

UNITED STATES SENTENCING COMMISSION
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AGENDA

United States Sentencing Commission
Hearing on the Treatment of Prior Criminal Record

May 22, 1986

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ORIGINAL TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
THE TREATMENT OF PRIOR CRIMINAL RECORD

MAY 22, 1986

(THIS TRANSCRIPT WAS PREPARED FROM A TAPE RECORDING.)

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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON

THE TREATMENT OF PRIOR CRIMINAL RECORD

MAY 22, 1986

WILLIAM W. WILKINS, JR., Chairman, Presiding.

(THIS TRANSCRIPT WAS PREPARED FROM A TAPE RECORDING.)

1 LIVEbw

P R O C E E D I N G S

CHAIRMAN WILKINS: Good morning, ladies and gentlemen.

On behalf of the all of the members of the United States Sentencing Commission, I welcome you here to the second of a series of public hearings on the important issue of drafting guidelines, that will be in effect, if the timetable holds, sometime next year.

The hearing today will focus on what I think most will agree is a very relative factor to be considered, and that is, the offender's prior record.

But even with those who agree on the relevancy of this factor, there is still much room for debate, on how shall an offender's prior record be factored into a guideline? What prior records should be considered? Is there a distinction that can be made between felonies and misdemeanors, given the definitions that the 50 states give these two classifications of offenses.

How shall juvenile records be considered? How long shall they be considered? What juvenile records are relevant, if all are not?

Some of these answers, I am sure we will address today and hope to find -- some of the questions we will address and hope to find the answer to this discussion.

I want to tell you, on behalf of the Commission,

1 LIVEbw 1 we appreciate all the hard work, and it is very obvious that
2 a lot of thought and preparation of work has been done by
3 all of the participants, and I am sure, members of your
4 perspective staffs, prior to today.

5 In addition, we have received written testimony
6 from a wide variety of individuals, judges, prosecuting
7 attorneys, other -- probation officers, defense attorneys
8 and other organizations and individuals who are very
9 interested in the development of these guidelines and the
10 improvement of our criminal justice system.

11 All of this testimony that we have received prior
12 to today has been circulated to all Commissions, and it
13 will be made a part of the permanent record.

14 I might add, too, as a point of notice, we have
15 other hearings set up in the future.

16 On June 10th, we have a hearing that will address
17 the issue of organizational sanctions.

18 On July 15th, we will be dealing with sentencing
19 options.

20 And on September 9th, plea negotiations.

21 It is our intention that on September 15th, we
22 will deliver for the Federal Register what we will call our
23 tentative preliminary guidelines that will be distributed
24 throughout the nation that will allow public comment that
25 will begin a few weeks after that. .

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1 We will be holding public hearings here in
2 Washington and throughout the nation over the next -- over
3 the next couple of months, beginning sometime in the first
4 of October.

5 In addition to that, we will be soliciting input
6 in written form from all individuals who are interested in
7 what we are doing.

8 Again, we appreciate what all of you have done.
9 We appreciate your coming today. We believe that public
10 input, not only from members of the judicial family that we
11 will be hearing from today, but the American public, in
12 general, is very important, for these guidelines will
13 not only serve us as judges and lawyers and probation
14 officers and others interested in working in the judicial
15 field, but they will, indeed, serve the American public, in
16 general,

17 We are going to continue this policy of
18 soliciting input from all sources, all those who share an
19 interest in what we are doing.

20 This morning we will hear from a distinguished
21 group of officials who represent various aspects of the
22 criminal justice system.

23 To the extent possible, I ask that witnesses
24 summarize your testimony for us, for we have received your
25 written statements in advance. They have been read by all

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1 of the Commissioners and our staff. So we are interested in
2 hearing a summary of that, if possible, and then allowing a
3 free exchange of ideas and questions during the allotted
4 time.

5 Our first witness this morning is a very
6 distinguished United States Attorney from Boston,
7 Massachusetts, Mr. William F. Weld.

8 I understand and I hear from the rumor mill that
9 Mr. Weld may be leaving Boston before too long and joining
10 us here in Washington as the new Assistant Attorney General
11 in charge of the Criminal Division.

12 Mr. Weld, we are delighted that you are here with
13 us and ask you to come forward at this time.

14 TESTIMONY OF WILLIAM F. WELD, ESQUIRE,

15 UNITED STATES ATTORNEY, BOSTON, MASSACHUSETTS.

16 MR. WELD: Thank you very much, Mr. Chairman, and
17 members of the Commission.

18 I would like to suggest just a few points briefly
19 and have myself ready for questions that anyone might have.

20 On the topic of the use of a prior record, the
21 first point I would ask would be the reliability and
22 completeness of the information that is ordinarily available
23 to both the prosecuting and judicial authorities.

24 As you know, the completeness of the prior record
25 information at the FBI's Identification Division in

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1 Washington Division depends upon the regularity with which
2 state authorities send in conviction information. The
3 record is not always complete in Washington. And one
4 thought that springs to mind is whether any sanctions or
5 teeth should be put into the reporting obligation of state
6 authorities to make sure that the FBI's records are
7 complete.

8 It is also not uncommon for a person who is
9 arrested not to disclose to prosecuting and pretrial service
10 officers that the person may have resided in State X for a
11 period of years and might have quite a lengthy record in
12 State X, whereas the arrest for the instant offense maybe in
13 State Y. Now if he doesn't come up with that information,
14 and if there is nothing in his background to tip the
15 pretrial services officer, the investigating agent or the
16 assistant U.S. attorney, then that may never come to light.

17 Judge Breyer may recall a case that I had in the
18 First Circuit last year involving the constitutionality of
19 the risk of flight presumption in the pretrial detention
20 provisions of the '84 crime bill or Crime Act, I should
21 say. The name given when the person was arrested for this
22 drug offense was Mr. Jessup. And he said that he was -- had
23 no record, was pure as the driven snow. How could we
24 presume that he was a risk of flight, when he was a good
25 family man, and the whole thing was just a misunderstanding,

1 LIVEbw 1 and he was on the fringes anyway?

2 There was something that didn't quite ring true
3 in his account of his background. Come to find out,
4 eventually, that he was an escapee from an institution in
5 Illinois, sub nomina something else.

6 So if that had -- if that had been known, and
7 that had been available, obviously, the case would have been
8 rooted out well before it got up to that level.

9 The next point I would mention as to the felony
10 misdemeanor quandary, whether to observe that distinction, I
11 would say, no, in view of the difference among the state
12 practices, I'd go by the nature of offense.

13 One problem with using the statutory maximum, in
14 addition to those often seen pointed out, is statutory
15 maximums may be winked at in some states.

16 We have in Massachusetts a creature known as the
17 "Concord sentence." You can get sentenced to 20 years, 20
18 years in Concord. And the defendant marches out saying,
19 "Ouch, that really hurt." But what that means is a year or
20 two years, because it is an iron rule that the time served
21 is either 5 percent or 10 percent for a "Concord sentence,"
22 whereas for a house of correction Walpole sentence, that
23 means what it says. It's an ordinary rule (inaudible.) And
24 those may not be of record as local practices.

25 So that is a problem of using a statutory

2 LIVEbw

1 As to the decay question, how long a period crime
2 free does one have to have before the slate is wiped clean,
3 my opinion, and I can't prove this, obviously, is that ten
4 years is a little bit too short a time to use as an absolute
5 wipeout decay period. And I would be even more comfortable
6 with 15 or possibly even something longer, although I think
7 when you get to 15 years, then it's fairly reasonable to
8 suppose that a person may have straightened up their act.

9 I think consideration should be given to
10 exempting the most serious offenses -- murder, rape and the
11 like, from decay provisions, so that if you have a bad
12 enough offense, you may never be able to wipe that one out
13 from consideration.

14 As to juvenile offenses, I would agree with those
15 who say that those offenses should be considered. It seems
16 to me if the offense is one that would not have been
17 criminal or committed by an adult, it is not fair to hold it
18 against a juvenile, assessing what period he should serve
19 for an adult offense. If you have truancy or runaway
20 offense or stubborn child in those states which have such
21 statutes, I would not count those.

22 I would draw the same distinction for military
23 and tribal offenses. Offenses such as AWOL, I might be
24 tempted not to count that, because it would not be an
25 offense civilly. An offense, which is an offense, only

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1 because it occurred in a tribal context, I would not count
2 that, but otherwise I would.

3 Fifth point. Prior arrests.

4 I feel quite strongly that those should be
5 considered. I know it cuts against the grain a little bit
6 because of the presumption of innocence, but I can say, as a
7 practical matter, that certainly if someone has a lengthy
8 history of arrests, it does seem to me relevant to the
9 assessment of the offender, and it is a relevant offender
10 characteristics.

11 What you have to guard against, I suppose, is
12 penalizing somebody too severely, because they are just a
13 problem in their community, and the police don't like them.
14 It is true that some people just get picked now and then,
15 because the police don't like them.

16 Maybe in considering arrests, you could exclude
17 minor offenses that might meet that model -- disorderly, or
18 the like, but the reason I feel so warmly that arrests
19 should be considered, is that there are a lot of reasons why
20 cases don't go to term, and some of them aren't very good
21 reasons, such as a person may have influence with the local
22 judicial structure or the person may be very successful in
23 bullying or intimidating witnesses. Someone who has a
24 12-year history of arrests for assault and battery, e.g., on
25 his wife, but who never seems to -- all these cases seem to

LIVEbw 1 get filed without a finding. It could be that those are
2 filed for the wrong reasons, also right reasons.

3 So I would -- I would tend to include those as
4 well.

5 Somebody may plea bargain away a fairly serious
6 offense, so that that arrest would not go to conviction, but
7 the fact that the person has engaged in a conduct which is
8 the subject of that charge as well as a lesser charge, is
9 not relevant.

10 The sixth suggestion I would make as to waiving
11 of offenses is that you need to have some kinds of sliding
12 scale. You can't have a system so simple that the most that
13 can happen to an offender is that he or she loses two
14 points, because of the bad record.

15 I think you need a system more sophisticated
16 than the current system of calculating (inaudible), for
17 example, because there is only so much you can lose there,
18 no matter how bad a record you could have.

19 Some modification of the -- something like the
20 Pennsylvania system, or my understanding of it, where you
21 lose three points for a bad offense and two points for a not
22 quite so bad offense and one point for unclassified
23 felonies. Some sliding schedule seems desirable, so that if
24 you get someone with really a vicious and lengthy record,
25 that is going to have a dramatic impact on the amount of

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1 time that that they are going to be serving.

2 Two suggestions. These are my final points that
3 I would have as to other factors that the judge would be
4 permitted to crank into consideration of which guideline
5 blocks the offender fits into.

6 One relates to the conduct of the accused during
7 the proceedings that results in his instant conviction, and
8 I would include trial perjury, grand jury perjury, bullying
9 of witnesses, threats and the obstruction of justice.

10 These are common, everyday occurrences. At
11 least we find them to be so in federal cases in
12 Massachusetts. And I think it would be salutary, if there
13 were some way of reflecting them, in the sentencing system.

14 By the obverse token, I would like to see some
15 countenancing of the judge taking into consideration the
16 cooperation of a witness with the government. You may
17 regard this as a subset of contrition, but it can take on a
18 life of its own, and some of these people can do the
19 government a world of good -- society a world of good,
20 without substantial risk to themselves, in terms of going
21 under cover and helping the government to bring down, for
22 example, a narcotics trafficking network.

23 I would think it would be advisable if there was
24 some way, expressly, to recognize that type of issue.

25 That is my "oral argument," so to speak.

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1 And my answers to the Commission's written
2 questions, my answers are included in the letter that I have
3 submitted.

4 Thank you, Mr. Chairman.

5 CHAIRMAN WILKINS: Thank you, Mr. Weld.

6 Let me ask you -- you said a distinction should
7 be made between what we may call "minor offenses" and more
8 serious offenses, not using the term misdemeanor felony,
9 because, I say, that varies so much from state to state.

10 The statutory maximum is one way to do it. I
11 understand the problem too, although in my state, assault
12 and battery with a high and aggravated nature carries ten
13 years, but it is classified as a misdemeanor. So we need to
14 -- we can't just use that terminology. But what can we do?
15 How can we make the distinction?

16 MR. WELD: Oh, I'd go by the nature of the
17 offense. I would not go by felony versus misdemeanor or by
18 statutory maximum but by a description of the conduct.

19 CHAIRMAN WILKINS: Well, will we get enough of
20 that description in the presentence report?

21 MR. WELD: Of the instant offense? On, I think
22 so.

23 CHAIRMAN WILKINS: No, of the prior record
24 offense. Prior record, it says assault and battery in South
25 Carolina committed five years ago. It says the fellow got a

1 LIVEbw 1 three-year sentence.

2 MR. WELD: That's right. That -- there's a lot
3 of work in this, and it may be that the pretrial service --
4 that a burden would be placed on the pretrial services
5 officers to put more flesh on the bones than now appears,
6 but the very best pretrial services officers already do
7 that.

8 CHAIRMAN WILKINS: That's right.

9 MR. WELD: They find out whether the person was
10 represented by counsel, whether the thing had been plea
11 bargained down from something else.

12 If the charge was filed, they know why. If the
13 person is influential in the community, they know why. If a
14 witness moved to florida and was unavailable at trial, they
15 find that out. So it may be that the answer to that is
16 simply more at the pretrial service stage or at the
17 preparation of the presentence report stage.

18 CHAIRMAN WILKINS: I think the probation
19 officers, at least the ones that I knew, do a thorough job
20 of that. You and me would say that we will describe what
21 we're going to call serious offenses and minor offenses, and
22 then from that description, apply it to the description
23 given of the individual's prior record offense.

24 MR. WELD: Yes.

25 CHAIRMAN WILKINS: Work out some system like

1 LIVEbw

1 that.

2 This 15-year decay factor you mentioned. Does
3 that assume -- and I don't know if that's the number. It
4 could be that we have no decay factor for felonies, for
5 example, or what we might call serious offense, but I assume
6 that the decay factor, if we have one, will begin to run
7 from the date of release from either confinement or
8 probation of whatever the sentence was and not the date of
9 the sentence.

10 MR. WELD: That is correct, your Honor. I would
11 run it from the date of release from supervision, the date
12 when the person was cut loose from the system, so that
13 without any supervision, he was crime-free for a period of
14 10, 12, 15, whatever number of years free.

15 CHAIRMAN WILKINS: Any Commissioners to my right
16 have any questions that they would like to ask Mr. Weld?

17 VOICE: I wonder, on the juvenile record, you
18 indicated that you thought the entire record should be
19 considered, except with those offenses that would not have
20 been violations, had they been an adult.

21 Did you have any in mind -- any age limit, in
22 terms of going back? I'm really not asking pertaining
23 to violent offenses that might have been committed. But for
24 offenses other than violent offenses, did you have in mind
25 any age limit going back to age 15 or --

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1 MR. WELD: I did not have any limit in mind,
2 Madam Commissioner, but I have not focused sharply on that
3 point, and it certainly would not shock my conscience to
4 think that perhaps there should be a washout at age 15, or
5 that minor offenses, such as disorderly, should be totally
6 washed out. I think that's pretty fine-tuning. My
7 principal concern is that there not be a total washout for
8 juvenile offenses, because, as I am sure the Commissioner
9 knows, there is very heavy stuff that can go on in those
10 early years.

11 VOICE: That is why I excluded the heavy stuff
12 from my --

13 MR. WELD: Right. Right.

14 VOICE: Okay. Thank you.

15 CHAIRMAN WILKINS: Any questions from my left?

16 VOICE: How does Massachusetts handle juvenile
17 records, and what is a juvenile record in Massachusetts, 18
18 to 21?

19 MR. WELD: I think -- we've had very little
20 experience with juveniles in the federal system in the five
21 years that I have been in, your Honor, because we don't get
22 them unless we receive a certification that the state can't
23 handle them.

24 VOICE: I'm not talking about juveniles. I'm
25 talking about juvenile records.

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MR. WELD: Oh. It's not 21. I think it is 18 or possibly 16.

VOICE: And how does Massachusetts deal with their records? What is the Massachusetts law? Does it prevent disclosure of juvenile records?

MR. WELD: The Massachusetts state law?

VOICE: Yes.

MR. WELD: I'm not sure that I can answer that. (?).

VOICE: Well, of course, a lot of the states don't.

MR. WELD: Massachusetts is a very privacy-oriented state, and I strongly suspect that they don't.

VOICE: I notice that they are arguing that they ought -- and you've mentioned the fact that these states ought to be made to conform in turning over records. But how are you going to make a state conform in turning over records, for instance, juvenile records, that their state laws says shall not be disclosed?

