 504 U.S. 946 (1992) (White, J., dissenting from the denial of a Petition for Writ of Certiorari)?

4. Can the government allocute against Acceptance of Responsibility even if it recommends for it as part of a plea bargain if the Government includes language that its

position "is based on the information presently available to the Government? See, United States v. Ashurst, ___F.#d___, 1996 WL 552991 (7th Cir. 1996)--this assumes there is additional criminal conduct by the defendant after the plea agreement is signed.

5. Can a district court consider a defendant's refusal to talk to a probation officer as a basis to deny a defendant a downward adjustment for acceptance of responsibility? See, United States v. Flores, 93 F.3d 587 (9th Cir. 1996)

6. Can a district court award "partial acceptance of responsibility", i.e., a one level reduction? See, United States v. Atlas, 94 F.3d 447, 452 (8th Cir. 1996)

In addition to commenting on these litigation points of interest how is 3E1.1 working in practice in your district? You might be interested in knowing that the Sentencing Commission, as part of its simplification project, is planning on publishing for comment proposed changes to 3E1.1. These proposals include the following options:

1. Providing for a third level decrease if the defendant "clearly demonstrates extraordinary acceptance of responsibility" (in lieu of the present language for the third point).

2. Providing for an additional one level point for defendants at ALL offense levels, as opposed to only those defendants where the offense level before the adjustment is 16 or above .
3. Providing that a defendant who has received an enhancement for obstruction of justice can still qualify for a two (2) level decrease, but not the third point .
4. Providing for a graduated series of points for Acceptance of Responsibility : (a) a one point reduction if the defendant enters a guilty plea; (b) a two (2) level decrease if the defendant satisfies some enumerated factors ("substantial acceptance of responsibility"; and (c) a three (3) level decrease if the defendant meets all of the enumerated factors ("full acceptance of responsibility").

Query ::: What are your views on which direction the Commission should go in this area, or do you think that since it ain't broke don't fix it??

Fred Warren Bennett

Associate Professor of Law

Columbus School of Law

Catholic University of America

Appended by: Alan L. Zegas -- Attorney - West Orange

Date: Wed Oct 16 23:19:37 1996

Subject: Penalizing Defendants

In my view, the provision for "acceptance of responsibility" is premised upon the disingenuous rationale that defendants who show early repentance by owning up to their crime should receive credit reflecting their early rehabilitation. The real reason this provision exists, and every honest person knows it, is to induce people to plead guilty. Three points are available for those committing more severe offenses, not because these persons show more repentance by accepting responsibility, but because they need greater inducement to plead.

Acceptance of this analysis leads inexorably to the conclusion that defendants are beng penalized for exercising their right to go to trial. I think that is wrong. You can argue the semantics all you want, but the bottom line is this: if you exercise your constitutional right to go to trial, you are going to pay for it if convicted.

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Tue Oct 22 16:12:57 1996

Subject: Acceptance of responsibility

The rules of 3E1 are intended to induce a defendant to plead guilty and I see nothing wrong with that. If a defendant wants to go to trial she/he has that right. However there is no guarantee of a free lunch if you are convicted.

The present rule might be more honest if they in fact had the three levels Fred cites that the commission is looking at.

One point for the fact of the plea. Other levels if there is true remorse.

We do have to be careful that we do not make this into a way to buy your way out of a sentence. Too heavy a resolution on restitution places the defendant with money in a property crime at an advantage over the defendant who has no money or who is involved in a non property crime.

This may be an area where the court should have some additional discretion without too many lists and comments. The trouble with a long of list of what does and does not justify the extra levels is that it just adds to the appellate load.

In whatever changes we make to the guidelines we need to try to limit any increase in appeals. If an adjustment is in the discretion of the court it should not be subject to appeal absence a clear abuse of that discretion.

Placing too much detail encourages appeals.

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Fri Oct 25 15:54

Subject: A stacked deck?

Last Append: Sat Oct 26 14:12:03 1996

In the Washington Post's recent series on the sentencing guidelines, one article suggested that the federal sentencing guidelines have shifted court room power from judges to prosecutors and law enforcement.

Have the sentencing powers shifted too much away from judges and too much toward the prosecutors? For example, a prosecutor may ask a judge to ignore the sentencing rules and reduce the prison term of a defendant who gives law enforcement "substantial assistance" in investigating or prosecuting crimes by another person. Known, as 5K motions (because this is provided for in Chapter 5 of the guidelines), they have been described as the wild card in the sentencing process. It is prosecutors who hold complete control over all 5K motions.

But the guidelines apparently say little about what is "substantial assistance"? Indeed, many states don't know what to make of the term either. Some give it great leeway and others don't. Overall, substantial assistance motions, totaled nearly 1 in 5 federal cases in 1995, yet in Alexandria, Va., they were used in only 6 percent of the federal criminal

cases during the last two years. There is wide disparity in use across districts. Dan Litt, the Department of Justice's deputy assistant attorney general for the criminal division told the Washington Post that a supervisor in every U.S. Attorneys office should approve every 5K request.

What should the Sentencing Commission do about "substantial assistance" 5K motions? How can there be a more uniform use of the motion? What experiences have people had with this motion? Is it being overused? Underused? Abused?

You can read the Washington Post article at www.WashingtonPost.com.

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Sat Oct 26 14:12:03 1996

Subject: For the prosecution - yes

There is no question that the guidelines stack the deck in favor of the government. But 5K is only one part. The probation office in most districts does not conduct a totally independent determination of the applicable facts. At least in my district the probation officer calls the AUSA who tells him or her what the facts of the case were. In doing so, the Government has first crack at determining the resulting guideline calculation in the PSI. Then it is up to the Defendant's counsel to try to convince first the probation officer and then the Court that their version of the facts is the correct one. In either case the Government has the power during the plea bargaining process of agreeing to omit certain facts from the probation officer which can lead to a more favorable calculation. This is particularly true in the areas of role adjustment, some special offender characteristics, and, lately, the safety valve. The government can also exert influence in the area of quantity and amount, particularly in multi defendant cases where knowledge of the scope of the conspiracy is relevant.