MR. WELD: Well, if to comply with the federal statute would be in derogation of state law, I don't know, I suppose that's a (inaudible). It comes up all the time. You might have to allow for that kind of crevice in the information you're going to have at your disposal,

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1 although that cuts a little bit against the desirability of
2 the uniformity that I think should inform these guidelines,
3 as I have argue in the written submissions. If somebody
4 steals \$249, for federal purposes, it would be nice if it
5 didn't matter whether it happened in Wisconsin or Georgia or
6 New Mexico.

7 I don't really have an answer to that(?).

8 CHAIRMAN WILKINS: What else?

9 VOICE: I am curious to know what you think about
10 the arrest record. Suppose a person is arrested, and then
11 he's acquitted. Should a person who is arrested and
12 acquitted -- should that person then later on have his --
13 when he is accused of a different crime, have his punishment
14 increased because he was previously arrested, but acquitted?

15 MR. WELD: That's a tough one too.

16 (Laughter.)

17 VOICE: Well, I don't think it's so tough. I
18 don't see how you can increase a person's crime --
19 punishment later on, when the system previously found him
20 innocent.

21 MR. WELD: The model that I had in mind was
22 that the kids where charged in the file, but were under
23 suspicion, as well, but after a number of arrests, in my
24 mind, something was rotten(?). But an acquittal sounds a
25 little bit unconstitutional, but you know, you can make the

1 LIVEbw 1 argument against using arrests at all.

2 VOICE: Well, that's right. That's what I was
3 going to do.

4 (Loud laughter.)

5 VOICE: (Inaudible.)

6 MR. WELD: That's where I would not be willing to
7 go.

8 VOICE: That is (inaudible.) What bothers me, is
9 you said -- I mean, a person was not convicted, and of
10 course, it is true that some people who are arrested,
11 although not convicted, might well have done the crime. But
12 many people who are not arrested might well have done the
13 crime.

14 There might be many ways of finding out about the
15 person who is not convicted of crimes, or that previously
16 that person was very suspicious in respect to crimes one,
17 two and three, but he wasn't convicted. And so what I don't
18 quite see is how one can, in a formal system, say, although
19 you were not convicted of crimes one, two and three, because
20 an arresting officer believed that you might have been
21 guilty of those crimes, therefore, your sentence for crime
22 four is (inaudible).

23 I mean, I understand your point and why you feel
24 the way you do, it's just that I find it difficult to reduce
25 to writing how one must taken that into account in the way

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1 it looks there.

2 MR. WELD: We've already made a judgment, as a
3 society, incorporated in the statute that says no
4 limitations shall be placed on the information the judge may
5 consider at the time of sentencing. That it is more
6 important for the judge to be able to consider anything than
7 it is to carve out categories of informatin that we want to
8 shield from him or her. So I suppose a judge, under that
9 statute, could consider even the fact that someone -- a
10 woman was accused of murdering her three previous husbands,
11 but was acquitted on each occasion. And I suspect that a
12 judge might well consider that when she was convicted of
13 murdering her fourth husband in a trial before him.

14 The problem that you people are being asked to
15 quantify these things and put them into a system where the
16 judge is going to have to give some weight to this.

17 So I am tempted to say my response is, gee, can't
18 there be some fail-safe, whereby the judge can, in a certain
19 context, if he is persuaded that there will be a miscarriage
20 of justice, not to -- that it would be a miscarriage of
21 justice to give any weight to the arrest, then he doesn't
22 have to.

23 Now maybe that's so oatmealish that the
24 guidelines lose any utility whatsoever, but that would get
25 over your tough case. (inaudible.)

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1 COMMISSIONER: Let me interject. The other side
2 of -- the flip side of this thing is that you are
3 considering conduct that never resulted in any indictment or
4 arrest or anything else. And to consider conduct, when he
5 was arrested and proved guilty or not guilty, is another
6 matter.

7 But I want to say this. I certainly agreed with
8 your comment that in weighing the offenses, that we need a
9 sophisticated system. That I think is one of the things
10 that causes such a variation in one crime against another,
11 and we do need a sophisticated system to reflect that.

12 CHAIRMAN WILKINS: Mr. Weld, thank you very
13 much.

14 MR. WELD: Thank you.

15 CHAIRMAN WILKINS: We look forward to seeing you
16 when you move to Washington.

17 The Federal Public Defenders Association has been
18 most responsive to our requests for input as have the United
19 States Attorneys.

20 Today we have ZMr. thomas W. Hillier from
21 Seattle, Washington. He is a public defender in that area,
22 and he represents the Federal Public Defenders Association.

23 Mr. Hillier, we're glad to have you with us.
24
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1 TESTIMONY OF THOMAS W. HILLIER, FEDERAL
2 PUBLIC DEFENDER, SEATTLE, WASHINGTON, ON
3 BEHALF OF THE LEGISLATIVE SUBCOMMITTEE,
4 FEDERAL PUBLIC DEFENDERS ASSOCIATION
5 MR. HILLIER: Thank you, Mr. Chairman.
6 Mr. Chairman and Commissioners.

7 For the record, my name is Tom Hiller, and I am a
8 member of the Federal Public Defenders Legislative
9 Subcommittee and appearing on their behalf and on behalf of
10 all the Defenders.

11 We appreciate the invitation to be here, and even
12 more importantly, I think appreciate what we perceive to be
13 a willingness by the Commission throughout your existence
14 thus far to listen to our views.

15 As you are aware, the Federal Defenders are
16 greatly interested in the task of the Sentencing Commission
17 and have for some time, we have been trying to identify
18 areas of particular concern to our mission as Federal Public
19 Defenders.

20 Sometime back, while we were brainstorming and
21 going through the legislation, it became clear to us that
22 when talking about offenders, the term "criminal history,"
23 would be an area of controversy --

24 (End Side A, Tape 1.)

25 (Side 2, Tape 1.)

2 LIVEbw

1 -- but we did it because we feel that the
2 definition we submitted is one which is fundamentally fair
3 and perhaps most importantly, pragmatic, and one which was
4 consistent with and will further the goals of the Sentencing
5 Commission, as outlined in the legislation.

6 Always there is some feeling of insecurity when
7 one is advocating on behalf of a particular group; however,
8 last night I read with some relief, the several letters
9 which have been submitted to you from various probation
10 officers around the United States and Mr. Weld and the FBI.
11 And it is with renewed vigor that I am here to present to
12 you our view with respect to how criminal history should be
13 defined.

14 I will speak first to some of the questions you
15 presented in your letter of April 29th, Judge Wilkins,
16 concerning reliability and source of information, which
17 concerns prior records of offenders who are facing an
18 imminent sentence by a judge.

19 The primary source, of course, and as you well
20 know, and which was highlighted in all the submissions you
21 received concerning this topic, is the presentence report.
22 And if the District of Washington is any example of how
23 those reports are prepared, I would say that it is done with
24 a high degree of excellence, and I hope that it is that way
25 nationally.

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1 The presentence reporter, however, depends upon
2 the recordkeeping of the local jurisdictions and the FBI to
3 get the information that he or she submits to the sentencing
4 judge, and in reading through the submissions from
5 Mr. Hughes of Georgia and Mr. Broome of North Dakota and
6 Mr. Weber of New York and the statistics provided by Don
7 Chamlee, there appears to be a threat of consistency in some
8 of the problems that they encounter. Among them, the
9 accessibility and accuracy of records and information varies
10 from jurisdiction to jurisdiction.

11 Generally, better recordkeeping occurs in the
12 larger, more populous areas. Generally, the less serious
13 the misconduct -- I use misconduct instead of misdemeanor
14 type level, the less likely it is that you're going to
15 obtain reliable information, and certainly, Mr. Chamlee's
16 statistics suggest that you're going to have a paucity of
17 information concerning the details of those types of
18 offenses.

19 Frequently, the probation officers encounter
20 difficulty obtaining juvenile records, and it is noted in
21 the submissions. Some states don't allow that at all.
22 Others do. Some ones, just in a general way, but not with
23 the sorts of information that will allow for some
24 reliability to attach to the information provided.

25 Frequently, there is difficulty in assessing the

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1 reliability which attaches to tribal court proceedings.

2 These sorts of general trouble areas are problems
3 which are going to be inherited by you, the Sentencing
4 Commission, when you attempt to define criminal history or
5 how to score criminal history without subverting your
6 mission, which is to lessen sentencing disparity. And in
7 that respect, one has to ask, is it fair to penalize a
8 defendant who has a verifiable misdemeanor record, who
9 happens to be from New York City, where they keep good
10 records and they keep good details of offenses, but not
11 penalize the young man from a rural county in Georgia who
12 has the same record, but the record which does exist is
13 unreliable. It is not detailed, and as a result, it may not
14 get to the sentencing court at all.

15 The same argument can be made for the juvenile
16 offender. Is it fair to penalize an offender, who is being
17 sentenced by a district court judge, who has a verifiable
18 juvenile record, not a juvenile who comes from a district
19 where they don't allow scrutiny into the juvenile record.

20 It would seem to me that if you factored in
21 consideration of misdemeanor and juvenile convictions into
22 your calculation of criminal history, you run the risk of
23 calculating in disparity which, of course, is at odds with
24 your mission.

25 As a result, we have suggested that you not

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1 consider misdemeanors in assessing criminal history or in
2 scoring criminal histories.

3 We have also suggested that you limit juvenile
4 convictions, and I think, consistent with Commissioner
5 Corrothers' concerns, to those type which are certainly
6 violent type felonies and ones which occur on or after the
7 16th birthday of the offender.

8 To the extent that you disagree with our
9 position, we turn to what sorts of practical problems are
10 you going to be creating over and beyond the notions of
11 disparity, which, of course, you are concerned with.

12 Well, the task is going to fall to the probation
13 officer to ferret out accurate information at a time when
14 all federal resources are being severely limited. Our
15 probation officers in the Western District of Washington are
16 flat overtaxed at this point in time, and it would seem that
17 the extent that you are requiring them to go to the courts
18 or the local jurisdictions to get detailed, reliable
19 information that can be used in assessing an offender's
20 score, it is going to cause problems that I don't know that
21 the probation departments are able to deal with at this
22 point in time.

23 Ultimately, the sentencing court will be faced
24 with challenges at sentencing proceedings because of the
25 problems with these practical questions, and that system is.

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1 going to be sorely taxed also. And I believe that some of
2 you commissioners who were present in Phoenix last month,
3 the Sentencing Institute there, heard the collective gasp of
4 the judges who were in attendance, after Judge Choflat and
5 Judge Wilkins gave an overview of what your task is and gave
6 some predictions as to how sentencing hearings are going to
7 be conducted in the future.

8 I think the judges foresee protracted litigation
9 in sentencing hearings, and our submission is designed in
10 hopes of limiting that sort of litigation without abandoning
11 fairness.

12 I am not suggesting that you ignore misdemeanor
13 track records. We suggest in our paper that 28 USC 994(b)
14 the range of discretion that -- or the range that will
15 attach to a particular guideline will be sufficient to
16 consider those misdemeanors without fouling these other
17 concerns, these practical concerns and disparity concerns I
18 mentioned.

19 Next I would like to talk briefly about arrests
20 not resulting in convictions, and it is clear that this a
21 concern of you.

22 Mr. Weld speaks on behalf of U.S. Attorneys,
23 arguing vigorously for inclusion of arrests in your scoring
24 mechanism.

25 It is our most urgent recommendation that the

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1 term "criminal history" be limited to convictions, and
2 arrests without conviction, we suggest must not be scored in
3 criminal history, and we make that suggestion for several
4 reasons.

5 First of all, an arrest record does not translate
6 into an indicator of misconduct, something that ought to be
7 considered as relevant by a judge when passing sentence.

8 Innocent people are arrested daily. That is
9 simply a fact of life. Mr. Weld suggests that, well, we're
10 going to have to get factual information to find out why the
11 arrest occurred without a conviction. Well, that is a
12 rather simplistic answer, I think, that the bottom is that
13 in order to get that reliable information, again, you're
14 going to have to go to the probation officer and tell them
15 to go out into these records which sometimes include
16 innumerable arrests and try to get underlying factual
17 information as to each one of those arrests and try to
18 determine how it is that that arrest happened not to result
19 in a conviction.

20 I think that sort of a task, as a practical
21 matter, is the sort that is simply unconscionable, one that
22 cannot be accomplished by the Probation Department as it is
23 presently staffed and, frankly, huge increases in staffing
24 don't seem to be in order today. You have to ask who is
25 going to pay for all of this sort of investigation.

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1 It is sort of a spin-off of who is going to do it.

2 More importantly, what reliability do you attach
3 to the "facts" -- I put "facts" in quotes, once obtained?

4 What kind of information are you going to get?

5 Certainly an individual -- I can think of one
6 hothead in the Federal Public Defenders in Seattle who was
7 once arrested for yelling at a jailor because he wouldn't
8 let him in to see his client. And the jailor arrested him
9 and booked him in for a felony of intimidating a public
10 servant.11 Well, the case was dismissed in short order,
12 obviously, because it wasn't appropriate, but I expect that
13 officer, if he is inputting you with facts, is going to say,
14 this was a legitimate arrest.15 One the other side, you're going to say no.
16 Well, the bottom line is, you're going to have protracted
17 litigation at the sentencing level once again, expensive
18 litigation, over controversies that ought not to be
19 considered by a court at all. And again, I think the Ninth
20 Circuit's collective gasp should be considered.21 But more importantly, you're creating
22 constitutional problems to the extent that you actually
23 factor in arrests in a way which they tend to enhance one's
24 penalty. That is, you punish somebody for an arrest and
25 give them a number, based upon that arrest, and I suggest

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1 what you've already spoke too that, Commissioner Breyer, it
2 is not a problem that's easily taken care of. The fact of
3 the matter is that you cannot consider arrests which result
4 in acquittals. It is unconstitutional, to the extent that
5 you are giving somebody an enhanced penalty based upon an
6 arrest on a factual finding (noise interference-inaudible
7 phrase.)

8 (Noise interference-inaudible sentence.)

9 (Laughter.)

10 This always to public defenders.

11 (Extended laughter.)

12 I think that, to the extent that you give a score
13 for an arrest which enhances a penalty, and the factual
14 findings may, based upon a preponderance of evidence, you
15 run into other sorts of constitutional challenges.

16 I know of no states which presently have
17 determining sentencing guidelines in place which allow for
18 that. I have heard Judge Wilkins speak on several
19 occasions, and he suggests that your task is to build a
20 system which is better than that which exists in any other
21 of the other states, and it is my fervent belief that the
22 system will be worse if arrests are considered as an actual
23 score in assessing criminal history, and we will be simply
24 taking a step back in time.

25 Again, I think the sentencing range which will be

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1 inherent in the guidelines will allow for sufficient
2 flexibility for a judge to consider an arrest record, which
3 is a reliable arrest record, in fashioning an appropriate
4 and individual sentence for that person.

5 With respect to the decay factor, we, in our
6 position, suggest that in your debate. decay factor, that is
7 consistent with most of the states that have decay factors
8 in place presently consistent with the Parole Commission's
9 historic position. We have submitted it, because it's
10 time-tested.

11 I notice in Mr. Weld's submission, he suggested
12 15 years. I'm not sure exactly why. I think that there's
13 been nothing to suggest that the ten-year guideline, which
14 has been used in several jurisdictions, is inappropriate.

15 We would strongly oppose the suggestion that the
16 time start upon release from supervision as opposed to
17 release from custody.

18 If the individual who is released from custody is
19 in the community, interreacting in that community for a
20 ten-year period of time without criminal behavior, then it
21 seems to me only fair that he or she be given credit for
22 that in the community. To the extent that you don't, that
23 you say it's going to -- you're going to continue on while
24 you're under 20 years parole without any credit for that,
25 you are creating a second-class status of citizens for

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1 those types of probationary parolees.

2 And frankly, I think that sort of elitism is
3 abhorrent to the principles of equality attached to our
4 society.

5 We also, in our last submission talked briefly
6 about multiple convictions and suggested that in those kinds
7 of cases where any individual is engaged in a course of
8 misconduct that results in a -- for example, a three-count
9 indictment, and he is convicted of all three counts, that
10 you score that simply as one conviction rather than three.
11 The reasons for that suggestion are clear. The vagaries
12 which attach to plea and charge bargaining throughout the
13 country are going to impact how a person is treated from one
14 jurisdiction to another jurisdiction.

15 In other words, somebody might plead guilty to
16 one charge in New York, whereas in Texas, on the same sort
17 of misconduct he may be required to plead guilty to three
18 counts of an indictment.

19 For example, in the example we use in our paper,
20 if somebody is arrested bringing drugs into the country, he
21 or she is charged with importation, conspiracy and
22 possession with intent to distribute, well, some
23 jurisdictions are going to require three guilty pleas. Some
24 might require only one.

25 If your mission is to lessen disparity, it would

1 LIVEbw 1 seem to be equitable under those sorts of circumstances to
2 only score the convictions as a single conviction, for
3 purposes of assessing the criminal history score.

4 With those thoughts, I am ready for questions.

5 CHAIRMAN WILKINS: Mr. Hillier, assume you
6 represent a fellow charged in the federal, who has pleaded
7 guilty to a mail fraud. His prior record is assault and
8 battery with intent to kill in the state court in
9 Washington, where he fired a pistol and injured somebody
10 without death ensuing.

11 And you have that same fellow again, and his
12 prior record is grand larceny.

13 Should there be a distinction made between the
14 prior record and the offense for which the defendant is
15 pleading or is convicted? That is, a violent crime is
16 aggravated -- aggravates the present offense more or if it
17 is of a similar nature, that is, theft or stealing or fraud,
18 a series of those prior to the mail fraud, would that
19 aggravate it more, even in the violent crime?

20 MR. HILLIER: That is not an easy question to
21 answer. I think that the system should build a sliding
22 scale for the prior record without -- certainly, an
23 individual who has a prior violent conviction versus an
24 individual who has a check charge as a prior conviction --
25 the person with the check charge would not want to be in the

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1 same position prior historywise as the person with the
2 violent record. And I think that your scoring mechanism has
3 to take that into account.

4 I don't think that the nature -- that the violent
5 crimes then prior record will necessarily impact the present
6 crime, rather that will be taken into consideration in the
7 offender's score itself.

8 I think that certainly a pattern of misconduct,
9 which includes a present defense similar to a prior record
10 may very well be from an aggravating circumstance. At
11 least, I predict it will be an aggravating circumstance and
12 probably an appropriate type of aggravating circumstance.

13 But I don't think that you enhance a present
14 sentence based upon a violent prior record but rather you
15 simply put a number of the entire record which is greater
16 than it would be if it were not a violent record(?).

17 CHAIRMAN WILKINS: Well, the number, of course,
18 of any system used, it still would aggravate the sentence
19 or increase the sentence, would it not?

20 MR. HILLIER: Well, it will. That's correct.
21 You will have that practical consequence. I don't think
22 that you necessarily can (inaudible) it matches, as I think
23 the question was(?).

24 CHAIRMAN WILKINS: That's right. You've got a
25 series of thefts, and then you stand charged with mail

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1 fraud, it's similarly related, should those aggravate it
2 more even than a violent offense that is totally unrelated
3 to the present offense for which the defendant is in court?
4 And if so, how do you work out such a formula?

5 MR. HILLIER: (Laughing) Well, the formula that
6 you are working on, I expect -- we haven't -- we're working
7 on trying to fix some sort of formula or suggest the nature
8 of some sort for consideration.

9 We haven't come to any firm conclusions on how to
10 do that. It is a task that I don't envy that you have, but
11 I think that the prior record is going to -- if it is a
12 similar type prior record, it is going to actually have the
13 potential of both scoring higher -- scoring as a prior
14 record plus aggravating, being an aggravating circumstances,
15 and that is not necessarily inappropriate.

16 CHAIRMAN WILKINS: Thank you.

17 Any questions to my right?

18 VOICE: Mr. Hillier, I was pleased to hear you
19 evaluate the presentence reports prepared in the District of
20 Washington. I am sure, Bob Lee, the (inaudible) author,
21 will be glad to hear that.

22 I wanted to ask you about this -- you know, this
23 disparity issue that you raised. I mean you -- you indicate
24 you want to do away with disparity, but, you know, by doing
25 what you suggest, it seems to me you are going to create

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1 another disparity.

2 For example, a 20-year-old -- two 20-year-olds.

3 Each gets arrested for bank robbery.

4 Now one of them, as far as anybody knows, had no
5 prior record at all.6 The other one had these juvenile convictions, you
7 know, not status offenses but serious juvenile convictions,
8 which, if they were adult, would have been commission of a
9 felony.10 You know, are you suggesting you ignore that,
11 because they were juveniles?12 MR. HILLIER: We don't suggest that. We
13 presented in our submission the suggestion that you, in
14 fact, consider a juvenile record, but that you limit
15 consideration to serious offenses. We suggested violent
16 offenses, which is consistent with, I believe it is the
17 Minnesota model, perhaps it is in the New York model.18 The reasoning behind that is, oftentimes, even
19 though a juvenile commits what would be a felony if it were
20 committed by an adult, for example, housebreaking,
21 oftentimes, these offenses are the results of an immaturity
22 or peer pressure, the nonviolent types that a person
23 outgrows in time. And we suggest that you ought to look
24 seriously at the nature of the misconduct to determine
25 whether, indeed, it is an indicator of criminal propensity,

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1 or if it was something that just happened while the kid was
2 going through some growing pains. And certainly that
3 happens.

4 That's why we suggest that limiting to violent
5 felonies, which are a more reliable indicator of criminal
6 propensity, which would then be something a sentencing judge
7 should consider when passing sentence on the present
8 offense.

9 VOICE: The other kind of disparity in your --
10 when you talk about misdemeanors, and you want to downgrade
11 those, isn't there a big difference throughout the country
12 relative to misdemeanors, and isn't certain criminal
13 behavior plea bargained downward? You mention Minnesota,
14 and that's what I understand happens there. It is plea
15 bargained down, so then, you know, you don't lose your
16 points. I mean, wouldn't it make more sense what Mr. Weld
17 says, you look at the actual behavior that was committed.

18 You know, if you're interested in truth and
19 you're using this theory(?), then you look at what actually
20 happened.

21 MR. HILLIER: Well, again, you're going to have
22 to find out if you want to adopt that sort of a model, why
23 it is it was plea bargained down, in order to assess, in
24 reality, what occurred.

25 I haven't run into a lot of prosecutors that are

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1 generous enough to simply reduce down to misdemeanors
2 because they want to get on with the show. There's normally
3 -- in fact, there's always a reason, and that reason may be
4 something which significantly impacts your consideration.
5 So to simply look at the nature of the offense may require
6 more work than you perceive.

7 Our belief is, if somebody pleads to a
8 misdemeanor, then they ought to be treated as a
9 misdemeanor. They ought not to all of a sudden be treated
10 as a felon, when it comes time to consider prior records.

11 VOICE: I just want to address this question
12 about propensity, crime propensity and mixing arrests and
13 convictions.

14 Would it be your position that if you had two --
15 two offenders, one who had, say, two prior convictions mixed
16 with a lot of arrests in between those two convictions and
17 one who just had two prior convictions on their rap sheet,
18 that you treat those people the same and ignore what
19 information might be there, in terms of propensity to commit
20 crime, or is it that there is no information there?

21 MR. HILLIER: Well, our suggestion is that not
22 score it, in terms of whatever mechanism it is that you open
23 on the fashion, because you are going to be enhancing a
24 penalty, based upon an arrest(?).

25 Certainly, U.S. v. Tucker suggests that the court

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1 can consider that properly, and it is relevant, to the
2 extent that it is shown to be reliable information. And
3 that is the concern. How are you going to show that? You
4 are going to have to have a rather protracted sort of
5 hearing, in order to get into that. If it proven to be
6 reliable and if accurate, then -- reliable and accurate,
7 then we feel that the guideline range that will cover each
8 offense will be sufficient to take it into account. But it
9 ought not to be enhanced.

10 CHAIRMAN WILKINS: Any other questions? Ben?

11 COMMISSIONER BAER(?): You have related your
12 comments today to a desirable consequence of the actions,
13 and that is, reduction of disparity, (inaudible).

14 You have not, however, related your comments
15 (inaudible) to the purposes of the sentencing process
16 (inaudible).

17 I wonder if you might be able to tell us, that of
18 the four statutorily specified purposes -- just deserts,
19 deterrence, incapacitation, rehabilitation -- which of those
20 you think prior records is the most pertinent issue and
21 which is the least pertinent issue?

22 MR. HILLIER: Well, I think it is least pertinent
23 to rehabilitation. I think it is pertinent to -- I think it
24 is more pertinent to each of the other factors. Certainly,
25 just deserts is going to be impacted by a prior record, even

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1 though the just desert model tends to focus on the offense
2 itself, I think, as a practical consequence, you are still
3 going to have to factor in the offender's prior history, in
4 order to assess, in a particular case, whether or not what
5 just deserts is appropriate, although perhaps it's less than
6 (inaudible), the other factors, the other considerations.

7 (End Side B, Tape 1.)

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1 VOICE: Now, the State of Washington has an
2 elaborate set of rules that go into that, and I wonder if
3 you are familiar with them, or if you haven't worked with
4 them, you could look at them and maybe you could give us
5 some comments in writing or orally now about that particular
6 problem.

7 VOICE: I will do that. We, in the submission
8 that we just presented, gave (inaudible).

9 VOICE: That is a little more general.

10 VOICE: It was very general, and that is a
11 problem that we are continuing to look at. Frankly, we are
12 having difficulty grappling with it ourselves.

13 VOICE: If you look at theirs, you would know
14 whether their solution is the right one.

15 VOICE: I have looked at theirs, and I don't
16 think it is the right one. I think what we have suggested
17 is the best. Every jurisdiction has a different angle.

18 VOICE: Yes, but you haven't addressed, for
19 example, what happens when a state court convicts a person
20 of three -- conspiracy plus attempt plus the crime, et
21 cetera -- and then when the judge sentences them to five
22 years on the conspiracy count and one day extra on the
23 substantive count or nothing extra on the substantive count,
24 does that count as five offenses or three or one, or how do
25 we count those?

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Well, some states look to whether consecutive or concurrent sentences have been imposed.

(Inaudible.)

It seems to me that you -- if you did that, you would factor in the potential (inaudible) initial disparity in your scoring. That is why we have suggested the more simple approach that we have.

We will present (inaudible).

VOICE: I am not aware of how Washington State in their statute handles arrests.

Do you know?

VOICE: Criminal history is defined as convictions, period.

VOICE: And how would you define misdemeanor?

VOICE: I was somewhat shocked to hear that you have a misdemeanor that gets 10 years --

(Simultaneous voices.)

(Laughter.)

VOICE: I hope that is a rare sort of problem. I am a bit (inaudible). I expect it to come down to having -- running into this sort of hope aberration, then I would look for the traditional approach of one year being what we talked about as -- more than than one year as a felony, less than one year as a misdemeanor.

(Inaudible.)

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VOICE: I think it is a pretty general

2 definition.

3 VOICE: And you mean whether the offense carries
4 that by the statute or whether it is imposed?

5 VOICE: Whether it carries that by the statute.

6 (Pause.)

7 CHAIRMAN WILKINS: Helen.

8 COMMISSIONER CORROTHERS: First of all, I agree
9 with your assessment of the quality of the presentence
10 reports for the District of Washington.

11 The question is I believe with the previous
12 testimony we heard a couple of other factors that were
13 thought to be worthy of our consideration in addition to the
14 ones -- the questions that we asked, and I believe Mr. Weld
15 suggested conduct during the proceedings --

16 (Hammering and construction noises in
17 background.)

18 -- and cooperation of the witness as other
19 factors worthy of consideration.

20 Are you able to think of any additional factors
21 at this time in the offender characteristics area that might
22 be worthy of consideration as either mitigating or
23 aggravating?

24 MR. HILLIER: I am not prepared to do that. I
25 certainly agree with Mr. Weld's comments, and in fact one

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1 of my assistants, when I was trying to get some input from
2 him on a problem that we were grappling with, noted that
3 cooperation wasn't in Congress' list that they gave to you,
4 and that is a difficult problem, I think, on how --
5 (inaudible) cooperation or not.

6 On the other hand, it is a -- Mr. Weld indicated
7 -- (inaudible) important aspect of the criminal justice
8 system (inaudible) consideration in the prosecution.

9 We will exempt (inaudible), put together a list
10 of additional characteristics.

11 COMMISSIONER CORROTHERS: I would be interested
12 in looking at some future list.

13 CHAIRMAN WILKINS: Thank you very much.

14 MR. HILLIER: Thank you.

15 CHAIRMAN WILKINS: I appreciate your testimony
16 and the work that you have put into it.

17 All of the discussion that we have had so far is
18 meaningless unless the prior record is available and
19 reliable.

20 To discuss this with some other issues that are
21 related, Mr. Melvin D. Mercer, Jr. is with us. He is the
22 Chief of the Recording and Posting Sections of the Federal
23 Bureau of Investigation.

24 Mr. Mercer, we appreciate your attendance this
25 morning.

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TESTIMONY OF THE FEDERAL BUREAU OF
INVESTIGATION BY MR. MELVIN D. MERCER, JR.,
CHIEF, RECORDING AND POSTING SECTIONS,
IDENTIFICATION SECTION

5 MR. MERCER: Thank you, Mr. Chairman.

6 Mr. Chairman, as you are aware, I have submitted
7 an opening statement. With your permission (inaudible).

8 CHAIRMAN WILKINS: Yes.

9 MR. MERCER: (Inaudible.)

10 CHAIRMAN WILKINS: Fine.

11 MR. MERCER: I have been a special agent with the
12 FBI for a little over 20 years, and for the last 10 I have
13 been assigned in the FBI Identification Division, which was
14 established in 1924 as the central repository for
15 (inaudible) information in this country.

16 Two developments at the turn of the century
17 really went to the Division's creation. The first was using
18 fingerprints as a positive means of identifying criminals,
19 and the second was the mobility of the criminal element,
20 which necessitated that some type of national index be
21 established where a single inquiry could determine whether a
22 person had a prior criminal history record.

23 The Identification Division operates in the
24 following manner:

25 Federal, state, and local criminal justice

1 OMTbur 1 agencies voluntarily -- and I want to stress that word
2 "voluntarily" -- submit arrest fingerprint cards and
3 disposition reports to us. We use the information on these
4 cards and disposition reports to establish and create the
5 criminal history record.

6 Subsequent inquiries of the system are made by
7 additional arrest fingerprint cards coming in or name
8 (inaudible) requests coming in to us. We take these
9 requests, classify the fingerprint cards, attach them to the
10 records. And either a person has no prior record or we have
11 the entries of their record we have already established.

12 Right now we have a criminal file that represents
13 a little bit more than 23 million people. Approximately,
14 22,000 authorized users of our services.

15 During the fiscal year '85, we received
16 approximately 6.9 million fingerprint cards. About half
17 these cards were from one criminal justice applicant
18 (inaudible). So we received about 3.5 million arrests
19 (inaudible) fingerprint cards.

20 It is currently taking us about 13 workdays to
21 process an incoming card through our system once it is
22 received in the Identification Division.

23 The information is only routinely purged from our
24 system when an individual becomes 80 years old. Many states
25 have adopted expungement ceiling laws. If we get a request

1 OMTbur 1 from a state to expunge or seal a record, we do honor those
2 requests. They involve a very small percentage of our
3 records, however.

4 Generally, the arrests, when they are listed on
5 the records, will not distinguish between felonies and
6 misdemeanors unless the arresting agency on the fingerprint
7 card indicates after the charge if it is a felony or
8 misdemeanor. So most of our rap sheet information does not
9 show whether it is a felony or a misdemeanor.

10 A lot of times it is pretty easy to make a
11 decision on whether it is a felony by the second (inaudible)
12 disposition card.

13 Mentioning dispositions, in the past few years
14 they have increased substantially, and this is evidenced by
15 the fact that during fiscal year '83 we received about 1.6
16 million dispositions, during fiscal year '85 we received
17 almost 3 million.

18 Juvenile criminal history information is not
19 maintained in our system unless the juvenile is tried as an
20 adult.

21 Military and foreign criminal record information
22 is maintained when the arrest cards are submitted to us.

23 The important thing to remember with our rap
24 sheet is that it is designed to mainly be a point to the
25 contributor or the agency, to give you just sort of a bare

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1 outline of the charge information, the dispositions, and if
2 there's any questions concerning the charges, dispositions,
3 or clarification needed, right on the rap sheet we indicate
4 that you should point back to the contributor (inaudible).

5 One other thing I wanted to mention is this new
6 interstate identification index system, which is now part of
7 the NCIC system. We have about 10 million of our 23 million
8 records indexed into that system, and by using that system
9 criminal history records are available in a matter of
10 seconds.

11 I have attached a number of items to my opening
12 statement mainly to give the Commission an idea, if they
13 haven't seen what a rap sheet would look like, an automated
14 rap sheet looks like as opposed to (inaudible) rap sheets.

15 CHAIRMAN WILKINS: Thank you very much.

16 I assume that the information you receive from
17 the federal courts is very complete; that is, a conviction
18 in federal court, there is no question that that is going to
19 reach your office and go in your records? Do you have any
20 problem on that?