In terms of 5K there is no question that the Government holds all the cards. Case law is clear that the decision to file a 5K rests solely on the Government unless they are stupid enough to state that they are not doing so because the defendant is black, hispanic, or

handicapped. Short of that defense counsel will be fighting a losing war in forcing the government to (1) allow the defendant to cooperate and (2) filing the 5K or R.35. On the other hand, there is no question that the 5K is often used to effectuate a plea in the case or to alleviate the harsh results of a strict application of the guidelines. It is here where I think there is a growing divergence among the districts. Some districts are more willing than others to use 5K for these purposes. Is it necessarily wrong to use 5K for that purpose. I don't think so. Do I think its bad that this flexibility is only in the hands of the Government and not the Courts or defense counsel. Absolutely. One solution may be to allow the Court or the defense counsel to file or consider a 5K without the Government going along.

Absolute power corrupts absolutely and we are seeing more and more evidence of this in the Government's decision regarding 5K. Let's just make sure we don't throw the baby away with the dirty water.

Ruben Oliva

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Fri Oct 25 17:40

Subject: UNFAIR TO POOR, MINORITIES?

"Rules Often Impose Toughest Penalties on Poor, Minorities," was the headline in another of the Washington Post articles on the sentencing guidelines. (October 9, 1996, available at www.washingtonpost.com)

According to the Post, black defendants receive slightly longer sentences than whites. In fact, judges from Washington state to Washington, D.C. have refused to hand down heavy sentences required under the guidelines because of concerns about racial disparity.

Six years ago, U.S. District Judge J. Lawrence Irving of San Diego quit the bench after declaring that harsher drug sentences for drug defendants and increased prosecutorial power were creating an absurd situation.

A New York Times article (NYT, August 20, 1996) suggests that tougher sentencing rules coupled with stricter welfare rules are falling harder on women and children. In the article, a woman arrested for being a drug courier received probation instead of prison on the grounds of "extraordinary family circumstances." Her three children had been placed in an abusive foster home in New York. She was given a break so she could return to her family. The woman is now attempting to rebuild a law abiding life with the help of welfare. New welfare rules, however, would permanently deny cash benefits and food stamps to anyone convicted of a drug felony. In light of this development, U.S. Court of Appeals Judge Patricia Wald of the D.C. Circuit, has issued a harsh critique of the impact of the sentencing guidelines on women.

But the fairness of the guidelines is defended. U.S. Department of Justice officials say the guidelines, saying they are fair and there is no pattern of sentencing problems. So far the U.S. Sentencing Commission has not undertaken a comprehensive review of whether there are systemic unwarranted disparities.

What is to be made of this? If there is a disparity is that a function of the guidelines themselves, the people interpreting them, the degree to which blacks may be committing

more serious crimes, and that maybe not all women who committ crimes face
 “extraordinary family circumstances”? Your thoughts, experiences,
 suggestions for improvement?

Eleanor Kerlow

Executive Editor & Marketing Director

Counsel Connect

Washington, D.C

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Tue Oct 22 17:44

Subject: OVERRIDING QUESTION

Last Append: Thu Oct 24 19:26:08 1996

Should the purpose of the guidelines be crime control or just deserts for criminals? If the answer is just deserts, then shouldn't punishment be scaled to the offender's culpability and the harmful results that may have occurred? So a less blameworthy defendant would receive less punishment.

On the other hand, if the answer is crime control, then shouldn't punishments be granted which lessen the likelihood of future crime and emphasize deterrence?

Although the guidelines were drafted to serve both of those purposes, does one philosophy prevail over another? Should the guidelines be reformulated to give greater weight to the culpability of an offender and to offenders' role in offenses (or role factors) to fulfill more of the just desserts goal? Your thoughts? (And you don't have to be an expert on the guidelines to add your two cents.)

Appended by: Thomas Chapman Clark -- Law Offices of - Hartford

Date: Thu Oct 24 13:39:12 1996

Subject: Overriding Question

As past chairman of the sentencing commission for the State of Connecticut (that proposed the sentencing guidelines that were subsequently adopted), I remain concerned that guidelines have to remain extremely flexible. Our study of "sentencing" left me with the overriding impression that the focus on the judge ignores whole aspects of "sentencing" that take place outside the glare of the media. Who does the policeman arrest, what does the prosecutor charge, what charges are nolleed, how good is defense counsel, what does the sentencing report include, what does the prison grant for "good behavior"? All these questions impact the "sentence" directly but are not part of any guidelines. The ultimate answer seems to be that the "proper" sentence for any person is the result of many factors all of which we hope are administered by wise people. We can only really hope to enact guidelines that will eliminate the wild extremes, but to do more

is to detract from the wisdom to be offered by the people who are dealing with these problems day in and day out. We also concluded, based on over a year of study, that deterrence is overrated as a reason for enacting guidelines.

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Thu Oct 24 19:26:08 1996

Subject: Overriding Question

<<We also concluded, based on over a year of study, that deterrence is overrated as a reason for enacting guidelines.>>

Most of my clients can barely speak english, forget about knowing about the existence of "guidelines" or "minimum mandatories."

Ruben Oliva

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From: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Tue Oct 22 00:21

Subject: WHAT SHOULD WE EXPECT

Last Append: Thu Oct 24 19:12:13 1996

Many of the comments in this seminar have been very interesting and thought provoking. On the other hand I would like to get at least a feel for some of the substantive changes which we should expect in the guidelines next year.

From some of the comments posted and having reviewed the staff papers some changes seem certain: shifting some of the Chapter Three adjustments to Chapter Five departures, eliminating some of the SOC (like minimal planning), and clarifying Chapter Four provisions.

Some of the other changes proposed by the staff paper seem dependent on congressional action which does not appear forthcoming or realistic, e.g., elimination of the minimum mandatories and the 25% rule.

How about an expanded series of role adjustments (from 4 to 6 levels, either way)? How about the proposed cap on departures (including 5K1.1.)? Are these changes likely?

What other likely changes am I missing?

Comments appreciated.

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Wed Oct 23 17:45:38 1996

Subject:

Mr. Jones poses good comments and questions.

Unless there is a real bipartisan effort in a non election year, we will not see changes in the minimum mandatory sentences.

The commission needs to push hard for careful consideration of this area with studies to show the cost both long and short term and the problems they cause in having workable guideline sentences.