21 MR. MERCER: Mostly we have the federal arrest
22 agencies following their cases through the federal courts
23 and submitting final presentations. About the only problem
24 with the federal arrests -- in most things it is pretty
25 evident on the rap sheet -- we may have two entries on a

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1 rap sheet, one from the U.S. Marshal's Office and a second
2 one either just before or just after showing the same date
3 of arrest and would relate to the same crime.

4 Now, we try to eliminate those duplicate entries
5 and just keep whatever one gets to us first. When you deal
6 with rap sheets 20 or 30 years old, you will find a lot of
7 duplicate entries because that wasn't done.

8 CHAIRMAN WILKINS: Now, since the states
9 voluntarily participate in this, what percentage of prior
10 arrests and then prior convictions do you think from the
11 states reach your office?

12 MR. MERCER: I would think a very high percentage
13 of the arrest information taking place in the states are
14 reported to us and indicated on our records. About 10
15 percent of the incoming fingerprint cards that we do get,
16 either because they are lacking some information that is
17 critical for us to matching for the file or the fingerprints
18 themselves are so illegible that we can't match them for an
19 existing file, they are returned back to the contributor
20 with instructions to refingerprint the person and resubmit
21 the card.

22 Once that is done, not a very high percentage of
23 that 10 percent that you return is resubmitted to us, a lot
24 of times because the individual is no longer in custody and
25 either doesn't show up on the date of the court hearing

1 OMTbur 1 or (inaudible).

2 CHAIRMAN WILKINS: You would classify then as far
3 as state convictions are concerned the information that your
4 rap sheet would show would be reasonably reliable and
5 complete?

6 MR. MERCER: Right. The records we get from the
7 states and through this III system we see a lot because
8 under that system it points to the state identification
9 bureaus, and substantially the same information that they
10 have at the state level within a state is existing in our
11 FBI Identification Division.

12 CHAIRMAN WILKINS: Any questions to my right?

13 COMMISSIONER CORROTHERS: Do you have any
14 suggestions, Mr. Mercer, or is there any work being done
15 toward making the state reporting the information mandatory
16 rather than voluntary?

17 MR. MERCER: A lot of the states have mandatory
18 reporting laws as far as the (inaudible) state systems go.
19 I am not aware of anything (inaudible) mandatory as far as
20 reporting to the national system. This is in a state
21 identification index system in its final concept (inaudible)
22 will involve sort of a decentralized system which the FBI
23 just houses fingerprint cards on one individual. The
24 records would be maintained out in the various states. We
25 would only get the initial fingerprint card for that

1 OMTbur 1 particular state. If you make an inquiry into the system,
2 we would point you to whatever states are involved, and you
3 would get the state records.

4 COMMISSIONER CORROTHERS: That was for the
5 national account; that would satisfy that.

6 VOICE: Will the proposals for this
7 incident-based uniform crime reports increase their
8 reliability in all of the criminal records?

9 I understand there is a proposal to go to an
10 incident-based uniform crime report where you report
11 (inaudible).

12 MR. MERCER: I don't think that would have any
13 effect on our system because, you know, our system is
14 triggered with that arrest fingerprint. Every line item you
15 see on our rap sheet is supported by the fingerprint card.
16 It stays with our system.

17 CHAIRMAN WILKINS: Any questions to my left?
18 (No response.)

19 CHAIRMAN WILKINS: I have got a number of
20 technical questions, but what I will do, Mr. Mercer, I would
21 like to perhaps at your convenience visit you in your
22 offices and sit down and talk about some of these things in
23 detail with you.

24 Is that satisfactory with you?

25 MR. MERCER: That would be fine. I am only two

1 OMTbur 1

blocks away.

2

CHAIRMAN WILKINS: All right, good. Thank you

3

very much.

4

MR. MERCER: Okay, thank you.

5

CHAIRMAN WILKINS: We will take a short break

6

now.

7

(Recess.)

8

CHAIRMAN WILKINS: We will continue now with our

9

hearing.

10

One individual who has been of great assistance

11

to the Sentencing Commission's work, who has responded not

12

only timely but in detail to every request that we have

13

made, is the Director of the Probation Division of the

14

Administrative Office of the United States Courts, Mr. Don

15

Chamlee.

16

Don, we are delighted to have you here this

17

morning, and we have received your submissions. We are

18

happy to hear from you in summary form or any other form

19

that you feel appropriate, and then we will put you on the

20

hot seat.

21

TESTIMONY OF THE PROBATION DIVISION,

22

ADMINISTRATIVE OFFICE OF THE UNITED STATES

23

COURTS BY MR. DONALD L. CHAMLEE, DIRECTOR

24

MR. CHAMLEE: Thank you, Mr. Chairman. I

25

appreciate the opportunity to be here. I especially

1 OMTbur

1 appreciate the opportunity to appear before the Commission
2 today, only next time I would like you to schedule me ahead
3 of Mr. Hillier so I can summarize his testimony.

4 (Laughter.)

5 The questions that you have posed to us are
6 largely in the area of what uses should be made of the prior
7 criminal record, and, rightly or wrongly, I am going to
8 respond largely as to whether you should use the prior
9 criminal record, and my answer is going to be a resounding
10 "yes."

11 And I will tell you what we do to prepare a
12 criminal record for the presentence investigation report,
13 and I think that will convince you that at least in the main
14 there is reliable information there that can be used by the
15 Commission as well as the sentencing judges.

16 The key issue is reliability. The Sixth
17 Amendment right to counsel is really the amendment that has
18 led most of the case law on the subject. In responding to
19 the Sixth Amendment and the case law, we have written a set
20 of standards, which are provided in the appendix to the
21 statement, that direct probation officers into a variety of
22 areas looking at a wide range of subjects, not just the FBI
23 rap sheet.

24 We do have a set of experts that follow me who
25 can talk to you about the practical problems of implementing

1 OMTbur

1 those standards.

2 Since I have taken over my job in Washington,
3 D.C., I have become much less of a practitioner and more of
4 a theoretician.

5 You know what a theoretician is? That is a man
6 that knows 50 ways of making love, but he doesn't have any
7 sex partners.

8 (Laughter.)

9 There is a couple of specific problem areas in
10 the prior criminal record -- juvenile records, juvenile
11 adjudications, and tribal records.

12 Dan Broome, from North Dakota, the Chief
13 Probation Officer there, has written extensively on the
14 tribal records in his statement so I won't repeat those. He
15 is far more expert than I.

16 Juvenile records, as we indicate in the survey
17 that is in our summary, are not uniformly available. A
18 variety of different agents click in when those records are
19 sealed, and it varies within the state sometimes by county
20 by county or even within cities.

21 There is a problem in uniform availability of
22 juvenile records. I don't really know how to address that
23 question for the Commission.

24 One thing I would suggest is that you establish
25 some minimal criteria of what you are going to look at.

1 OMTbur 1 It seems to me from what we have done in the survey is
2 institutional commitments by a juvenile court are probably
3 fairly reliable.

4 You can get that information from a variety of
5 sources. If it is not available at the county level, maybe
6 it is available from a state records agency or the state
7 facility where the individual was confined. So maybe at a
8 threshold level juvenile institutional commitments would be
9 something you could rely on.

10 Going down below that, it gets to be a lot
11 tougher as to how much you can do.

12 The only other two things I will address, the
13 question we asked in our survey about decay of records may
14 be a factor in which -- the way in which we asked the
15 question, but 15 years seems to determine what is an ancient
16 record and therefore hard to get ahold of. Whether you
17 might want to go beyond that or not I really can't say, but
18 when you are getting into that area, it is getting harder
19 and harder to get ahold of those records.

20 I speak also finally in my statement to what we
21 have in our present statistical systems that we cull out of
22 presentence investigation reports, the kind of things that
23 might be useful to the Commission right now in arriving at
24 cutting scores, relating scores or something, and we focus
25 in our statistical system on prior juvenile adjudications,

1 OMTbur 1 prior adult convictions, major/minor prior commitments, and
2 that is as far as we go. We don't have anything right now
3 that would help you on the subject of the prior criminal
4 record, about prior violence or number of prior counts on
5 one conviction, that sort of thing.

6 But as you know, we are willing to work with the
7 Commission on anything (inaudible).

8 That concludes my formal remarks. I would be
9 pleased to answer any questions.

10 CHAIRMAN WILKINS: A question that has been asked
11 of others and one that is being considered by the
12 Commission, assuming prior record will be given
13 consideration within the guidelines, how do we distinguish
14 prior record, less serious from more serious, felonies from
15 misdemeanors?

16 Where is the breaking point? Should it be the
17 statutory maximum or, as has been suggested, somehow define
18 what really happened, and if it really was a bad situation
19 it goes in this category, if it wasn't quite as bad perhaps
20 it is not considered or it is considered with less
21 aggravation?

22 MR. CHAMLEE: As Mr. Hillier said, that is a very
23 difficult question to answer. It is so easy to do it in the
24 presentence report because you have got a level of detail
25 there that a judge can weigh. He has got a probation

1 OMTbur

1 officer there that he can question.

2 And a key difference in all of this is that the
3 probation officer has been able to talk to the defendant,
4 and if there's questions the defendant can resolve a lot of
5 them.

6 How you get that -- how you translate that into
7 national sentences, frankly, I don't know. The level of
8 complexity is enormous.

9 I had lunch yesterday in Lexington with Judge
10 Burns from Oregon, who is very interested in sentencing
11 issues, and he said, I wish I had had the Sentencing
12 Commission there with me in Oregon before I left home to
13 come to the Wardens Conference. He said, we had two cases
14 that on the face of them looked so alike and then when you
15 got into the background of each they were so different and
16 the direction that you would take in sentencing was so
17 different that I just wish they had been there to help me
18 grapple with the problem of the sentencing (inaudible).

19 I don't know.

20 CHAIRMAN WILKINS: Should we build in a decay
21 factor?

22 MR. CHAMLEE: I think so. Something, yes. Maybe
23 15 years as a minimum.

24 CHAIRMAN WILKINS: Should it be different for
25 violent crime as opposed to property crime?

1 OMTbur

1 MR. CHAMLEE: I would answer that largely in
2 terms of what is available, and the question is that
3 somewhere around 15 years you can't get anything any more.
4 So certainly your old murder cases, they might still hang
5 around. You might be able to find those better than an old
6 grand theft case. But again it is a question of reliability
7 as to what you are looking for.

8 CHAIRMAN WILKINS: Any questions to my right?

9 COMMISSIONER CORROTHERS: Did you say, Don, that
10 it is extremely difficult to get the information from beyond
11 15 years or -- I thought I understood you to say that if we
12 utilized the 15-year period that it would be very difficult
13 to get that information.

14 MR. CHAMLEE: Well, I am relying on the survey
15 that we did, and we asked the question, and 15 years came
16 out of that. Now, whether that is really an artifact of
17 what is going on or whether that is an artifact of the way
18 we asked the question, I don't know.

19 But somewhere in there it does start to get very
20 difficult to get your hands on old records if nothing else
21 has happened in between. Now, somebody who has had a
22 continuing criminal career for the last 25 years, as you
23 know --

24 COMMISSIONER CORROTHERS: He would be easy.

25 MR. CHAMLEE: -- you can get your hands on those

1 OMTbur 1 records. We have got those now.

2 COMMISSIONER CORROTHERS: But you would recommend
3 that we utilize the 15-year?

4 MR. CHAMLEE: I think that is probably as good a
5 rule of thumb as any. I don't have any particular
6 reason to say whether that is really a lot stronger than any
7 other, but it seems fair.

8 COMMISSIONER CORROTHERS: And as a point of
9 emphasis, as far as reliability of juvenile records, the
10 institutional commitment would be about the most reliable
11 source?

12 MR. CHAMLEE: Yes. That may be too high a
13 threshold for your needs, but we are fairly confident from
14 what we know that that is reliable and available, and maybe
15 my experts here that are going to follow me are going to say
16 that that is not true either.

17 COMMISSIONER CORROTHERS: But the most reliable
18 of all.

19 Thank you.

20 VOICE: Mr. Chamlee, you heard testimony earlier
21 today as to the quality, the very excellent quality of the
22 PSI's contained in the Prior Record Section in the Western
23 District of Washington.

24 In your opinion, does the level of quality hold
25 up pretty much among the other 93 districts in the United

1 OMTbur 1 States?

2 MR. CHAMLEE: Yes, sir. That is one of our
3 functions in the Administrative Office, is to review
4 probation officers' work, and we have five people dedicated
5 to liaison with the regions that match (inaudible) regions
6 around the country.

7 Almost uniformly, whenever they visit an office,
8 they look at presentence reports, prepare a report for me on
9 the quality of that work, and that is one thing that gets
10 priority attention in the system because it is the product
11 that goes to the U.S. --

12 (Tape reversed.)

13 VOICE: -- prior, you know, prior arrest, you
14 know, was there a conviction, what actually was the
15 behavior? That is what I visualize reading under the plan.
16 Is that pretty much what you expect the probation officer to
17 do?

18 MR. CHAMLEE: That is in the standards that they
19 all have, which was last revised in 1984. That is the
20 standard that people in my office use to review their work.
21 I would say there is a very high degree of compliance
22 (inaudible).

23 VOICE: Thank you.

24 CHAIRMAN WILKINS: Questions to my left?

25 VOICE: I take it your 15-year figure is what,

1 OMTbur 1 you are just saying records are not likely to be available
2 after 15 years?

3 MR. CHAMLEE: Yes, sir.

4 VOICE: I knew (inaudible) probation officers,
5 letters that they have sent us, recommended -- they tended
6 to think of the time, which I imagine would also somewhat be
7 pulling the time out of the air. They tended to say 10
8 years.

9 I don't know where that recommendation comes
10 from, but I notice that we have received a lot of letters.
11 There were, I think, 30, 40, quite a few, and they all seem
12 to say 10 years.

13 MR. CHAMLEE: Well, there is no good figure, and
14 of course it all depends on what other work has been done.
15 If we have had the case before, the standards that we are
16 referring to have been in place for a numbers. So if there
17 is an old -- a 10 year old federal presentence investigation
18 report, that prior criminal record is nailed down pretty
19 well.

20 So it is only a question really of you have got a
21 new case, you have never seen this fellow before, and you
22 are starting to look back through his prior criminal record,
23 and nobody else has worked this case in the meantime, and
24 you are trying to find a 15 year old record. That is where
25 you run into a problem.

2 OMTbur

1 VOICE: (Inaudible.) Decay rate of course, it
2 needn't be -- decay rate could be that literally; that is,
3 you could take (inaudible) by saying the record -- a record
4 of a conviction less than five years old would count as a
5 record of conviction. A record of a conviction five to ten
6 years old counts as half a record. You could count it --
7 complicate it further.

8 Is that a good idea, and is it a good idea to
9 distinguish between juvenile records and adult records,
10 perhaps county juvenile records or some juvenile records
11 differently from similar adult records, or perhaps having a
12 faster decay rate?

13 I think you may not have reacted, so you might to
14 some of those rather traditional questions.

15 (Inaudible.)

16 MR. CHAMLEE: Well, as sometime student of
17 criminology -- of course if you have got a five-year gap or
18 a 10-year gap between criminal episodes, predictively that
19 is a very reliable indicator of progress or success or low
20 frequency of violations. So, sure, some kind of a discount
21 for a five-year or a 10-year prior criminal record is very
22 worthwhile looked at from the standpoint of predicting a
23 future crime, which is not all that the Sentencing
24 Commission is about, as I understand.

25 But the way we treat juvenile records -- the only

1 OMTbur 1 way I can answer the second part of your question is the way
2 we treat juvenile records in our standards is basically a
3 juvenile adjudication for an incident that would be the same
4 as a crime committed by an adult carries for most purposes
5 the same weight.

6 We try and separate it out, and our standards
7 call for not including any of the so-called status
8 amendments in the prior criminal record which do not refer
9 to crimes and were reported as a personal offense
10 (inaudible) section of the report.

11 So if somebody who is 17 or 16 years old commits
12 a rape or a burglary (inaudible) the purposes in which we
13 report -- judges vary in the way they apply this, but for
14 the purposes in which we report it that carries the same
15 weight as an adult offense.

16 VOICE: (Inaudible.)

17 If you had to guess, say, 50 states and 51
18 jurisdictions, and how many of them would you guess
19 (inaudible), how many would you guess you could?

20 VOICE: (Inaudible.) Do you have any ideas on
21 the right answer to that question?

22 (Inaudible.)

23 VOICE: ...from the Eastern District of
24 Pennsylvania, where he was a specialist with the
25 (inaudible).

1 OMTbur 1 (Hammering and construction work going on in the
2 background.)

3 VOICE: Generally based on the responses we
4 receive, it is fair to say that in a large urban and
5 metropolitan system we can be able to find the records more
6 easily than in a smaller or more rural system. That is one
7 thing you are going to run into. There is such a great
8 variation from across the country to the districts, to come
9 up with a standard or a nationally applicable standard.

10 (Inaudible.)

11 VOICE: You seem to kind of put the 15 years on
12 the basis of availability of records, but the other -- I
13 thought the key factor was also representative of giving
14 some credit for the fact that (inaudible) some desirable
15 adjustment.

16 Isn't that true?

17 MR. CHAMLEE: Mostly the predictive (inaudible)
18 use a five-year term as indicative of good behavior or
19 having cleaned up their act. You might have a discount come
20 in at five years.

21 VOICE: Let me ask you this. We have had people
22 say that it is going to be very, very difficult to find out
23 what this man's prior record was. Well, actually that isn't
24 so difficult at all, is it, for a probation officer who has
25 settled down and talked with the defendant and his counsel

1 OMTbur

1 when they have their discussion as to what items they
2 question and what they don't and come up with a statement as
3 to what the prior record is?

4 MR. CHAMLEE: I would really like to defer that
5 question to the next panel. They are the people with the
6 every day, practical experience with that. But you are
7 quite right. The probation officer does sit with the
8 defendant at a time when there is every motivation for the
9 defendant to be cooperative and question him in detail about
10 what his own prior criminal record is. Many times the
11 defendant is the best source.

12 VOICE: And given the chance to question anything
13 that they have as to its validity?

14 MR. CHAMLEE: Correct.

15 CHAIRMAN WILKINS: You mean, Don, you had clients
16 when you were working in the field and you said this is your
17 rap sheet, anything you want to add to it?

18 (Laughter.)

19 We don't do it quite like that.

20 (Laughter.)

21 Probation officers usually ask the questions when
22 they already know the answers, and routine practice would
23 call for you -- you sit down with the person and you
24 interview him and you ask him about his prior criminal
25 record, and he doesn't know whether you have got the rap

1 OMTbur 1 sheet in your file or not. He does know that he is coming
2 up for sentencing.

3 CHAIRMAN WILKINS: Right.

4 MR. CHAMLEE: And he doesn't want to get caught
5 being uncooperative.

6 CHAIRMAN WILKINS: The primary source of course
7 must be the rap sheet rather than depend upon the defendant
8 to fill in the gaps?

9 MR. CHAMLEE: Absolutely.

10 CHAIRMAN WILKINS: Sometimes I am sure you are
11 right.

12 We have been talking about aggravating the
13 sentence because of prior record, and perhaps our guidelines
14 will incorporate that process.

15 Should a defendant who is a first time offender
16 with no prior record receive some discount for the clean
17 life that he or she has led to that point of arrest?

18 MR. CHAMLEE: Ordinarily.

19 CHAIRMAN WILKINS: Or should you just not receive
20 any aggravation?

21 I mean, the system could work either way.

22 MR. CHAMLEE: Well, ordinarily you look at a
23 first offender -- and age plays a factor. Is he an 18 year
24 old first offender, and if he is, he has not had many
25 opportunities to offend in his life before, or is he a

1 OMTbur 1 50 year old person?

2 But ordinarily a first offender now in most
3 courts would get a special consideration. Unless there were
4 some real reasons for incarceration, he would be put on
5 probation, and most of those people -- just by virtue of
6 them not having very frequent offenses most of those people
7 succeed very well under probation.

8 I don't know if that is an answer to your
9 question.

10 CHAIRMAN WILKINS: Yes, it is.

11 Any other questions?

12 (No response.)

13 CHAIRMAN WILKINS: Fine. Thank you very much.

14 MR. CHAMLEE: Thank you.

15 CHAIRMAN WILKINS: Next, in somewhat of a panel
16 form, three United States Probation Officers are here with
17 us -- Dan Broome, who is the Chief Probation Officer from
18 Fargo, North Dakota; Robert Hughes, who is the Supervising
19 Probation Officer from Macon, Georgia; and Joel Weber, who
20 is the Probation Officer from New York.

21 Gentlemen, we are delighted to have you with us
22 today. We will allow each of you to make a brief statement
23 summarizing the previous testimony that has been submitted,
24 and then hopefully we will get into some informal
25 discussion.

1 OMTbur 1

Dan, you want to start?

2

TESTIMONY OF UNITED STATES PROBATION OFFICERS

3

PANEL BY MR. WILLIAM "DAN" D. BROOME, CHIEF

4

USPO, FARGO, NORTH DAKOTA; MR. ROBERT C.

5

HUGHES, JR., SUPERVISING USPO, MACON, GEORGIA;

6

AND JOEL WEBER, USPO, NEW YORK, NEW YORK

7

MR. BROOME: Thank you, sir. Thank you for

8

having us here this morning. We appreciate the opportunity

9

to bring you the perspective of field officers to the issue

10

of how to deal with prior arrest records in the presentence

11

report.

12

At the risk of being a little redundant in giving

13

information previously submitted by other members that have

14

appeared before the panel this morning, I will just maybe

15

highlight a couple of things that I think bear some

16

additional looking at in your consideration.

17

That is the completeness and availability of

18

adult and juvenile history, arrest history, as well as other

19

criminal records.

20

You have heard some people say that it is pretty

21

accessible and people say it is there but you got to dig for

22

it, and my experience is that you not only have to dig for

23

it but sometimes you have to dig like hell for it.

24

The federal system I think is stronger than many

25

of the other systems because at least we have probation

1 OMTbur 1 officers in the 50 states as well as several of the
2 territories, and any time we have a problem running down a
3 prior arrest record, why, we can generally call on a
4 colleague in North Dakota or Georgia or New York, wherever
5 it may be, and they will get out there and research it for
6 us. In some cases we certainly benefit from that.

7 As I pointed out in my response to the questions
8 that you asked, Judge, for the most part states or state
9 record repositories or where we go for information, my
10 experience is that the quality of the information,
11 availability of the information, the detail contained in it
12 really varies from jurisdictions, state to state, county to
13 county. I think that bears keeping in mind.

14 Something that hasn't been touched on here this
15 morning yet but I think is worth keeping in mind is that in
16 our district our local trial rule is 45 days from finding of
17 guilt or admission of guilty to sentencing. The statute
18 doesn't require any specific time frame in which to have a
19 sentencing hearing, but as I say, our local rule is 45
20 days.

21 Once your guidelines are promulgated, the
22 statutes will then require that the presentence report is
23 made available to defendant and counsel 10 days prior to
24 sentencing. So in our district the 45 days shrink to 35
25 days.

1 OMTbur 1

2 If we have to send out to other districts for
3 collateral responses or for additional information,
4 particularly on the prior arrest record information, we are
5 really tightening up that time frame to say give us
6 something here in 25, maybe 30 days at the most for the
7 five-day dictation time.

8 All of this is not only just as timing
9 constraints operate, and I think as you are hearing the
10 various presenters here you know, too, that the information
11 that we are after or the probation system in general is very
12 informational intensive and there are lots of ways to go
13 about getting that information and none are necessarily
14 right. Sometimes you just have to take a shotgun approach,
15 as I point out in my response.

16 The only other comment that was made relative to
17 juvenile records -- I think I will just wait and probably
18 get some of that (inaudible) down in the dialogue between
19 you and panel members, or other panel members.

20 As far as tribal arrest record informations go, I
21 have a lot of experience working on tribes. We have four in
22 North Dakota, and I have worked actively on two of them. I
23 think they are pretty representative of what you find in
24 tribal courts across the country.

25 I have summarized again my perceptions on how
tribal courts operate, and I will be pleased to answer any

1 OMTbur 1 questions that may arise in that area.

2 One final statement is I can speak to some
3 foreign arrests. We work routinely a lot with the Royal
4 Canadian Mounted Police, U.S. Custom Service. We are a
5 state contiguous with the Canadian border. Canadians are
6 good people to work with. They operate somewhat sooner than
7 we, and I think in much the same way that we have some
8 difficulties getting arrest information in this country we
9 find the same kinds of barriers with Canada. But by and
10 large, we can get it.

11 Thank you, sir.

12 CHAIRMAN WILKINS: Thank you very much.

13 Mr. Hughes.

14 MR. HUGHES: Judge Wilkins, Commissioners, first
15 of all, let me say it is an honor to be here to appear
16 before the Commission. I appreciate the opportunity.

17 I will keep my remarks brief, introductory
18 remarks. Probably you will have a little bit of time.

19 First of all, let me say that federal probation
20 officers, I think nationwide, are used to the idea of doing
21 extensive research in the area of prior criminal records.
22 As we were talking earlier this morning, over the years it
23 has become more or less putting a puzzle together in any
24 presentence investigation, especially when you are dealing
25 with a long prior record. It is sort of an honor to handle

1 OMTbur

1 one of these, and it becomes competitive among officers in
2 our office to see who can develop the most information and
3 do the best job in the area of prior record. So it is
4 something that we are used to doing.

5 One recommendation to the Commission concerning
6 prior criminal records is that you look at patterns of minor
7 offenses and where there is significant single
8 felony-oriented offenses. We feel that patterns of minor
9 offenses are indicative many times of a lifestyle of the
10 individual, of the defendant.

11 Generally, there are three types of courts in the
12 State of Georgia. I won't go into a long dissertation
13 concerning these courts, but records are accessible,
14 generally speaking, throughout each of the 159 counties that
15 make up Georgia. A number of these counties are rural, and
16 as has been stated earlier, records in rural counties are
17 not quite as complete, not quite as detailed as we find in
18 the larger districts.

19 I have also included in my letter to you just a
20 local newspaper article dealing with a problem that is
21 beginning to grow throughout Georgia, and that deals with
22 data taking up so much space in courthouses and having to be
23 warehoused and how do we retrieve that data, not only how do
24 we retrieve it but the time and the cost of retrieving it.

25 Generally speaking, at the present time we can

2 OMTbur

1 find out details of almost any offense that occurs except
2 the juvenile records. Juvenile records are more difficult
3 to research and to have access to.

4 There is a policies change among juvenile courts,
5 but here again it is up to the probation officer to develop
6 the type of rapport with each court that would enable he or
7 she to obtain those records.

8 Information that we need from probation parole
9 agencies throughout the State of Georgia, which has separate
10 agencies -- parole operates independently of probation --
11 there is no problem concerning retrieving that information
12 from the sentencing court, nor is there a problem in
13 retrieving information from the state prison systems. It
14 takes a little time sometimes, but it can be retrieved.

15 Juvenile records, as I mentioned, are a little
16 more difficult. We have very little need for records.
17 Occasionally, we do have that need arise, especially in
18 large drug cases. We have used Interpol and the FBI in the
19 past and have found that to be satisfactory, although there
20 is a time lag retrieving that information, and we have had
21 occasions where sentence had to be proceed and the record
22 was not available.

23 This morning there was some concern voiced about
24 the PO going and getting reliable information, more detailed
25 information, and I say to you from the field perspective we

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1 welcome the opportunity to do that.

2 That concludes my remarks.

3 CHAIRMAN WILKINS: Thank you very much,

4 Mr. Hughes.

5 Mr. Weber.

6 MR. WEBER: Thank you, Mr. Chairman. It is a
7 pleasure for me to be here, although I am a little nervous
8 (inaudible).

9 One thing that I don't remember hearing mentioned
10 at all today are periods of commitments which are used in
11 the parole guidelines now, especially discrete, consecutive
12 periods, discrete periods of commitment that are for
13 different offenses committed after a previous period of
14 commitment.

15 (Inaudible) it is a highly indicative process.
16 If an individual (inaudible) goes to jail, (inaudible) gets
17 caught, goes to jail, comes out and does it again and goes
18 to jail again and does it the third time, I think that that
19 is something that is really a very relevant factor and
20 should be included in some way.

21 I am strongly of the opinion that misdemeanor
22 offenses should be included and that on a practical basis it
23 is almost impossible to go back and look at the details of
24 an offense five, 10, or 15 years ago to find out whether
25 this really was a felony that was reduced to a misdemeanor

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1 or whatever.

2 New York State poses some specific problems that
3 I am familiar with, such that there is no availability
4 directly of juvenile centralized arrest records or
5 conviction records barred by state law from getting any
6 institutional information of juvenile offenders, and the
7 only way to get information about juvenile arrests,
8 convictions, et cetera, is to go to the individual counties
9 to the probation officers, and you have to know the mother's
10 first name, give the juvenile's name, and they can look
11 through their card file and find out if they have ever had
12 any juvenile by that name, and you pick it out.

13 So if the defendant hasn't been kind enough to
14 tell you that he had a juvenile record, it is really a
15 pretty unwieldy and impractical (inaudible) to get juvenile
16 records in the State of New York.

17 Another thing that has happened recently in the
18 State of New York by state law, all the dismissed cases are
19 coming off the rap sheets. The state's rap sheets and the
20 county will be coming off the federal rap sheets as well.

21 From my experience, having first worked for the
22 City of New York before I worked for the federal system,
23 this can get to be very complicated, especially when the
24 city system very frequently will have someone arrested for
25 shoplifting and they not show up for court, arrested for

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1 shoplifting again and get out before they figure out that
2 there is a warrant, and the third time they catch him and he
3 takes a plea of one shoplifting, the other two cases covered
4 (inaudible)d. Five years later that docket sheet is in
5 archives, and the other two cases are off his rap sheet.

6 It can get quite complicated ferreting that out.
7 Often it can be done with time, but if Dan has 30 days and
8 his typist took two days to get it to me and it takes a few
9 days for me to get it to the court and they have to send it
10 to their archives to get it back, this can be a very
11 difficult proceeding.

12 I would also like to say, since it came up
13 earlier, that my personal opinion about the 10-year
14 conviction freeze, the decay factor, is that it makes an
15 assumption I am uncomfortable with -- is that the person has
16 been law abiding during those 10 years. It can also mean --
17 have (inaudible) of an alleged organized crime figure whose
18 last release from prison was 1972, but nobody believes that
19 he has been a law abiding person between then and now. And
20 the decay factor would knock out five prior arrests, five
21 prior convictions.

22 It is my opinion that only (inaudible), but even
23 dismissed cases might be used in looking at the overall
24 (inaudible).

25 Thank you.

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2 CHAIRMAN WILKINS: So you would suggest that we
3 not have a decay factor, that a prior record is a prior
4 record?

5 MR. WEBER: I would suggest that perhaps a -- the
6 judge could take into consideration if the person really
7 seems to have been a law abiding person for the 10 or 15
8 years since their last crime (inaudible) perhaps even go
9 outside the guidelines. I know that might be an unpopular
10 position. Go outside the guidelines on the basis of that.

11 But I would be against putting it in just
12 statistically in every instance, yes.

13 CHAIRMAN WILKINS: Yes, sir.

14 MR. CHAMLEE: Could I respond also to the decay
15 factor?

16 CHAIRMAN WILKINS: Yes, sir.

17 MR. CHAMLEE: Since that seems to be
18 (inaudible). A lot of people are talking about it and
19 concerned about it.

20 CHAIRMAN WILKINS: I think it is a good format,
21 too. If anyone has a comment responding to any question,
22 just interject.

23 Yes, sir.

24 MR. CHAMLEE: In my view -- and I appreciate what
25 he is saying, what Joel is saying, I guess I have some
concerns about it because we have heard 15 years, we have

1 OMTbur 1 heard 10 years.

2 Today there is an awful lot of statistics
3 around. I know the Bureau of Justice Statistics just ran --
4 it is maybe about a year old now -- innovative study on
5 recidivism, and they showed pretty clearly some demarcation
6 points where a person is most likely to recidivate and come
7 back, and they didn't talk anything about five, 10, and 15
8 years. They were talking about a year, a year and a half,
9 nine months, in those areas.

10 And I know that we have a fair amount of
11 statistics over in our (inaudible) Research Division
12 (inaudible), and then again we have the Bureau of Justice
13 Statistics.

14 I think it would be easy to put some sort of an
15 empirical study together using (inaudible) data bases to
16 find out what those points are, where they are most
17 critical, and I like the idea that Mr. Baer brought up, and
18 that is some sort of a diminishing factor.

19 I don't know what kind of a guideline you come up
20 with or actuarial stories you are going to come up with, but
21 let's just say hypothetically if it is a five year old
22 record it is three points, if it is a 10 year old record two
23 points, and one point is some sort of a gradation factor put
24 in there, but maybe even your points will even shrink
25 further, and it might be permissible that you won't count

1 OMTbur 1 a record that is over seven years old or 10 years old or
2 whatever, and you can do that with some statistical
3 confidence that you are on the right track.