The role in the offense adjustments could go to +/- 6. However, given the fact that the reductions are often in drug cases with a minimum mandatory they would make no difference on the lower end. the +/- adjustments work only if they can be applied. If a minimum mandatory trumps them, they are of no use.

The idea of a cap on departure including 5K1.1 is worth consideration. When we look at the commission reports that show some districts have 5K1.1 departure in over 60% of their cases and other districts about the same size and with the same amount of drug case have 5K1.1 departure of 10% you have to wonder what is going on. Are 5K1.1 departure being used to settle cases and drop below minimum sentences or is there that much substantial assistance being given.

The amount of departure in 5K1.1 is a problem. The prosecutor always has the ultimate departure of declining to prosecute at all. However, when the motion is made what standards should be used. My practice when I was U.S Attorney was to recommend a maximum of a 4 level or 50% departure for assistance that was full complete and above the average defendant saying my buddy helped me do it or I bought the drugs from Sam. For average assistance we would recommend 2 levels or a 25% reduction. This recommendation was made after consideration by at least three attorneys in the office.

Of course a recommendation by the prosecutor is only that. In most case it is given real consideration by the court. On the other hand this is an area where once the motion is made the judge has an open field. To keep both prosecutors and courts within some general boundaries a cap on the departure to the +/- 6 range would have some appeal.

I hope the commission will publish a meaningful study of the 5K1.1 area. It would be of great help to know what is really going on in this area.

Joe Brown

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Thu Oct 24 19:12:13 1996

Subject:

<<Mr. Jones poses good comments and questions.>>

Thank you for the compliment but my partner is Jones, I'm Oliva.

<g>

<<The role in the offense adjustments could go to +/- 6. However, given the fact that the reductions are often in drug cases with a minimum mandatory they would make no difference on the lower end. the +/- adjustments work only if they can be applied. If a minimum mandatory trumps them, they are of no use. >>

True, except in cases in which the safety valve applies in which case the enhanced adjustments would make a big difference.

As far as the cap on the 5K1.1. I should point out that the reason I bring it up is because I would be concerned about it. In the Southern District of Florida departures pursuant to 5K1.1. are made on a percentage basis rather than a number of level basis. This becomes particularly important in cases in which the levels are high. Because of the reliance on weight by the guidelines a very minor offender may still end up with a significantly high sentence and a reduction of 2 - 4 levels would still leave him/her with a high sentence. On the other hand, if we had the enhanced role departures then perhaps a cap on reductions would be more palatable. I believe that substantial assistance is an area that is not easily susceptible (or should not be) to rigid policies. There are many factors which differentiate one defendant's assistance from another. Under your system a defendant who makes 14 cases and runs a significant risk of danger would get the same reduction as another defendant who maybe only made one. Of course, you may argue, the guy that made 14 cases must have been heavily involved in the drug trade previously. True, but if you cap the reduction then there is no incentive for him to procure so many additional cases which truly have an impact on crime. In many instances 5K1.1. is the only vehicle to correct some of the glaring injustices that can result from a rigid guideline system.

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From: Alan L. Zegas -- Attorney - West Orange

Date: Wed Oct 16 23:51

Subject: FORMULAIC MISH MOSH

Last Append: Tue Oct 22 21:51:22 1996

What a simple paint by numbers idea it was. You take the crime, you give it a score, you make some adjustments, you go to a chart and . . . whamo! . . . you've got the sentence.

Nothing more to it than that, right? Uniformity is built in, right? Focus is on the crime, not the offender, right?

Wrong. . . . all of this is a bunch of hogwash.

There were allusions in an earlier thread to probation having to keep the government and defense honest by not allowing them to agree to a result not dictated by proper application of the guidelines. Agreed. Perhaps this does happen. But why? Because both the government and defense, the only adversaries to the controversy being litigated, often realize that the sentence dictated by the neat little formula supplied by the guidelines (and, in truth, the formula is rarely neat or simple) does not fit the crime or the person. So, "guidelines bargaining" occurs, maybe a little jiggling with reality here and there to arrive at a more just result. But so what. Is anything wrong with this? The answer is yes and no. No, because in the end a just sentence may be better produced by agreement of the adversaries than the formulaic application of the guidelines and the intrusion of probation into the adversarial process. Yes, because the need to engage in guidelines bargaining suggests that the guidelines are not working.

In New Jersey, first and second degree crimes carry presumptions of incarceration. Third and fourth degree crimes do not. Judges have much wider discretion in fashioning a sentence, but more serious crimes do require jail time, with the minimum fixed. This approach gives prosecutors and defendants more opportunity to bargain and reach a just result. I think New Jersey's methodology is superior to the federal approach, though it too has its shortcomings.

What do others think? What is going on in other states? Is sentencing by number the way to go or is it time to get off this runaway train?

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Tue Oct 22 15:57:33 1996

Subject: plea agreements

I take exception to Mr. Zegas statement that the only people interested in sentences are the defendant and the prosecutor. His discussion that those two parties should be able to come up with a "Just Sentence" between themselves is flat wrong. "Just Sentence in whoes opinion? The defendant who wants no sentence or a busy prosecutor who wants to go on to the next case? Too ofter we forget the victim of a crime and that the public as a whole has an interest in criminal trials and sentences. Too ofter the victim is the forgotten person. The defense counsel speaks for the defendnat and can put that defendnat in the best light. The defendant is in court and should be able to make a good impression. The victim is ofter not present or represented only by a statement given the prosecutor or the probaation officer. The guidelines insure that there is a floor for the offense that does protect the public and insure the the seriousness of the crime is considered. This is clearly true in white collar crime.

Some guidelines may be too high some may be too low, but they do represent an effort to insure that the public is represented.

The criminal justice system is not a game for the convenience of the defense and the prosecutors to play by their rules without supervision and firm guidance.

Joe Brown

Appended by: Alan L. Zegas -- Attorney - West Orange

Date: Tue Oct 22 21:51:22 1996

Subject: An Adversarial System

Maybe I'm missing something, but when I last looked, the criminal justice process was an adversarial one. The prosecutor stands in one corner, the defense in the other, and they fight it out. The prosecutor represents the State in all its glory and receives input from victims, which it may choose to use or not use in its discretion. The defense attorney represents the accused, the little guy, the one who has significantly less power than the

State and therefore has constitutional rights to help even the balance. It is through the clash of adversaries that a just result is supposed to emerge. This is the way both the criminal and civil sides of the American justice system works.