4 , I just offer that as a possible suggestion to be
5 looked at.

6 CHAIRMAN WILKINS: Good.

7 Any other comments along that same line?

8 MR. HUGHES: Two cents more, Judge Wilkins,
9 please, sir.

10 Violent crime, I would recommend that -- someone
11 said it earlier this morning and that not be erased from the
12 record. I think we must want his label as a committer of
13 violent crime. My recommendation, my office recommendation
14 is that they retain that label.

15 MR. BROOME: But even I see problems with that.
16 I come from a state that has Indian reservations. We have
17 three or four or five, and sometimes (inaudible).

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1 I mean, I don't know. It just seems to me that's
2 an inherent problem that needs to be addressed in that kind
3 of a matrix design. You can't always go by that penalty
4 establishment. Again, the voluntary (inaudible) statutes
5 (inaudible), but I would argue, and I would agree with you
6 that that's serious. (Inaudible) the results of some --
7 it's a serious matter.

8 CHAIRMAN WILKINS: Well, we've been discussing
9 this issue all morning, and perhaps this panel, two out of
10 three may give us the answer here.

11 Assuming prior record is going to be a relevant
12 factor, and I think we can start with that assumption, and
13 that we wish to make a distinction between more serious
14 offenses and less serious offenses, as far as aggravation of
15 the sentence is concerned.

16 How do we define the difference?

17 VOICE: I could suggest one place to start.

18 What about just using the FBI Crime Index Report
19 and go with the more -- crimes of assault, rape, murder and
20 then go to the more aggravated property counts -- burglary,
21 larceny and those kinds of things. And maybe those should
22 be the ones that are weighted most heavily and then go down
23 from there.

24 That is one possible point. That sort of
25 excludes drugs, and I certainly don't want to minimize the

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1 -- (inaudible) effects of the widespread use of drugs in
2 this country. That, obviously, would have to be factored in
3 too, but I think that is a beginning point.

4 CHAIRMAN WILKINS: So we may come up with our own
5 definition of "misdemeanor and felony" by putting categories
6 of crimes in one column or the other.

7 VOICE: Well, I guess, inherent in this too, and
8 I am not really able to pick up on where you guys are coming
9 from, in the sense that, I don't know if you're out for
10 selective incapacitation, collective incapacitation, just
11 deserts. They haven't been able to narrow that down, so I
12 don't know, when you start establishing penalties, are you
13 out to punish uniformly, which I sense is one of the things
14 you want to achieve, well, then, you almost, believe me(?),
15 have to do that collectively, but I also hear, well, we want
16 to use prior arrest record. And then you're looking at
17 selective incapacitation on those people who show a history
18 of criminal violations and who, obviously, at least the
19 perception is, represent the greatest risk to society to
20 again offend.

21 You want to hold them longer.

22 CHAIRMAN WILKINS: That's right. And that -- you
23 may be right, but we're talking about more the general run
24 of the mill, the fellow who comes in, who's got one or two,
25 maybe three prior convictions. And they come from various

3 LIVEbw

1 states, and states define their laws differently. And so
2 you've got to somehow translate that into a national federal
3 system, so that we don't have one state's definition of a
4 felony making the difference in a sentence. Just because
5 the same crime was committed in South Carolina as opposed to
6 Kentucky, should not make any difference as far as the
7 federal approach is concerned.

8 And that's what we're wrestling with and that's
9 what gives me a lot of trouble, trying to find that correct
10 definition. You say, all right, this was committed in
11 Kentucky, and it means so much aggravation. If this same
12 crime was committed in South Carolina, it's the same
13 aggravation, although Kentucky calls its law something else
14 than South Carolina, and so forth.

15 VOICE: Judge, it is a complex issue, and I don't
16 want to offer a simple answer to a complex issue, but in
17 talking about this question that was in the letter that
18 preceded our appearance with other probation officers,
19 lawyers and a number of people, the general consensus of
20 these public types of persons was that the Commission define
21 it as they see it and draw a guideline, say, of the maximum
22 possible penalty. If it's a year, and it is a misdemeanor
23 for the Commission's purposes. If it's above a year, it's a
24 felony. It's clean and simple, and it may be too simple for
25 a complex issue, but that was the general feeling when

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1 talking with colleagues (inaudible.)

2 I have a similar feeling, only from the point of
3 view that -- especially, I'm looking at a prior record here
4 that was prepared by one of my coworkers the other day, and
5 if I'm going to try and find out if a felonious assault in
6 1953 really was a felonious assault or whether it was the
7 disorderly conduct that was the final charge, we're going to
8 have lots of problems, and I think that (inaudible)
9 previously, as you're going to go back to back patterns in
10 cases, I think in each case, you're going to have an awful
11 lot of litigation coming out of it (inaudible)
12 time-consuming (inaudible).

13 One of my problems that I mentioned with the
14 decay or that I would like to mention with both the decay
15 and the first offender is, you talked about run of the mill,
16 and I definitely think statistics should be relevant, but
17 I'm very worried about rewarding successful criminals. If
18 he's a first offender, because it's the first time you've
19 caught him, and he's been doing it for 20 years, that's a
20 very different type of first offender than the situation of
21 an offender who embezzles some money from the bank to pay
22 for his sick wife's hospital expenses.

23 And so I don't -- and the decay factor has a
24 similar problem to me, that if he's simply been successful
25 for the last 15 years and not caught, does that mean that

1 LIVEbw 1 he's deserving of statistical consideration?

2 CHAIRMAN WILKINS: What you say, though, is
3 difficult to put into a national policy that's uniform. I
4 have, as a trial judge, a great ability to look a man in the
5 eye and know whether he's a good guy or not.

6 (Laughter.)

7 Some don't.

8 (Laughter.)

9 VOICE: That's why I would oppose the decay
10 factor and would oppose any extra -- if you have no -- if
11 you have no -- if you're a first offender, by, for instance,
12 the parole, the current parole guidelines, the FSF-81, you
13 would have the highest score, no matter what, or you would
14 be the high category, no matter what, and have less time in
15 prison. So I don't -- all I'm saying is, I don't think
16 extra consideration should be given for a person
17 (inaudible), other than by the court (inaudible).

18 CHAIRMAN WILKINS: Good. Any questions from my
19 right?

20 VOICE: Yes.

21 VOICE: I'd like to ask -- Mr. Weber, you made
22 two statements there, you know, that bothered me a little
23 bit. I mean, you said at one point, you know, that the case
24 factor's a period, you know, no arrests, but you seem to
25 know that he wasn't living a law-abiding life. Then you say

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1 this other first offender, but for 20 years he's been
2 violating the law.

3 Now even if you think that, how do you report
4 that to the judge in your PSI?

5 MR. WEBER: Sometimes you can't and sometimes you
6 can, which is why I am against a statistic that would assume
7 that he was leading a law-abiding life, so that, for
8 instance, from what I have in front of me, the individual
9 was working for, I say, allegedly working as a packer in a
10 store that sells pornographic filmsl, for the same man that
11 he had been arrested with in 1962 and 1967 for the 10 years,
12 for the 11 years that he was not convicted.

13 Proof? No, it's not proof. I don't think we
14 could prove it. That's one of the reasons why I feel uneasy
15 about putting in the decay.

16 VOICE: Mr. Chairman, I'd like to ask of the
17 panel -- it may sound, you know, naive, but a question to
18 all three of you -- in your experience, when you interview
19 the defendant, and you talk to him about, you know, his
20 prior record, whether or not -- can you make any
21 generalizations, generally, at that point? Are they telling
22 you the truth then, if you ask them if there are some
23 things, you know, were you arrested, were you convicted as a
24 juvenile? When you're going through his past behavior, do
25 you usually get the truth or do you not, and do you ever --

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1 when he is lying, do you follow up?

2 VOICE: Let me address that, initially,
3 Commssioner. Here again, this is not a simple answer. It
4 depends on the individual. Generally, those with long
5 records don't like to share that with a probation officer,
6 because they know they're sharing it with the court. And
7 the policy is that each person be interviewed a minimum of
8 two times, each defendant in a presentence investigation.

9 In the initial interview, you cover the prior
10 record as best you can. Hopefully, upon arrest, you get a
11 copy of the FBI fingerprint sheet. This is a tool to
12 investigate verbally with the individual his prior record,
13 to discuss this with him. The FBI fingerprint sheet is a
14 lead, so to speak, developing it from there.

15 As the situation develops, as you check reference
16 and things are found and located that he didn't share with
17 you, this is a subject and topic of your second interview
18 with him. And many times you will have to go back and forth
19 -- I say many times -- occasionally, you go back to the
20 court and request more time prior to sentencing, because the
21 record continues to unfold.

22 Usually, the white collar offender, you go in
23 knowing, generally speaking, that the banker does not have a
24 prior record. Those, like I say, that do, are the ones we
25 usually have trouble with.

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1 There are those individuals that will tell you
2 what their prior record is, and it gets humorous sometimes
3 at how they can recall dates, names and places. And those
4 are the kinds of people that probation officers like to
5 interview.

6 But generally speaking, it is a pretty difficult
7 task, and it takes some experience in learning how to
8 interview persons and how to take that information and
9 develop it.

10 MR. BROOME: I have found that in my experience,
11 that by and large, people are pretty honest in the
12 presentence investigation initial interview, where you go
13 into prior record; however, I tend to accept that as pretty
14 much face value information and do some of the things that
15 Robert suggests. We do an NCIC check, also -- and all
16 states have what they call Bureau of Criminal Investigation
17 or similar agency that is tasked with being the repository
18 for criminal arrest record information. We will routinely
19 query them, at least in the North Dakota one, and if they
20 tell us -- tell me they've lived in three or four other
21 states, I will also send inquiries by teletype out just to
22 make sure, because I have encountered those who have
23 selective retention. They tend to remember those things
24 that are most favorable to them and tend to block on some of
25 the things that aren't.

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Also, every now and then you come up with somebody who's got a juvenile record, and it might be a rather serious one. Their feeling is that that is a sealed record or it is expunged, or whatever, because they don't want to talk to you about it, but you will develop it in the process of doing the presentence investigation.

VOICE: I would generally endorse that, especially the notion that the people that I interview are generally open about those things they think I can find.

(Laughter.)

If they think I can't find it, I tend not to hear it from them.

VOICE: I would like to add this caveat, though. I think that -- this is just a prediction of something we might see. Once you go to sentencing guidelines, I wouldn't be surprised that those defendants, especially those more sophisticated offenders who have come through the system before, are going to withhold information. They've got nothing to lose, and they realize that the information that they're concealing, if it becomes known, will be factored into the sentencing guidelines, and then they end up with more time.

VOICE: You don't think that their counsel would tell them to the probation officer.

(Laughter.)

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1 VOICE: Oh, I wasn't going to say that, but just
2 say, here's the probation officer, be cooperative with him.
3 And that may be the end of the discussion.

4 VOICE: But without any humor at all, the defense
5 counsel, frequently in my district will tell an individual
6 not to discuss either the offense or sometimes the prior
7 criminal record or sometimes financial issues, and this
8 would be all up front. He will come in and tell me, my
9 counsel has told me not to discuss my prior criminal record.

10 VOICE: Now that's interesting. On a -- say, a
11 drug dealer. And you're interested in his finances; right?

12 VOICE: Right.

13 VOICE: If the counsel tells him not to discuss
14 his finances, and you don't get into -- you don't delve into
15 that?

16 VOICE: To the best of our ability, we delve into
17 it, though without his help.

18 VOICE: There is a special financial consent form
19 that would have to be signed for us to even get any kind of
20 bank records, and if he opts not to share the financial
21 information, we're left to pretty much ferret it out on our
22 own, even though the --

23 VOICE: How do you think the Sentencing
24 Commission should deal with that problem?

25 VOICE: The financial data and the --?

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1 VOICE: Yeah, if the defendant doesn't want to
2 share.

3 VOICE: The failure to cooperate.

4 VOICE: Yes.

5 VOICE: On a drug dealer, and we have a lot of
6 drug dealers -- I appreciate where you're coming from,
7 because I think -- they have a vested interest. They want
8 to get paid. So they don't want all that money to be found
9 wherever it's at, because lots of times it's seized as a
10 part of the profits derived from the criminal act.

11 I think, in the -- certainly, in the -- if the
12 current format of the presentence report remains the same,
13 in the probation officer assessment, some mention can be of
14 having a recalcitrant defendant who would not be
15 straightforward with questions directed in certain areas,
16 whatever they may be.

17 VOICE: The other side of that coin, it may work
18 to our advantage, if the Commission did take that into
19 account. Attorneys would be well aware of that and may
20 encourage their client to be cooperative, if it were taken
21 into account. The same way with cooperation with the United
22 States Attorney's Office. If they thought they were going
23 to get something in exchanged, it would offset each
24 other, and it would --

25 VOICE: Following that up, how much of the

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1 current cooperation is induced, you feel, by the fact that
2 that cooperation is likely to affect sentencing?

3 VOICE: I think considerable. I think most of
4 the defendants and certain of their attorneys recognize that
5 probation officers play an essential role in the sentencing
6 process, and that it is in their best interests to be as
7 cooperative as they can, while not maybe compromising in
8 certain areas. Perhaps, say, like in a prosecution -- or
9 defendant version(?), they may not want to be as forthcoming
10 there, because maybe they anticipate appealing a conviction
11 or something, but you generally know when they are being
12 reasonable and trying to work with you and maybe guarded in
13 certain areas.

14 But that's just a (cough interference-inaudible)
15 better questions (inaudible).

16 VOICE: What happens now when you face some crime
17 where there is a mandatory element of the cooperation? I
18 mean, that's one of getting some feel of what the guidelines
19 might -- might induce? Do you have any experience with
20 that?

21 VOICE: Well, my experience with that has been at
22 18 USC 924(c), I think it is, which is an enhanced penalty
23 for possession of a firearm. And I find that those get plea
24 bargained down. In my experience in my district. So, you
25 know, if they enhance a penalty, I haven't seen it at this

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1 point.

2 VOICE: I meant in the cooperation (inaudible).

3 VOICE: Okay. Generally -- well, if we're into
4 a presentence phase, by and large, we're there because
5 there's already been a finding, adjudication and/or an
6 admission. So any areas that might be problematic,
7 oftentimes have already been dealt with through the
8 procedure of negotiating a plea.

9 VOICE: I'm saying -- Commission Block, maybe I'm
10 misunderstanding you,. You're talking about cooperation
11 with the probation officer during the presentencing process,
12 as opposed to cooperation with the U.S. Attorney.

13 VOICE: Yeah. And the point is really simple.
14 If you have some mandatory elements, it's somewhat like the
15 guideline system, where the offender knows that revealing
16 information may be held against -- may influence the
17 sentence. He or she has to trade that off against the
18 cooperation (inaudible).

19 And I was just trying to get a feel for how much
20 problem you have now with that lack of cooperation, when
21 cooperation hurts. I've done approximately five cases where
22 people have been convicted or taken the continuing criminal
23 conspiracy count, which carries a mandatory ten years up to
24 life imprisonment. And I've run the gamut from someone who
25 wouldn't talk to me at all to someone who was fully

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1 cooperative.

2 VOICE: There is nothing systematic (inaudible).

3 CHAIRMAN WILKINS: Any other questions to my
4 left?

5 VOICE: Yes, I have a question.

6 I don't know if there is an answer to this, Dan,
7 possibly you could give us some advice, in the area of our
8 consideration of tribal court records. I know that's a
9 doozy. Problems being a lot of cases are frequently handled
10 informally, possibly the defendant did not have legal
11 representation, and on the face of that, it could seem
12 simple, and you say, well, ignore that. Ignore that
13 material.14 My problem is that I don't know if the majority
15 of the cases, but certainly a high number of the cases are
16 very, very violent, very, very brutal. A number of brutal
17 rapes occur on a frequent basis. I am not so much bothered
18 by the fact that I guess sometimes maybe the records in the
19 state that they were found guilty, because if I could see
20 that the defendant was required to pay 10 pigs, then I would
21 probably assume that there was some belief that he was
22 guilty.23 But do you have any advice for how we could deal
24 with that, you know, and not excuse or just exempt from
25 consideration some very terrifically violent behavior?

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MR. BROOME: I think it is a real dilemma, and we wrestle with it every day in North Dakota and many of the other states, primarily west of the Mississippi, that have reservations.

I think -- first of all, tribal courts are anomalies. My experience is that they rarely have a judge -- tribal judge who is trained in the law. That's the first problem.

There are some that have gone to the State Judicial College of the University of Nevada at Reno, so they have some training, and they have a tribal code, and they are experienced in applying that. But by and large, they run the gamut from people who have elementary school education to GEDs to maybe high school. When they get into adjudicated matters, they generally aren't experienced in, then they will bring in a qualified member of the state bar, and he will handle it like a trial.

But as I think I pointed out in my response to some of the questions you asked, under the Indian Civil Rights Act of 1968, while they employ many of the due process rights and the same sorts of quasi-tribal court structure that we say off the reservations, they are -- it is written specifically into the law, that an indigent defendant or any defendant for that matter, is not entitled to legal counsel in a tribal court proceeding.

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1 It tends almost to be what I think maybe Congress
2 intended it to be, and which is a sort of a gathering of
3 people of a clan or a tribe to sort of informally handle a
4 matter, but it does have the trappings of the Anglo Saxon
5 system. It is a little misleading in that sense, because
6 you think it is going on, but it isn't.

7 And I have one judge that I work for that does
8 not tribal arrest records shown in the prior arrest record
9 section of the report, primarily because our experience has
10 been that tribal arrests almost are inextricably linked to
11 alcohol abuse, and alcohol abuse is the number one social
12 problem on the reservation, and it might in society at large
13 too, for that matter.

14 But they're almost -- the causal linkage is so
15 close that he wants it in the personal and family data
16 section of the report, usually down in social and emotion
17 (inaudible), and it gets to be an issue there of chronic
18 alcoholism or episodic drinking, and when engaging in these
19 behaviors is most apt to act out in some antisocial manner.

20 That is how one judge handles the tribal(?).

21 The other judge in the western part of the
22 district wants it in there.

23 We are constrained, nonetheless, and this not so
24 much the decision but how it gets used anyway. But the
25 Tucker decision -- Don Chamlee mentioned that, that we are

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1 required to show whether or not the defendant was
2 represented by counsel or waived counsel. It is a moot
3 issue in most instances on a reservation case. But if it is
4 sitting up there, and you are looking at it, a guy has six
5 tribal arrests, and they run the gamut from assault and
6 battery to public intoxication to resisting arrest, it is
7 still going to imprint on the judge's mind, and he is going
8 to form some impression off of that, I think.

9 I am a strong believer that it shouldn't go in
10 there, unless it can be shown that the defendant was
11 represented by counsel admitted to the bar of the state.

12 VOICE: Of course, I am not concerned about the
13 disorderly conduct and all that. I am concerned about the
14 violent offenses.

15 VOICE: There's a number of assaults there, it's
16 true. And it is interesting too, because structurely, the
17 way it is set up, it's almost like a misdemeanor court -- or
18 not even a misdemeanor court, it is more like a JP court or
19 a municipal court. It is limited to imposition of a
20 six-month sentence or a \$500 fine. Yet there are some very
21 aggravated offenses.

22 VOICE: In some cases, the father of the victim
23 of rape simply forgives the defendant after discussing the
24 matter, which has bothered me with cases I have handled,
25 because the father wasn't raped, but I guess we just -- your

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1 recommendation is that we just not consider those -- that
2 history, those records, because of the problem of
3 representation.

4 VOICE: Right.

5 VOICE: Even to the point of violent offenses.

6 VOICE: My experience is, I don't know, in many
7 cases, if those cases would have gone into a more due
8 process-oriented court would have been, it would have been
9 adjudicated (inaudible). That's just my guess, but that's
10 what I've seen operating.

11 In tribal cultures and extended family cultures,
12 people there get their sense of who they are by their
13 family, their clans. And there is an awful lot of pressures
14 and politicking. That's a little society, a microcosm,
15 usually on a very circumscribed reservation. And it's just
16 a lot of folk mores and family dynamics and culture dynamics
17 --

18 VOICE: The victims, though, suffer just the same
19 as other victims.

20 VOICE: Without any doubt.

21 VOICE: What is the line of demarcation between
22 tribal courts and the federal courts? Is it just this
23 penalty structure?

24 VOICE: No, sir, it's what called the Major
25 Crimes Act. It's basically subsumed at USC 1153. It lists

1 LIVEbw

1 16 offenders, that if they occur on the reservation, the
2 U.S. Attorney's Office can assert jurisdiction. They run
3 the gamut from assault, murder, rape, sodomy, just basically
4 what you see in tribal court -- tribal reservation kinds of
5 cases coming into federal court. What most of you would
6 view as street crime.

7 To that extent, even the federal jurisdictions
8 that deal with those kinds of cases are dealing with
9 anomalous cases. You know, the District of Columbia sees
10 them, we see them, but by and large, you don't see those in
11 federal court.

12 VOICE: And when you do, in a lot of cases, the
13 federal court will be inclined to do a study and consider
14 sending the defendant back home, because the father had
15 forgiven. I've seen those cases --

16 VOICE: Right. I agree --

17 VOICE: -- on my desk. Very disturbing.

18 VOICE: Yeah. The state can't assert
19 jurisdiction, and if the Federal Government declines
20 jurisdiction, declines prosecution, you're really then with
21 a really pretty weak response to what you're pointing out.
22 Sometimes it's a very serious and aggravating (inaudible).

23 VOICE: Oh, yes. Very disturbing.

24 CHAIRMAN WILKINS: Questions from my left?

25 VOICE: When you write the presentence report,

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1 LIVEbw

1 and then it goes to the judge, if there is a dispute over a
2 question of fact, I suppose there is a hearing; is that
3 right?

4 VOICE: It's resolved at the time of sentencing.

5 VOICE: How often are there hearings in disputes,
6 in your -- in your impressions(?)?)

7 VOICE: I would say, sir, there are probably
8 between -- here again, how do you define "dispute"? A
9 controverted matter, I'd say probably 50 percent of the
10 cases that come to the center are usually centered on the
11 government's version to the defense(?), where they don't see
12 eye to eye, as to who did what.

13 VOICE: And then how is it resolved?

14 VOICE: The court is required, if it is brought
15 up at the time of sentencing, to make a finding on that, and
16 the controverted matter form is attached to the presentence
17 -- involving the presentence investigation throughout the
18 gamut(?).

19 VOICE: And how often -- if the defendant wants
20 to make a major issue with the prosecution(?), then I guess
21 they call witnesses?

22 VOICE: Yes, sir. That is (inaudible) under Rule
23 34(?).

24 (Simultaneous voices.)

25 VOICE: How often do you think that -- and how

1 LIVEbw 1 often would you say there is what I would call a genuine
2 evidentiary hearing, where people want to call witnesses and
3 cross-examine, as they look around for outside evidence, a
4 real little trial? What percentage of cases do you think?

5 VOICE: My experience is, that is a rare --

6 VOICE: You get controversy and affirmation(?)
7 and under Rule 32, the court is obliged either to say that
8 the information won't be taken into account for purposes of
9 sentencing or make a finding as to the affirmation.

10 VOICE: Do you think it is more frequent if there
11 is about to be some kind of major hearing, the judge will
12 just say, well, I am not going to take it into account, and
13 that's the end of it?

14 (Simultaneous voices.)

15 VOICE: Also sometimes it's negotiated among the
16 adversaries, and sometimes it is agreed to just drop it from
17 the presentence report.

18 VOICE: What I am really driving at, and this
19 I just don't know, is right now, the judge would say, well,
20 I'm not going to take it into account. And of course, it is
21 in his mind.

22 (Simultaneous voices.)

23 VOICE: The jury would disregard --

24 VOICE: Then if we move to -- or when we move to
25 a guideline system, that won't happen anymore. That is to

LIVEbw

1 say, if it isn't taken into account, it isn't taken into
2 account, because if a different bracket and guideline comes
3 into play.(?). And so what I wonder is the extent to which
4 that is going to create an additional need for hearings.
5 And additional controverted issues and evidentiary hearings
6 and witnesses coming (inaudible).

7 VOICE: Well, I think one way that is going to
8 get addressed is the fact that they are now obliged to give
9 those presentence reports about 10 days prior to
10 sentencing. And that certainly should give defense counsel
11 and defendant enough time to say, this is controverted, or
12 we're going to controvert that, or this isn't accurate. And
13 I would assume that more than likely, the way we would set
14 it up is that if there is controverted information in it, we
15 will want to know about it, so that, hopefully, we can deal
16 with it in some useful way before sentencing.

17 VOICE: I think this enhances -- I don't know if
18 "enhance" is the proper word, but I think it speaks to the
19 probation officer who wrote the report and is supervising
20 the (inaudible). I think the load of the probation officer
21 is felt, where he mediates to prove to the authorities(?).

22 Now a lot of so-called "hearings" can be
23 prevented by probation officers talking with both sides and
24 coming to an agreement and making whatever --

25 (End Side A, Tape 3.)

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(Side B, Tape 3.)

VOICE: -- guy had seen a total of two years,
since -- in my tenure as a probation officer.

VOICE: (Inaudible) it's a hearing, you're saying
a hearing about 1/100, 1 percent of the cases? So how many
could the system handle, or have you discovered that you
couldn't administer in the justice system.

VOICE: The quality control that we are required
to meet, just by our own agency standards is such that it
fits in that report, there is cooperative information to
back it up. And most defendants know that, or if they
don't, by the time they raise the question and bring out a
court record or a certified copy of a conviction, wherever
it is, then they can -- well, they ask you where it came
from (inaudible).

VOICE: As to the contested issues, they tend to
fall in the offense portion of the report and not really on
the prior record, because the prior record is something on
this document. And the policy and the standard

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VOICE: As to the contested issues, they tend to fall in the offense portion of the report and not really on the prior record, because the prior record is something on this document. And the policy and the standard is then (inaudible), and the monograph is that -- if you can't back it up, this is not going into the report.

So there is not a lot to contest.

VOICE: Let me ask him another question, different subject. We're talking about (inaudible). There is a clear line between, say, misdemeanors and felonies.

LIVEbw

1 Less than a year. You look -- you look to see whether the
2 statute provided for maximum penalty of a year or less for
3 a year or more.

4 Does that work in the juvenile offense? That's
5 what I wonder is if the juveniles are sentenced (inaudible)
6 under statutes which aren't clear as to what they provide,
7 or where they may provide indeterminate sentences, and then
8 they're indeterminate, so you wouldn't know if it was
9 serious or not by looking at the penalty.

10 In that respect, how does the present system -- I
11 notice that the present system -- do you have any comments
12 on how that works? What the Parole Commission has done, I
13 guess, has listed 14 kinds of felonies -- loitering,
14 gambling, prostitution, fish and game violations,
15 hitchhiking. See, and they've listed them by name, and
16 said, well, if it's that, don't count it at all. And if it
17 is a juvenile offense, it's a status offense. Don't count
18 it at all. Other than that, count it full.

19 Will that approach work?

20 VOICE: As long as the record is accessible. But
21 getting the record is (inaudible). In many districts, the
22 records are sealed. In some districts, they are in states,
23 and some they are not. (Inaudible) some rural county you
24 can't get it, and in the more urbanized and probably more
25 record intensive jurisdictions you can.

LIVEbw

1 VOICE: You think it would be practical to make a
2 list?

3 VOICE: Yes, sir.

4 VOICE: It sure is easy to work with.

5 VOICE: I don't think it would be practical,
6 honestly, to put juvenile (inaudible) in a statistical
7 determination to begin with, because if you're constantly
8 (inaudible) in other states where they are totally destroyed
9 at the age of 18? And how can you say that a juvenile that
10 commits a bank robbery in West Virginia should not be held
11 accountable for it, whereas if he commits it in a state
12 where it is not destroyed, he will be held accountable.

13 VOICE: (Inaudible), the state where it isn't
14 destroyed, you shouldn't hold him accountable?

15 VOICE: No, I think that one of the major answers
16 to your question about how many hearings you're going to
17 have, I think is going to have a lot to do with how the
18 guidelines are promulgated, and if the guidelines include
19 numbers which will vary from state to state or which will be
20 highly controversial, I think you are going to have a lot
21 more hearings. And I think -- including juvenile
22 convictions, I think is going to be a very major problem in
23 terms of variance(?) from state to state, among other
24 things, in addition to getting the records and having (noise
25 interference-inaudible).

LIVEbw

1 (Simultaneous voices.)

2 VOICE: -- if one person gets what he is entitled
3 to, but another person gets a lesser sentence, because they
4 weren't able to get (inaudible). I think that's a
5 constitutional (inaudible)?

6 VOICE: I am not an expert on the Constitution --
7 (Laughter.)

8 VOICE: -- but I do think that it would be a
9 constitutional issue, if the person would get a lesser --
10 and it was unable, and it was known to be unavailable. In
11 West Virginia, I believe that is a state that destroys its
12 records. And the young man who spent his whole life in West
13 Virginia, and perhaps there was reason to believe that he
14 had a juvenile record, but we couldn't get it, what do we do
15 then?

16 VOICE: We wouldn't have it.

17 VOICE: He gets a lesser sentence than he would
18 if it were available, but who is going to complain about
19 that? The guy who got the longer sentence in South
20 Carolina, because it was available. This has been my
21 experience.

22 We have --

23 VOICE: You mean, he got the record, he got the
24 sentence he was supposed to get.

25 VOICE: Right.

LIVEbw

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(Laughter.)

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VOICE: (Inaudible) South Carolina is going to scream bloody murder, because the guy didn't get it in West Virginia. I am not saying that I agree with the premise of that, but I think that is the reality of that.

VOICE: Well, that is the situation now throughout the country; isn't it?

VOICE: To some extent with juveniles.

VOICE: No, every place.

VOICE: But I would like to make a distinction also between what the sentencing judge consider and what should go into the statistical guidelines.

I think that if there is reliable information that a tribal court found that there was a rape or there is reliable information that at the age of 14, he committed a bank robbery, the sentencing judge should definitely be able to take that into consideration.

I just don't think they can go into statistical formulation for guideline purposes. And I really want to make that distinction very strongly, because I think the sentencing judge should have all the best information available to him.

VOICE: (Inaudible) aggravating or mitigating An aggravating factor is another issue that complicates (?). Say, well, for purposes of deciding that there was

LIVEbw 1 aggravation or mitigation, the judge can consider it -- and
2 then we have to fill in the blank. If we don't have to fill
3 it in and say anything.

4 That's the way I believe it stands now, and I
5 would like to see it to continue in that fashion.

6 VOICE: Well, Counsel -- not Counsel --

7 (Laughter.)

8 As I understand it, at the present time there are
9 22 states in the union where you can't get juvenile records.

10 VOICE: That sounds like a reasonable number to
11 me. I don't know (inaudible).

12 VOICE: I believe in the total(?) Juvenile
13 Delinquency Act provides limited availability on criminal
14 convictions.

15 VOICE: And of course, under the old Youth
16 Corrections Act, there was expungement in certain cases.

17 VOICE: There still is.

18 VOICE: And still is -- well, I don't know. That
19 was repealed, so I suppose (inaudible) -- by virtue of the
20 prior sentencing(?)

21 VOICE: In some minor --

22 VOICE: (Inaudible.)

23 VOICE: Well, maybe it would be possible -- my
24 impression of your list is that the states approach the
25 problem of decay of the record in two ways:

LIVEbw

1 One group has said, it sticks around for, say,
2 seven years or five years.

3 And another group has said, it sticks around till
4 a certain age, like 21. Well, is there some -- maybe is we
5 were to say, for example, hypothetically, that a juvenile
6 the record decays at a certain rate, and therefore, is
7 relevant for five years or seven years, and that the states
8 would move toward that uniform approach, bringing themselves
9 into line, instead of taking the (inaudible) birthday
10 cut-off rather than the decay rate cut-off.

11 I guess you can't answer that. (Inaudible.)

12 VOICE: Well, the states are so different now, in
13 New York State, you are only a juvenile until your 16th
14 birthday. And you get arrested when you're 16, you go to an
15 adult court.

16 In many states, that doesn't happen until you're
17 21 -- until you're 18. And I think there is one or two left
18 where you are still considered in juvenile till you're 21.
19 Right there, you have a very wide range.

20 VOICE: That is a very good point, and that is
21 why you go back till you look at what is the truth, what was
22 the behavior? And you know, you want to know how old he was
23 when he committed it. But you want to know what happened.

24 I'd like to go back to Mr. Broome. If I heard
25 him right, he's got at least two federal judges out there

LIVEbw 1 in North Dakota, and did I hear you say that they give you
2 different instructions of how to prepare the PSI and the
3 format?

4 VOICE: The content of the prior arrest record as
5 it relates to a tribal court arrests, they certainly do.

6 VOICE: I thought that the Probation Service put
7 out a manual that was dictated, the format of the PSI, and I
8 thought that that was approved by the Probation Committee at
9 the Federal Judiciary?

10 VOICE: The Committee doesn't have to deliver it
11 to the judge, Ben, that's a --

12 (Loud laughter.)