Now for the next step. When the prosecutor and defense attorney agree that the formulaic result dictated is not a just result, that signals something is wrong. Now what could be wrong? Perhaps the formula supplied by the guidelines produces a horrible injustice. So, the parties, (the adversaries, remember?) agree to a just result. You don't like this process? Fine, repeal the Guidelines. And if that is not a politically correct solution because a bureaucracy has emerged, which depends upon the Guidelines for its continued existence, then reform the darned things. But don't go blaming the adversaries for a problem not one of their creation. Bad law is bad law and the Guidelines are an idea whose time has passed.

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Tue Oct 15 17:46

Subject: Simplification-Proposals

Last Append: Tue Oct 22 16:33:50 1996

Here are some of the things the Sentencing Commission is
proposing:

1. It is considering moving infrequently applied adjustments (from Chapter Three) to either the appropriate (Chapter Two) guideline(s) or use them as a departure consideration in Chapter Five.

For example, the Commission could remove from Chapter Three (3A1.3) (Vulnerable Victim), which is applied in one-tenth of one percent of all cases, and add it as a

departure (grounds for letting a judge depart from the guidelines) consideration in Chapter Five. This would not necessarily undermine the importance of the factor. Or would it?

2. It is considering restructuring some of the Chapter Three guidelines, particularly role guidelines, to achieve an increased level of judicial discretion in these determinations.

One proposal suggests establishing a range of one to six levels (increase or decrease) depending on the absence or presence of established factors. How would this differ that what's done now?

Another suggestion is to adopt a method currently used in Pennsylvania, which is to modify Chapter Three adjustments so that the same factors (victim, role, obstruction, acceptance of responsibility) are used to determine an overall aggravated range, a mitigated range, or the standard range. Would this be a problem?

3. Another idea is to eliminate all of Chapter Three (except for acceptance of responsibility) and list the factors in Chapter Five as factors under which a judge could depart from the guidelines. A number of state guideline systems have adopted this kind of approach. Would this be creating too much departure authority? What other experiences has anyone had with this kind of approach.

Eleanor Kerlow

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Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Tue Oct 22 16:33:50 1996

Subject: Changes to adjustments

There is some merit in making some adjustments into departures. A range of six for a series of departure might prevent reintroducing widespread disparity and at the same time reduce appeals since it is harder to appeal a refusal to depart or a departure that has a basis. It would take some study to determine what range should be considered. Six up or down may be too much.

There does need to be some way to consider aggregated factors that by themselves do not warrant a departur. However this is tricky since it is easy to list factors that really do not justify departur either singally or in the aggregate and then claim an unusual case.

Many of the cases that cause problem in the departur area are the failure of the judge to articulate good grounds for the departur. Caseful judges can articulate the basis for their departure and are usually upheld on appeal. Judges that depart because they want a particular result and throw up a departur to justify it cause everyone problems.

Good reasons to depart should be encouraged. Not ever case is a heartland case, but just because the judge does not like the sentence the guidelines call for does not take it out of the heartland.

Joe Brown

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From: Alan L. Zegas -- Attorney - West Orange

Date: Wed Oct 16 23:33

Subject: TRAP FOR THE UNWARY

Last Append: Mon Oct 21 18:54:32 1996

Let's get down to basics. I think the Sentencing Guidelines are a horrific monster that is spinning out of control. Each passing day brings new guidelines, new commentary, and new case law. One complication builds upon the next, with infinite esoteric nuances extending the weave beyond the horizon. The guidelines are so complex and require such specialized knowledge of how they have been judicially interpreted that defendants represented by lawyers unschooled in the guidelines (i.e. a lot of lawyers) receive unduly harsh sentences. The unschooled attorney does not know the bargaining points, does not know how to respond to the presentence report, does not know when to request a hearing or what to do if one is held. Who gets hurt? You guessed it: the defendant.

I know the pat answer: educate the attorneys. Easier said than done, particularly when the only way to get a competent education given the complexity of the subject matter is to take the equivalent of a full semester's course, something most attorneys have neither the time nor inclination to do. It's time to tame the monster. Repeal this thorny beast.

Appended by: Julie O'sullivan -- Georgetown Law - Washington

Date: Thu Oct 17 16:39:34 1996

Subject: Monster

Many areas of the law are complex and difficult but I don't think that necessarily argues for repeal (e.g., Fourth Amendment law, Fifth Amendment law, etc.). It seems to me that few decisions in law are as important as the question of for how long to deprive a defendant of his liberty. It is worth the resources committed to at least attempt to ensure that all relevant considerations are assessed. I think some simplification (or at least guidelines that are written in English, unlike 1B1.3) is great, but abandonment of the entire undertaking? What is the alternative? Charge-offense sentencing? Every bank fraud defendant gets 5 years regardless of the offense, offender or situational circumstances? That would certainly be simple and administrable but would be

substantively bankrupt. I think most defense counsel would rather invest a semester to mastering these guidelines than consign all their clients to arbitrary sentencing.

Appended by: Alan L. Zegas -- Attorney - West Orange

Date: Thu Oct 17 23:03:45 1996

Subject: Discretion is Okay

I see nothing wrong with giving judges discretion to take into account not only the crime, but the offender as well. This does not make sentencing arbitrary.

The Guidelines do not eliminate arbitrariness. Rather, they give rise to creative ways to circumvent the rules. Also, the power of a judge to depart vests the judiciary with the power to act arbitrarily. Departures are far more frequent than originally suggested would be the case.

The turgidity of the prose and the complexity of the rules is making the Sentencing Guidelines look more and more like a chapter of . . . you've got it . . . the IRS Code. This

monster is out of control. It needs to be nipped in the bud with that six-letter word: r-e-p-e-a-l.

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Mon Oct 21 16:51:03 1996

Subject: Repeal is not the answer

I doubt that the guidelines are quite as complex as the writer suggests. A semester would be gross overkill. There are several short courses offered that will get most attorneys who do any regular criminal work up to speed.

The danger of an attorney who does not do regular criminal work is always present. However that attorney will have trouble with search and seizure, confessions etc. long before he/she ever gets to the guidelines.

The procedure preguideline where the judge had unfettered discretion was simple in there was no appeal. It also resulted in wide disparity even within the same district.

Given congress dissatisfaction with "light sentences" I expect repeal would be followed with even more use of minimum/mandatory sentences. Hardly the result the writer seen to want.

We can simplify the guidelines by writing them in clear english and by not trying to put too fine a point on some conduct. Widening the range for judges to a limited degree and reducing the right to appeal unless the result of a successful appeal would be significant would go a long way to both simplify and reduce the work load of the appellate courts.

Joe Brown

Appended by: Alan L. Zegas -- Attorney - West Orange

Date: Mon Oct 21 18:54:32 1996

Subject: Don't Eliminate Appeals

I have no problem with the guidelines being simplified.

I do oppose mandatory minimum sentences. I think they result in jails being needlessly filled for long periods of time, at great, oftentimes completely unnecessary cost to society.

As for eliminating appeals, I would ask, why? The appellate courts are supposed to provide a check on the integrity of the sentencing process. I would be loathe to ever take away a defendant's right of appeal. As it stands, defendants, in the Third Circuit at least, do not even have a right to appeal from a court's refusal to depart from the Guidelines. I think this is horrible.

I must also say that I have a gripe generally with the federal appeals process, but don't start me on that. I believe there is a systemic bias towards affirming convictions. There is a far higher reversal rate in civil cases than in criminal. When I last looked at statistics, approximately 3 per cent of criminal convictions were reversed in the Third Circuit. The same judges are deciding civil and criminal cases. Are they just wrong more frequently in civil cases? No way. And what makes matters worse is that in criminal cases, where a defendant faces a significant loss of liberty, he is more likely to receive a simple summary affirmance of his conviction, with no opinion and no explanation from the appeals court.

If anything, I would prefer greater opportunity for appeals than to deprive a defendant of his only chance for judicial review of a trial court's actions.

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Tue Oct 8 15:37

Subject: MANDATORY MINS AND GUIDELINES

Last Append: Mon Oct 21 17:55:56 1996

Gerald Shargel mentioned mandatory minimums in an earlier comment. What effect have mandatory minimums had on the guidelines? Do mandatory minimums simply raise the starting point or do they take away necessary discretion? Are they reaching the proper policy outcome of harsher sentences in order to deter crime?

Appended by: Jim Bishop -- US Probation Office - Tampa

Date: Fri Oct 11 10:47:19 1996

Subject: Mandatory Mins and Guidelines

The mandatory minimums have had a tremendous impact on the guidelines. For a given offense of conviction for which the guidelines are computed, mandatory minimums frequently trump the otherwise applicable guideline range and become the sentence the court must impose. Thus, rather than raise the starting point, they frequently lead to very harsh imprisonment sentences and limit judicial discretion or judgement.

One proposal made has been that Congress do away with mandatory minimum sentences and trust the results of the guidelines in place. Frankly, I favor that approach, but realize that Congress has rejected that notion. The sad, resulting situation is that political

agendas have more importance than just sentences. It sounds great to politically espouse that "get tough on crime" and win votes, but the reality is that for many, many drug convictions defendants receive tougher sentences, without parole, than do those convicted in state courts for murder. Has it deterred drug traffic? No. What deterrent impact does a "tough sentence" have on someone who is impoverished and/or is from Colombia who can earn on one trip the equivalent of 5 years' income. The figures and statements of the DEA should convince us from the supply end that this is political rhetoric rather than overall deterrence.

All who witness it cringe both externally and internally when an 18 year old college student who was an offloader on a huge marijuana conspiracy gets a mandatory 10 or 20 year sentence, when facts available convince that he knew neither the size of the load or any other participants than his college friend who recruited him. It is worsened by seeing the major players such as high level cartel managers who cooperate with the government and receive substantial assistance departures get sentences of 36 months. The court is frequently in a position to do nothing to correct this since there is provision for departure for the cartel manager who cooperates, but can do nothing for the ignorant, minimal college participant who could offer the government nothing. This does need fixing! I'll argue all day with those who claim that this is warranted sentence disparity from an internal view of the sentence outcomes.

Appended by: Julie O'sullivan -- Georgetown Law - Washington

Date: Thu Oct 17 16:52:20 1996

Subject: mandatory minimums

Mandatory minimums are problematic not only because are often disproportionate in view of the offense conduct but also because they create unfortunate plea bargaining incentives for prosecutors to manipulate the guidelines. Bargaining these counts away gives prosecutors a big advantage -- not only can the prosecutor offer a defendant a big time advantage but it is a certain advantage (unlike an agreement, e.g., not to contest a downward departure motion). Where USAO's budgets are based on the number of indictments they produce, and they are yearly struggling to up their numbers to get a larger slice of the pie or stay even, the incentives to clean up case loads and increase statistics by giving up mandatory minimums counts (knowing that the sentencing result is going to be harsh in any case, just not outrageous) appears to be irresistible. A little amateur psychology here, but it also seems to me that where a prosecutor's charging decision will have a measurable impact on sentence (e.g., where it is not negated or tempered by the "real" elements of Guidelines sentencing), the prosecutor is more likely

to subvert where he believes that his decision will result in an injustice. Mandatory minimums just create incentives for this well-meaning Guidelines subversion.

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Mon Oct 21 17:55:56 1996

Subject: Minimum Mandatory Sentences

The unfortunate truth is that most minimum/mandatory sentencing statutes are inconsistent with guideline sentences. Mr Bishop's comments have a good deal of truth in them. As a long time prosecutor I cannot justify allowing the ringleader to receive a lighter sentence than the driver/offloader. In general the use of 5k1.1 should be used to secure convictions of people equally as involved or higher. The use of 5k1.1 to get evidence of lower people in the chain causes me problems, if it results in the higher up receiving a lighter sentence than the mope. Acceptance of responsibility is the appropriate reward for delevering those that are lesser involved.