13 (Inaudible voices amid the laughter.)

14 VOICE: I mean, I brought this up on purpose,
15 because, you knwo, the Sentencing Commission is going to
16 develop guidelines, and you know, are they going to be
17 adhered to by the Judiciary or not?

18 VOICE: You're going to be in charge of that.

19 (Loud laughter.)

20 (Simultaneous voices.)

21 VOICE: Having been to a couple of sentencing at
22 the institute (inaudible).

23 VOICE: That is an issue in our district, as
24 well, where we have many judges -- 33, I believe, at last
25 count -- and one who wants this special format, and one, for

LIVEbw 1 instance, and this came up earlier, who absolutely excludes
2 any information alleged by the government that the
3 individual committed perjury, for instance, during the
4 course of the trial. The court's position in that case
5 being, well, if he committed perjury, prosecute him for it.
6 If he obstructed justice, prosecute him for it. Don't use
7 the form of the presentence report to aggravate the
8 sentence.

9 I believe Mr. Weld earlier today brought up that
10 as a possible issue. And I know at least one judge in the
11 Southern District of New York has a very strong position on
12 that.

13 VOICE: So we need uniformity in presentence
14 reports.

15 VOICE: Inaudible.

16 VOICE: I think uniformity within the presentence
17 reports --

18 VOICE: There I think you will find some small
19 policy, internal policy, I think is more additions than
20 deletions. I think the format, generally, is the same. The
21 amount of work that goes into one, the basics of which you
22 are looking for, I think you will find. I have no qualms.
23 I would think that presentence (inaudible) been used
24 (inaudible).

25 VOICE: I wouldn't doubt that they're outstanding

LIVEbw 1 out there in North Dakota, and in fact, the entire western
2 region.

3 (Laughter.)

4 I can personally attest to that.

5 VOICE: But it really does (inaudible) in some
6 ways. You know, really, if you look at any presentence
7 report, and I think we should try mightily to be objective,
8 and yet there is a fair amount of editorializing that goes
9 in any time you're gleaning out from other record sources,
10 in condensing that down into prior arrest record to who,
11 what, where, when and how sorts of thing. Was there a plea
12 agreement? Wasn't there a plea agreement?

13 Probation officer exercising, actually,
14 professional judgements throughout the process of conducting
15 the investigation and preparing that report. And if some
16 judges have idiosyncrancies that they want met, we oblige.

17 VOICE: But you don't see that as a problem, in
18 terms of interfering with having all the information
19 available that we need available?

20 VOICE: No, ma'am, I don't.

21 VOICE: Okay.

22 VOICE: Nor do I. I didn't want to imply that I
23 did. It was simply that there are some individual judges
24 who have strong opinions on certain things that go in the
25 presentence report that should be there and should not be

LIVEbw 1 there, which really goes into --

2 VOICE: I was just thinking of a fairness issue,
3 if you had a presentence report from that particular judge,
4 wherein you left out information concerning perjury, and
5 then another area of the country the included it, I was just
6 thinking of the fairness issue, in terms of that being held
7 against the person where it was included and where it was
8 not, with an equally guilty person, where it had not been
9 included.

10 So I was a little bit concerned about that, and
11 that was what I was addressing.

12 CHAIRMAN WILKINS: Any other questions or
13 comments?

14 (No response.)

15 Well, thank you very much, gentlemen.

16 VOICE: Thank you, Judge.

17 VOICE: Is there anyone in attendance who would
18 like to make a statement to the Commission?

19 Yes, sir.

20 MR. HUNT: I am Gregory Hunt from the
21 U.S. Probation Office, District of Columbia.

22 And I have somewhat of a concern about the
23 statement that we should collapse(?) a consideration of the
24 prior record offenses into either dismeanor or felony or
25 just look at the Index of Crimes. The reason I say that is,

LIVEbw 1 there are -- if you look at offenses, when you are doing a
2 prior record, and you see something that's pled guilty to a
3 minor offense, and then you look at the offense behavior, it
4 is often much more serious than what they pled guilty to.

5 I certainly would hate to not look at that
6 information, and I would like to give an example.

7 I did a presentence report on a man who committed
8 several pocketbook snatches in New York.

9 Now if you look at that and say, well, that's a
10 misdemeanor. That's not a big deal.

11 But when I received the police report back from
12 New York, the man was hitting the people over with baseball
13 bats -- over the head with baseball bats. Now that is a
14 very serious offense. I would not want that to be looked at
15 as a misdemeanor, but more as a felony offense. So my
16 feeling would be -- and I would say that I am not the only
17 one who goes along with this, is that we have to look at the
18 behavior.

19 What did the person actually do?

20 And I think the Parole Commission does that now
21 in their guidelines, that that would be an approach that
22 maybe the Sentencing Commission could look at.

23 CHAIRMAN WILKINS: Thank you very much.

24 Does anyone have questions of Mr. Hunt?

25 VOICE: How did they (inaudible)?

LIVEbw

1 MR. HUNT: Well, they break it up into a lot of
2 different offenses. They have the boxes and you check how
3 many convictions you have and (inaudible). So they don't it
4 into account there. You check boxes. You put numbers in
5 your box. You say, how many convictions does he have?

6 VOICE: Well, I am not talking about the actual
7 figure of the (inaudible), I am talking about the categories
8 of crimes, when you are actually looking at the
9 (inaudible).

10 MR. HUNT: That is the (inaudible), but I was
11 saying you might want to do that --

12 (Simultaneous voices.)

13 VOICE: (Inaudible.) What they do now is all
14 these guidelines. Sure, you can look at it, go write it in
15 the report. But the relevant thing is going to be whether
16 there was a conviction or there wasn't a conviction.

17 Unless you figure out some other way to
18 (inaudible).

19 VOICE: Mr. Hunt is saying that even in the prior
20 record section, if he does it like it is supposed to be
21 done, and I gather he does it, and I am glad he checked on
22 New York to see what actually happened, he puts in there
23 what actually happened in that offense. He gave a very good
24 example which --

25 VOICE: But how do you use that? How do you use

- LIVEbw 1 it when it goes over to the Parole Commission?

2 VOICE: You mean, how does the Parole Commission
3 currently use it, yeah.

4 VOICE: Yeah. They don't.

5 VOICE: It is true that we -- when you -- on
6 Category A, prior convictions --

7 (Simultaneous voices.)

8 VOICE: -- one, two or three points or zero, but
9 we evaluate whether those prior convictions are very, very
10 serious like you discribe or they are relatively minor, and
11 we have a bigger range in the guidelines, first of all, and
12 those factors can be used to aggravate, to go above or to go
13 under, the guidelines which have the widest spread in the
14 first place.

15 CHAIRMAN WILKINS: How would you suggest we do it
16 then, Mr. Hunt?

17 MR. HUNT: Well, I would set up a system like the
18 Parole Commission has in deciding what is a serious offense,
19 using some of what they have as a guideline, and say, okay,
20 this is the way we're going to apply it to prior record.

21 You have somebody who has committed a bank
22 robbery, and it's been reduced to -- and I had this case
23 reduced to attempted theft, and that happened in this area,
24 then it should be looked at as a bank robbery, and not as
25 an attempted theft.

LIVEbw

1 They don't. They have this box here. Just a
2 box.

3 (Simultaneous voices.)

4 VOICE: I'm talking about when you're looking at
5 -- in the presentence report, you're looking at offense
6 behavior. They use a criteria that decides what is the more
7 important offense and what is the least important offense.
8 I am talkin about that criteria, not what they are actually
9 using in the same (inaudible).

10 VOICE: What they are using for the current
11 offense.

12 VOICE: But the Parole Commission, in connection
13 with what you are saying, with their system, there is a way
14 to account for the previous conviction, the extreme
15 brutality or whatever. The comment would be, probably, in
16 the analysis of the case, something like, you pose a greater
17 risk than the salient factor score indicates, because your
18 two previous convictions were committed, where you did an
19 extreme amount of brutality and callousness, and so on.

20 So there is a way that the Parole Commission
21 currently deals with that.

22 Would you say that is accurate?

23 VOICE: Yes.

24 VOICE: And so -- if we were to do that, we would
25 say, well, one thing to take into account in deciding

LIVEbw 1 whether this is an aggravating feature, which is outside the
2 guideline, would be the actual conduct (inaudible) the past
3 offense, if it is particularly brutal, or if it is
4 particularly (inaudible).

5 VOICE: So on the one hand, you can be counting
6 the number of previous convictions, and on the other hand,
7 you would be looking at the nature of the incidents?

8 VOICE: Yes. The other thing I just would like
9 to take one more, is on the record after ten years or 15
10 years, may say that somebody who has committed a violent
11 offense 15 years ago still should be considered when it
12 comes up, but I just want to raise this one issue. I had a
13 man, when he was a young man, he got in a violent fight.
14 Somebody was severely injured. He had that conviction. 15
15 years later, he's up for stolen -- mail fraud -- for mail
16 fraud.

17 It seems to me that -- is that really part of
18 what we want to consider, when we are looking at mail fraud?
19 I mean, the fact that he had a violent fight when he was 18
20 or 19 years of age, I'm not sure that that 15 years later
21 that that's material.

22 CHAIRMAN WILKINS: Well, how about five years
23 later?

24 VOICE: Well, I'd like the idea that was
25 expressed that as you go back away from the instant offense,

LIVEbw 1 that maybe you would have points, and that would change --
2 (inaudible) away from (inaudible.)

3 CHAIRMAN WILKINS: Thank you very much.

4 VOICE: Wait a minute.

5 VOICE: Why is that. (Inaudible) unless one
6 knows why one (inaudible) prior misconduct (inaudible).
7 Why should we consider (inaudible) one year? I think we
8 have to have an answer to that, do we not, before we
9 can intelligently assess whether or not a bank robber
10 (inaudible) forgery today?

11 Well, I -- well, do you think that the
12 (inaudible) some sort of socially objectionable conduct, is
13 itself something pertinent, but it should always be
14 considered (inaudible).

15 VOICE: I would agree with your latter
16 statement. I certainly, as a probation officer, when I am
17 going through an investigation, I try to find a pattern. I
18 think that's real important.

19 VOICE: I don't agree with (inaudible). I
20 believe it is totally irrelevant, but I just believe that it
21 is impossible to intelligently to assess, why we should have
22 a decay factor for five years or ten years, unless we know
23 why we are considering at all, the prior offense.

24 VOICE: Well, like I was saying, I like to look
25 at a pattern. If you have somebody who is involved in

LIVEbw 1 antisocial behavior over a number of years, continuous, I
2 think that is somebody we don't want (inaudible).

3 On the other hand --

4 VOICE: You would punish a person in this case,
5 because (inaudible).

6 VOICE: That's correct. (Inaudible.) I think
7 the community would feel the same way(?).

8 VOICE: You mentioned a bank robbery. Now you
9 deal with bank robberies, where a robber comes in and
10 confronts a cashier with a gun. He takes \$10,000 from him,
11 and then goes down, he gets another cashier, where he
12 confronts him and gets money from him, maybe pistol-whips
13 him, and maybe a couple of other cashiers.

14 Now that's one offense, isn't it?

15 VOICE: My understanding is that --

16 VOICE: In the District of Columbia.

17 VOICE: That's my understanding, but I would
18 certainly, if you have -- that's why I like to look at the
19 behavior at what exactly did happen. To me, behavior is two
20 separate offenses. And I think that that would have to be
21 considered.

22 VOICE: But in the rest of the country,
23 generally, it isn't, is it? Those are separate offenses.
24 They can be broken down.

25 On another point, when we are discussing decay

LIVEbw 1 factors, do you think it could be made relevant upon a
2 showing that he had been lawfully employed, for instance?

3 In other words, say you had a ten-year case
4 background, and you knew that he'd never engaged in any
5 honest occupation for that particular period.

6 Would that be a factor that you might be able to
7 factor in or compel him or ask him to show or he didn't show
8 on a presentence investigation that he engaged in lawful
9 activity?

10 VOICE: (Inaudible) at this point, I figure that
11 in when I am making the recommendation to the court. If a
12 person, even though he hasn't committed a crime recently,
13 and you look over, this man hasn't been employed in five,
14 six, seven years, and you can't find any viable means of
15 support, I certainly think that that is information that
16 should be considered.

17 VOICE: And hasn't filed an income tax reform,
18 but yet lives very handsomely.

19 CHAIRMAN WILKINS: Thank you very much, Mr. Hunt.
20 Does there anyone else who would like to speak?

21 VOICE: Just briefly, in the discussion this
22 morning about --

23 (End Side B, Tape 6.)

24 (Side A, Tape 7.

25 -- the gentleman from the FBI about what kinds

LIVEbw 1 of offenses are reported to the FBI. And he indicated there
2 was no distinction between a felony and a misdemeanor.

3 The Marshal's Office in the Eastern District of
4 Virginia does not report any misdemeanors to the FBI.
5 There's no record of misdemeanor offenses occurring in
6 federal court, being sent to the FBI.

7 And I think that is something that we need to
8 take into consideration. We are concerned about the states
9 and what the states are or are not reporting, but I think we
10 have to be concerned about what the Federal Government is or
11 is not reporting also.

12 CHAIRMAN WILKINS: How can we change that?
13 Obviously, they ought to be reported. Somebody --

14 VOICE: I don't -- I think it is something that
15 the Marshal's Office has to deal with, and I don't know who
16 the appropriate person would be to discuss that with the
17 Marshal's Office.

18 CHAIRMAN WILKINS: We will find somebody
19 appropriate to talk to.

20 (Laughter.)

21 Anyone else have a problem(?)? Yes.

22 VOICE: May I just add one thing on the subject
23 of employment. I believe the Parole Commission used to have
24 (inaudible) employment (inaudible), which they got rid of.
25 The reason for that, as I under -- from my experience is

LIVEbw

1 sophisticated(?) offenders (inaudible) employment. Or how
2 do you deal with the fact that your brother-in-law says that
3 he was working for me as grocery clerk for the last three
4 years. Sometimes it is on the papers. Sometimes it -- he
5 said he has a \$5000 a year job, and I just happen to notice
6 that he is driving a \$20,000 car.

7 But it is one of those factors that -- when you
8 talked about, Commissioner, having hearings(?), I think
9 would generate an awful lot of hearings, if it you
10 (inaudible) and employment factor. (Inaudible) on whether
11 (inaudible) employment or not consider employment.

12 CHAIRMAN WILKINS: How about an unemployment
13 factor?

14 VOICE: An unemployment factor might be much more
15 relevant. If you could -- (inaudible) employment, I think
16 would be (inaudible). Then again, reward someone who has
17 seeming legitimate employment, but doesn't have.

18 VOICE: Get the people (inaudible).

19 (Loud laughter.)

20 VOICE: People like your brother's(?).

21 (Laughter.)

22 VOICE: Brother-in-law. Exactly (inaudible),
23 extended family.

24 VOICE: I can answer part of that. The reason
25 the Parole Commission dropped that item and it is

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1 recognized and other research will show that, whether or not
2 he was employed, is a pretty good -- have pretty good power
3 of predicting future criminal behavior.

4 But we dropped it because some people believed
5 that it was racially tainted. And we dropped it and
6 developed the present system, which is just as powerful, as
7 far as predicting future criminal behavior.

8 CHAIRMAN WILKINS: Thank you.

9 I would like to recognize a distinguished
10 attorney from Virginia, a former prosecuting attorney, and
11 now in private practice, Mr. John Ariail.

12 Mr. Ariail, we are glad to have you with us
13 today.

14 MR. ARIAIL: Thank you, Judge.

15 CHAIRMAN WILKINS: Any other comments?

16 How about you? You (inaudible) discuss another
17 (inaudible.)

18 (No response.)

19 Having no other comments, we will conclude this
20 meeting.

21 I want to say how much again I appreciate the
22 participants and all of those who are in attendance today,
23 as well as those who sent us numerous written testimony.

24 I think one thing is clear here, as well as other
25 meetings, the role of the trial judge is going to change, to

LIVEbw

1 some degree. We are going to do this in a little bit
2 different manner in the guidelines, and that is going to
3 change the role of the defense attorney, the prosecuting
4 attorney. And the role of the probation officer is going to
5 change significantly, in my judgment.

6 And hopefully, some of the work effort now that
7 goes into some things would be shifted to the more areas,
8 but certainly, the role of the probation officer is going to
9 become an extremely responsible role in implementing these
10 guidelines, and many times acting as that mediator before it
11 gets to the trial judge in resolving disputes.

12 We do now, but to a much larger degree, I suggest
13 it be required under your guideline scheme(?).

14 I think all of your coming.

15 We stand in recess.

16 (Whereupon, at approximately 1:00 p.m., the
17 hearing was adjourned.)
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