Again judges should look at pleas and not sentence higher up under 5k1.1 until the judge knows the involvement of all people prosecuted in the case. A deal to give the kingpin 36 months and the off loader a minimum mandatory 5 years should be rejected. At best the king pin should get the 5 years his help gets even if he does cooperate. Some judges sentence the kingpin and then complain that they are sentencing the lesser people to more. They could avoid some of these problems by waiting until they know who all the players to be sentenced are. This may require reassigning some cases to insure a single judge hears the related cases.

I do not think the problem is as wide spread as some seem to suggest although it does happen.

Clearly some crimes like first degree murder justify a minimum sentence of life. I do not think we need to have as many other minimum mandatory sentences as we have. If congress wants to give specific guidance to the commission, a far better way is to say that an offense will have a base level of say 20. If congress gives a base level the guidelines can then apply adjustments for role in the offense etc and in cases that justify it, depart.

Unfortunately, minimum mandatory sentences tend to become the mandatory sentence.

If congress does set a minimum mandatory it should be set at the level for the least involved defendant that is reasonably foreseeable in a crime. It appears to many people in

the justice system, including many prosecutors, that congress sets some minimum mandatory sentences too high for the lesser involved defendants.

In an effort to modify the sentence, judges prosecutors and other end up bending guidelines by the use of 5k1.1, charging less serious offenses or trying to limit relevant conduct.

The result of over use of minimum mandatory sentences is a serious distortion of the entire guideline process.

Again after the elections let up hope that member of both parties will study the entire issue and made some decisions before the next election comes. No one wants to be soft on crime, but we need to think smart on the issue of minimum mandatory.

Joe Brown

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Mon Oct 14 15:27

Subject: FOR THE WEB

Counsel Connect would like to put part of this discussion on Counsel Connect Web, our web page (<http://www.counsel.com>). This opens up the discussion to questions from people on the web. We will then take the questions and post them in the forum for all of you. We will also link to the Sentencing Commission's home page. If you object to excerpting part of the discussion on the web, please let me know. If there are no objections, I will proceed accordingly.

Eleanor Kerlow

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Tue Oct 22 14:27

Subject: DISCUSSION EXTENDED

We are extending this event and these discussions through the end of next week, until
Nov. 1. Please join us.

Eleanor Kerlow

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From: John Newman -- Invisible Hand - Annandale

Date: Wed Oct 23 09:46

Subject: Simplify via Expert System?

Last Append: Wed Oct 30 17:31:35 1996

I'm not a criminal lawyer (and I don't play one on TV), but I am well acquainted with how expert systems can help generalists apply complex principles to complex fact patterns and come up with a very concrete output, such as a Preliminary Sentencing Report (or whatever it's called) in about ten minutes.

An expert system would help solve at least some of the problems identified in this discussion. What's needed is a secure system that runs on the Web (ie fully accessible 24 hours a day by any type of personal computer) and prompts the user with an interactive series of questions that identify the relevant issues (including follow up questions) and then apply principles from the Guidelines (etc) to generate a near-custom Preliminary Sentencing Report.

Sound far fetched? Not really; in fact, there is a new expert system on the Web right now that does the same thing, only in the context of drafting sophisticated contracts for computer industry transactions (www.quickforms.com). You might check it out and see how it works, and whether the same approach might not make sense for helping to solve this perplexing problem.

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Thu Oct 24 19:32:41 1996

Subject: Sentencing by computer

I think its a great idea - but let's go further. We can get rid of the judges and the lawyers.

The defendant walks up to HAL, inputs the information and off he goes. 2001 - A

Sentencing Odyssey.

But seriously, I think the commission had a software program called ASSYST which was supposed to do this. It works O.K. I hear but doesn't eliminate the value judgments inherent in the guidelines like role adjustments and departures.

Appended by: John Newman -- Invisible Hand - Annandale

Date: Fri Oct 25 10:13:45 1996

Subject: Fines and Imprisonment by PC

Actually, the Government's computer could fine the defendant's computer 10 megabytes of memory and put a restraining bolt on his PC for house arrest..

Putting this in context, the expert system is quite mechanical and cannot (and should not) replace human intellect and judgment in the process. All it does is take a huge mass of complex material and make the mechanical application of it to fact patterns more efficient. (e.g., if Question 1=A, Question 16=C, Question 29=D, Question 37=A and Question 56=C, then pull clause #34545 and append it to the document; repeat until finished...). It's the same process that an experienced user of the guidelines would undertake, only at the speed of light.

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Sat Oct 26 13:57:58 1996

Subject: Fines and Imprisonment by PC

Bill Gates would be proud.

As I said in my earlier posting the U.S. Sentencing Commission did put out a software program which apparently could roughly estimate the guidelines based on a series of questions and answers. Although I ordered it and have it I have never tried it. (I'm lazy. <g>) Undoubtedly such a program would help neophytes and lay persons. The danger lies in overreliance on such a system because the fact remains that there are judgment calls which can be made in calculating the guidelines. In addition, at least initially, the user may not have all of the facts necessary to input the necessary information. For example, an obstruction of justice adjustment may not be apparent from the indictment or even the affidavit in support of the information.

Yet I am sure that an expert system as you propose could be done on the Web which certainly would be very interesting. I wonder if someone who is considering committing a crime would first see what his sentence would be if he got caught. Maybe Michael Milken did ("I get to keep 100 million and only do 10 months -- sounds good to me.")

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Wed Oct 30 17:31:35 1996

Subject: Expert System

The computer program the Commission put out "assyst" does a good job of making rough guideline calculations. Although in my present job I do not use it as a great deal, I found it useful to run on cases to see if I missed anything. It was often helpful to give the defense attorney a copy so the attorney would have a starting point to starting plea discussions with the client.

The system at least gave a quick reality check for sentencing, and was a great way to play what if as you changed factors such as level of responsibility etc.

Joe Brown

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From: Stanley Harris -- U.S. District Court - Was

Date: Tue Oct 29 11:29

Subject: ONE DISTRICT JUDGE'S VIEW

Last Append: Wed Oct 30 17:23:45 1996

I've been intrigued by the comments made, but have concluded it's infeasible to slip thoughts in piecemeal. Hence these, from a district judge (D.D.C.) who has served both before and after Guidelines, with the added perspective of having served six years ('88-'94) on the Criminal Law Committee of the Judicial Conference of the United States, which included extensive contact with members and the staff of the Sentencing Commission. (Of course, I comment only for myself, and recognize the broad range of legitimate views on the subject.)

(1) Was there undesirable disparity before the Guidelines? Unquestionably. Would it require guidelines to remove it? Equally unquestionably. Is it worth the varied costs of the Guidelines? Tough question, but probably. It is, however, a legislative judgment.

(2) I'm a general admirer of Article III judges. But, like all other of the varied players on the criminal justice stage, we're human. Every federal judge doubtless feels that he or she does a good job. So, when the Guidelines came in, practically every district judge bemoaned the reduction in discretion. Circuit judges, previously free from review of sentencing, found sentencing questions raised prolifically. Woe. Sentencing Institutes were conducted for educational purposes; invariably they deteriorated into unconstructive attacks on the Commission and the Guidelines. The Commission simply was doing its best to follow the law Congress had passed -- and, I think, it did a rather remarkable job.

(3) Most participants in the sentencing process who comment on it must fight the "looking through the wrong end of a telescope" problem. The variations between the 93 districts and the twelve circuits are very significant. Metropolitan urban districts have high percentages of drug crimes -- particularly crack -- and minority defendants. That's not the fault of prosecutors (and, since it was not mentioned in my background description, I should note that I was the U.S. Attorney in D.C. for nearly two years),

probation officers, or judges. Every district has its unique demographic facts; those who would use them for some extraneous agenda do not contribute to a constructive consideration of the issues. Police and prosecutors take crime where they find it; judges take cases as they come to them. Also, each circuit has a different record in reviewing departures. Mine (D.C.), a study shows, reverses more departures than any other.

(Indeed, one of my former colleagues said he would no longer depart -- absent a section 5K1.1 motion. No matter how carefully he crafted a departure, he concluded, some flaw would be found on appeal and the case would be remanded for resentencing.)

(4) It must be remembered that judges are not the ones who put together the building blocks that lead to a guideline range. Opposing counsel must do so in the first instance to engage in intelligent plea bargaining; then, after a plea or finding of guilt, the probation officers get into it -- with input from both sides. Judges then have to resolve any question which the parties can't agree on, followed by the actual sentencing -- which does involve discretion, albeit reduced. Thus, we just don't acquire the overall expertise on the nitty-gritty details that others do.

(5) I've never seen a trial judge who doesn't take sentencing very seriously. Where we have had a trial, the judge has a pretty good feeling for the defendant. In plea situations, we don't. So, I want all the help I can get. When Mr. Zegas says it's "very wrong" for the sentencing judge to talk to the P.O. without counsel, I'm baffled (although I acknowledge

that a very small number of judges share his concern). The P.O. is part of the court team, and is a total sentencing expert. (Occasionally judges get help from their law clerks on sentencing questions; I've never heard it suggested that that might remotely be wrong.) I'm convinced that any defense counsel who would rather not have a P.O. talk to a judge before sentencing simply has no idea of how constructive is the dialogue that occurs. Probation Officers are balanced, middle-of-the-road professionals who can only be of help to the process. (Granted, however, that in a routine guideline sentencing, often the final meetings between judge and P.O. are quite brief.)

(6) It also has been suggested that "maybe a little juggling with reality" will help "to arrive at a just result." This goes with the idea that if a prosecutor and defense counsel stipulate to a factual or legal position, that shouldn't be altered by a probation officer. That too baffles me. Facts are facts, and guideline sentencing must be applied with integrity. Judges (and P.O.s) take an oath to support the laws of the United States, and sentencing statutes are among them. Granted, where the facts are unclear, some flexibility might be acceptable, but if, for example, a prosecutor and defense counsel want to agree that 125 grams of crack were 48 grams, that would be a fraud to which no P.O. or judge should be a party.

(7) Professor Wright suggests that judges are too deferential to the Commission in not departing more frequently. But, it seems to me, either we have a guidelines system or we don't. We shouldn't crank disparities back into the system by subterfuge.

(8) Several have commented on the effect of mandatory minimums on sentencing guidelines. Too often, it seems to me, criticisms of the guidelines are unrecognizedly predicated on mandatory minimums. The unfortunate fact is that Congress never gave the Guidelines a chance to work as contemplated by the Sentencing Reform Act of 1984. When mandatory minimums were statutorily superimposed on the guidelines system, they dramatically drove up the guideline ranges in many cases -- particularly those (with drugs and guns) seen with such frequency in metropolitan urban districts. I'd love to see those who rail against the Guidelines successfully channel their efforts towards getting rid of mandatory minimums -- for they're the major problem.

(9) Variations in mere percentages of departures between districts are meaningless. "Substantial assistance" figures to be significantly more frequent in districts -- such as D.C.-- where drugs, in quantity, constitute a major percentage of the overall cases handled, particularly with mandatory minimums.

(10) Mr. Oliva says most of his clients were unaware of the guidelines or the mandatory minimums. I suppose that's true, particularly if they are illegal aliens (of which we have many in D.C.). However, I don't think there's any doubt but that they know that what they're doing is illegal, and that (a) their rights are greater and (b) the penalties they're looking at are less harsh here than in most other countries.

(11) Several have expressed their beliefs that the Guidelines shift too much power (or discretion) from judges to prosecutors. I don't doubt the sincerity of those views, but I think that's a questionably valid means for those who oppose the Guidelines to attack them collaterally. Prosecutors, like everyone else in the system, are bound by the facts with which they're dealing, and no one suggests that -- much less would anything be served by -- prosecutors pursuing phony charges. Defendants have counsel, and prosecutors do have departure control based on substantial assistance. But that's part of what Congress wanted, and assuredly it isn't the judge's role to get involved in a defendant's decision whether to provide substantial assistance. And, I can understand a career defense counsel's preference for a limited departure for substantial assistance. But, obviously, if the potential departure isn't substantial, the potential assistance won't be either. By and large, I believe the section 5K1.1 departure system is working here just as Congress and the Sentencing Commission intended.

(12) A brief comment on the present 100:1 differential between penalties for offenses involving crack or powder cocaine. Was it chosen without adequately careful analysis? Probably. On the other hand, was the 1:1 ratio recommended by a 4-3 majority of the Commission the answer? I think not. I wouldn't attempt to suggest an ideal ratio, but only theorists who haven't actually seen the ravages of crack -- both to addicts and to the community -- can doubt the substantially more aggravated consequences of crack. And, again, those who seem to find racial reasons for the existing disparity do not have dispassionate reason on their side.

(13) Sorry to slug this in all at once. But, finally, would every district judge like to have more discretion? Probably, although (1) there is less anguishing by judges over sentences now than there was before the Guidelines, and (2) I have no real feel as to those district judges who came into the system after the Guidelines were in place. Would circuit judges like to have fewer appeals of sentences? I assume so. On balance, while I originally had great reservations about the Guidelines, I no longer do and I do not aspire to a return to the gross disparities we had. However, I happily could do without the mandatory minimums, and think the guideline system would be greatly improved without them.

Appended by: Ruben Oliva -- Rojas Oliva Jones - Miami

Date: Tue Oct 29 12:25:08 1996

Subject: Insightful comments

Your comments are both articulate and insightful. As I indicated in one of my postings I am not opposed to the guidelines. They provide me and my client a rough idea of the potential sentence and certainly I am less concerned about intangible factors which may have influenced a court prior to the guidelines. Unquestionably the minimum mandatories are the single, largest source of anguish in my practice. On the other hand the safety valve provision has alleviated to some degree many of these problems.

<<(10) Mr. Oliva says most of his clients were unaware of the guidelines or the mandatory minimums. I suppose that's true, particularly if they are illegal aliens (of which we have many in D.C.). However, I don't think there's any doubt but that they know that what they're doing is illegal, and that (a) their rights are greater and (b) the penalties they're looking at are less harsh here than in most other countries. >>

While it is true that my clients know that what they are doing is illegal the penalties, in fact, are usually much more harsh in the United States when it comes to drug cases.

Certainly, the typical mule who is caught in the airport and who was to be paid \$500 or

\$1,000 had no idea that he was facing a ten year minimum mandatory term or the guy that drives his friend to a drug deal where a 1,000 kilo transaction is discussed has no idea that he is facing a penalty almost as if he were the buyer or seller. Of course, this doesn't mean that we should get rid of the guidelines only that some of the changes that are being proposed (such as an enhanced role adjustment or a cap for mules) and a repeal of the minimum statutes would go a long way to addressing those circumstances.

<<And, I can understand a career defense counsel's preference for a limited departure for substantial assistance. But, obviously, if the potential departure isn't substantial, the potential assistance won't be either. By and large, I believe the section 5K1.1 departure system is working here just as Congress and the Sentencing Commission intended. >>

I, for one, do not have a preference for a limited departure. On the contrary, I'm very worried that the commission will indeed limit 5K departures. Having obtained 100% reductions pursuant to 5K I am familiar with cases which warrant such a large departure and I would not want our ability to do so stripped away. I agree that the 5K departure system is working.

Again, thanks for your excellent comments.

Appended by: Joe Brown -- U.S. Trustees Office - Nashville

Date: Wed Oct 30 17:23:45 1996

Subject: Comments By Judge Harris

I find myself in almost total agreement with Judge Harris. The guidelines on balance do work.

We do need to put our efforts to changing some of the minimum mandatory statutes which do work in many cases at counter purposes with the guidelines and on a hard look at the crack/cocaine ratio. 1 to 1 is not correct and neither is 100 to 1. I hope all of us can work to get congress and the administration to dosomething after the election. It is impossible to address in an election year.

While different districts have different type cases there is still a question on why there is such differences on 5k in cases involving the same type offenses. Routine gun cases do

not have the potential for 5k that drug and major fraud cases have, so difference there are understandable. But we do see major differences in drug cases of the same size.

While I do not favor an absolute rule on the degree of 5k departures, I do think some guidance is needed.

I only wish more Judges were like Judge Harris. Far too many of the district and circuit judges as well as defense attorneys and a few prosecutors have fought the problem from day one and only want an end to guidelines. Guidelines are here how do we make them better.

I think we need longer amendment cycles with input from all sides on changes.

When I was chair of the Sentencing Guideline Subcommittee of U.S. Attorneys we often met with probation office and defense attorneys to propose guideline changes and to discuss how we could make the system work. We need to continue to do that. At times we need to take off our prosecution and defense hats and put on our thinking hats to see how we can make the system work apart from a single case. Too often the Commission has reacted to one decision with a quick fix. There, at times, needs to be some development in cases to see why judges are departing on particular cases, before we decide a fix is needed. Not every decision needs a fix even if it is wrong. We all tend to overreact to a single case at times.

To use a football analogy: Before guidelines the playing field was from end zone to end zone on sentencing and there was no circuit referee. We will never limit sentencing to the 50 yard line nor should we try. We can limit the field to between the forty yard lines where within reasonable limits like defendants are treated alike and there is a referee to call flagrant fouls..

Prefection is at times the enemy of good. Given the nature of the Criminal Justice system we will never achieve perfection. Rather than decry that lack of perfection, we need to celebrate the good and work for that goal which is obtainable.

Joe Brown

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From: Eleanor Kerlow -- DC Counsel Connect - Wash

Date: Fri Nov 1 15:23

Subject: Thank You and Wrap Up

This marks the end of Counsel Connect's first online public hearing. Thank you to all of our panelists and to everyone who posted or read comments. Several of our panelists had technical problems which prevented them from posting more frequently. Thank you to Judge Stanley Harris, Sam Buffone, and Daniel Freed who managed to submit comments despite the technical obstacles. Thank you to our moderators Alan Zegas and Gerald Shargell who helped get the discussion rolling.

Overall, there was a good mix of perspectives, from criminal defense attorneys, prosecutors, probation officers, and academics. We all gained insight into how the sentencing guidelines were set up to work and how they actually work in practice. The discussion on the role of prosecutors and probation officers was also most interesting. I will be preparing the comments of this event in a printed and bound form to file with the

Commission later in November. This area will be open for a few more days for anyone who wants to add additional comments.

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From: Monica Bay -- Counsel Connect - San Francis

Date: Wed Oct 2 01:46

Subject: ESSENTIAL FOR CA CLE CREDIT

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